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Witkin California Procedure, Fifth Edition

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CHAPTER I - Attorneys

Witkin Summary of California Law

I. INTRODUCTION

A. Organization of Chapter.

1 Witkin Cal. Proc. Attys § 1

[§ 1] Organization of Chapter.

This chapter is organized as follows:

(1) *Introduction*. The nature and function of an attorney and the professional activities and pragmatic concerns involved in the practice of law generally are summarized and discussed. (See *infra*, §3 et seq.)

(2) *Attorney-Client Relationship*. This material discusses how an attorney-client relationship may be formed, its nature and scope, and how it may be terminated. (See *infra*, §42 et seq.)

(3) *Fiduciary Obligations*. Various aspects of the fiduciary relationship between an attorney and his or her client are discussed in the following situations:

(a) *Business dealing with client* (see *infra*, §91 et seq.).

(b) *Personal relationship with client* (see *infra*, §101).

(c) *Duty to keep client informed* (see *infra*, §102).

(d) *Representation adverse to current or former client* (see *infra*, §103 et seq.).

(4) *Compensation of Attorney*. This division discusses an attorney's compensation including the basis for determining fees, reimbursement for expenses, an attorney's lien, contingent fees, and actions for recovery of compensation. (See *infra*, §153 et seq.)

(5) *Authority of Attorney*. This material covers the extent of an attorney's authority under general agency principles including the attorney's control over the conduct of litigation and the nature and effect of stipulations. (See *infra*, §235 et seq.)

(6) *Liability for Negligence*. The nature and scope of legal malpractice is discussed in detail, including duty and breach (*infra*, §290 et seq.), causation and damages (*infra*, §310 et seq.), defenses (*infra*, §325 et seq.) and indemnity (*infra*, §333 et seq.).

(7) *Regulation of Practice*. The statutory and regulatory framework that governs attorneys is discussed in detail. (See *infra*, §339 et seq.)

(8) *Attorney Discipline*. Aspects involved in attorney discipline are discussed in detail and include the following topic:

- (a) *Rules of Professional Conduct* (see *infra*, §407 et seq.).
- (b) *Conviction of crime* (see *infra*, §466 et seq.).
- (c) *Acts involving moral turpitude* (see *infra*, §480 et seq.).
- (d) *Commingling funds and failing to account* (see *infra*, §509 et seq.).
- (e) *Representing or acquiring adverse interests* (see *infra*, §§513, 514).
- (f) *Advertising, communications, and solicitation* (see *infra*, §515 et seq.).
- (g) *Aiding the practice of law by nonattorneys and representing associations or groups* (see *infra*, §532 et seq.).
- (h) *Miscellaneous unethical practices and mitigating, and aggravating circumstances* (see *infra*, §536 et seq.).
- (i) *Disciplinary proceedings by the State Bar and the Supreme Court*. (See *infra*, §552 et seq.)

(9) *Miscellaneous Proceedings*. This division discusses conviction proceedings, involuntary inactive enrollment, probation, relief from suspension, and reinstatement proceedings. (See *infra*, §630 et seq.)

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I. INTRODUCTION

B. Statutory and Regulatory Framework.

1 *Witkin Cal. Proc. Attys* § 2

[§ 2] Statutory and Regulatory Framework.

(1) *State Bar Act*. Attorneys are regulated primarily by the State Bar Act. (*B. & P.C. 6000* et seq.) The following topics are of general interest:

- (a) Structure, authority, and regulation of the State Bar. (*B. & P.C. 6001* et seq.; *infra*, §342 et seq.)
- (b) Admission to practice. (*B. & P.C. 6060* et seq.; *infra*, §357 et seq.)
- (c) Mandatory continuing legal education. (*B. & P.C. 6070* et seq.; *infra*, §406.)
- (d) Fee agreements and fee disputes. (*B. & P.C. 6147* et seq., *infra*, §176 et seq.; *B. & P.C. 6200* et seq., *infra*, §220 et seq.)
- (e) Unlawful practice of law. (*B. & P.C. 6125* et seq.; *infra*, §379 et seq.)
- (f) Unlawful solicitation. (*B. & P.C. 6150* et seq.; *infra*, §527.)
- (g) Advertising restrictions. (*B. & P.C. 6157* et seq.; *infra*, §37 et seq.)
- (h) Disciplinary authority and proceedings. (*B. & P.C. 6075* et seq.; *infra*, §§558 et seq.)

(2) *Rules of Professional Conduct*. The Rules of Professional Conduct of the State Bar of California govern the ethical obligations of attorneys. These are supplemented by the A.B.A. Model Rules of Professional Conduct. (See *infra*, §407 et seq.)

(3) *Rules of Court*. Title 9 of the California Rules of Court covers attorneys and law practice. The following topics are of note:

- (a) Disciplinary proceedings. (C.R.C., Rule 9.10 et seq.; *infra*, §§561, 562.)
- (b) Minimum continuing legal education. (C.R.C., Rule 9.31; *infra*, §406.)

(c) Legal specialization. (C.R.C., Rule 9.35; *infra*, §9.)

(d) Practice by persons who are not members of the State Bar. (C.R.C., Rule 9.40 et seq.; *infra*, §389.)

(4) *State Bar Rules*. A number of topics and proceedings are governed by special rules adopted by the State Bar, including the following:

(a) Rules and Regulations of the State Bar of California.

(b) Rules Regulating Admission to Practice Law in California.

(c) Minimum Continuing Legal Education Rules and Regulations.

(d) Rules of Procedure of the State Bar.

(e) Rules of Practice of the State Bar Court.

(f) Rules Governing the State Bar Program for Certifying Legal Specialists.

(5) *Restatement and Other Sources*. The third Restatement of the Law Governing Lawyers was published in 2000. The Restatement goes beyond the scope of state ethics codes by addressing the formation of the attorney-client relationship and issues of legal malpractice. In addition, the "restatement draws heavily on decisional law, while the ethics codes ... have the form and force of statutes, or at least administrative regulation." (Foreword, Rest.3d, The Law Governing Lawyers.)

Other texts and commentary include the following: Rotunda and Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*; Mallen & Smith, *Legal Malpractice*; Dzienkowski, *Professional Responsibility: Standards, Rules, and Statutes*; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law*; Rutter Group, *Professional Responsibility*; American Bar Association Journal.

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I. INTRODUCTION

C. Nature and Function of Attorney.

1. Meaning of Terms.

1 *Witkin Cal. Proc. Attys* § 3

[§ 3] Meaning of Terms.

The term "attorney" is generally used to mean "attorney at law" or "lawyer," and refers to the professional attorney at law, licensed to practice law in some jurisdiction. (See 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §1; *Rodrigues v. Superior Court* (2005) 127 C.A.4th 1027, 26 C.R.3d 194, citing the text ["attorney" as used in C.C.P. 473(b) (relief from default judgment) includes attorney licensed in jurisdiction other than California].) In rare instances, however, representation of a client by a lay "attorney" is permitted. (On practice before administrative agencies, see *infra*, §402.)

An "attorney in fact" is not, as such, an attorney, but merely an agent with authority defined by a written power of attorney. (See 3 *Summary* (10th), *Agency and Employment*, §207; 14 *Summary* (10th), *Wills and Probate*, §835.)

Terms such as "counselor," "counselor at law," and "barrister" have no special additional meaning in California. (See *In re Cowdery* (1886) 69 C. 32, 60, 10 P. 47.)

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C. Nature and Function of Attorney.

2. Officer of the Court.

1 *Witkin Cal. Proc. Attys* § 4

[§ 4] Officer of the Court.

An attorney, as a person licensed to practice law, is considered an "officer of the court," with certain public duties and responsibilities incident to that status. (See *Hickman v. Taylor* (1946) 329 U.S. 495, 67 S.Ct. 385, 393, 91 L.Ed. 451, 462 ["Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice"]; *Cohen v. Hurley* (1961) 366 U.S. 117, 124, 81 S.Ct. 954, 959, 6 L.Ed.2d 156, 162, *infra*, §340 [observations on legal ethics where attorney refused to cooperate in judicial inquiry into ambulance chasing]; A.B.A. Model Rules, Preamble [lawyer as officer of "legal system"]; 48 A.B.A.J. 25 et seq., 146 et seq.; 107 *Harv. L. Rev.* 1629 [lawyer's responsibilities to court]; *cf.* *Cammer v. United States* (1956) 350 U.S. 399, 405, 76 S.Ct. 456, 459, 100 L.Ed. 474, 478, 7 *Cal. Proc.* (5th), *Trial*, §172 [distinction between lawyers and conventional court officers such as marshals, bailiffs, and clerks]; *infra*, §339 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Attorney Guidelines of Civility and Professionalism*. Recognizing that attorneys, as "officers of the court with responsibilities to the administration of justice," have an obligation of professionalism, the State Bar promulgated the California Attorney Guidelines of Civility and Professionalism (Guidelines) in July 2007. The Guidelines are essentially aspirational, and are intended to complement "codes of professionalism adopted by bar associations in California." Attorneys are encouraged "to make these guidelines their personal standards." (Introduction to Guidelines.) A copy of the Guidelines is available at the State Bar website, www.calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf.

The Guidelines view the obligation of professionalism as including civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, and discuss these principles in specific contexts relevant to an attorney's practice. For example, in the area of communications, the guidelines state that an "attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court." The Guidelines then provide examples. (Guidelines, Section 4, Communications.)

The Guidelines are organized as follows:

Section 1: Responsibilities to the Justice System.

Section 2: Responsibilities to the Public and the Profession.

Section 3: Responsibilities to the Client and Client Representation.

Section 4: Communications.

Section 5: Punctuality.

Section 6: Scheduling, Continuances and Extensions of Time.

Section 7: Service of Papers.

Section 8: Writings Submitted to the Court, Counsel or Other Parties.

Section 9: Discovery.

Section 10: Motion Practice.

Section 11: Dealing With Nonparty Witnesses.

Section 12: Ex Parte Communication with the Court.

Section 13: Settlement and Alternative Dispute Resolution.

Section 14: Conduct in Court.

Section 15: Default.

Section 16: Social Relationships with Judicial Officers, Neutrals and Court Appointed Experts.

Section 17: Privacy.

Section 18: Negotiation of Written Agreements.

Section 19: Additional Provision for Family Law Practitioners.

Section 20: Additional Provision for Criminal Law Practitioners.

Section 21: Court Proceedings.

With respect to the Rules of Professional Conduct (text, §409 et seq.), the Guidelines "exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence." (Introduction to Guidelines.) (For detailed discussion of Guidelines, see *48 Santa Clara L. Rev. 1127*.) *Correction*: Page 39, line 3, the date for "Hickman v. Taylor" should be "1947".



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C. Nature and Function of Attorney.

3. Classification of Professional Activities.

1 Witkin Cal. Proc. Attys § 5

[§ 5] Classification of Professional Activities.

The traditional professional activities of attorneys fall under five general classifications:

(1) *Consultation with clients.* Attorneys consult with clients to discover legal problems and advise about courses of action. (See Freund, *Lawyering: A Realistic Approach to Legal Practice* (1979), Chap. 6; C.E.B., *Advising California Employers and Employees*; C.E.B., *Advising California Nonprofit Corporations* 2d; C.E.B., *Advising and Defending Corporate Directors and Officers*; C.E.B., *Internet Law and Practice*; C.E.B., *Real Property Sales Transactions* 4th, Chap. 1; C.E.B., *Sales and Mergers of California Businesses*; C.E.B., *Selecting and Forming Business Entities*; on preventive law techniques, see *infra*, §6.)

(2) *Drafting documents.* Attorneys draft legal instruments and other papers. (See Mellinkoff, *Legal Writing--Sense and Nonsense* (1992); Mellinkoff, *Dictionary of American Legal Usage* (1992); Wydick, *Plain English for Lawyers*, 5th (2005); C.E.B., *Business Buy-Sell Agreements*; C.E.B., *Business Contracts*; C.E.B., *Civil Lit. Forms*; C.E.B., *Construction Contracts, Defects, and Litigation*, Chap. 2; C.E.B., *Ground Lease Practice*, Part 2; C.E.B., *Drafting California Irrevocable Trusts* 3d; C.E.B., *Drafting California Revocable Trusts* 4th; C.E.B., *Real Property Sales Transactions* 4th, Chap. 4; C.E.B., *Real Property Practice Forms Manual*; C.E.B., *Sales and Mergers of California Businesses*; C.E.B., *Will Drafting* 3d; Am.Jur. *Legal Forms* 2d [practice-oriented forms for legal and business transactions]; Cal. *Civil Practice* [checklists, case plans, and litigation forms for many types of actions]; Cal. *Transactions Forms* [practice-oriented forms for legal and business transactions]; on preparation of legal instruments as practice of law, see *infra*, §382.)

(3) *Limited Scope Representation.* Except in family law cases, C.R.C., Rules 3.35 et seq. authorize an attorney and a person to agree that the scope of the legal services will be limited to specific tasks performed by the attorney (e.g., drafting legal documents, limited appearance in court). (C.R.C., Rule 3.35.) The rules recognize the following types of limited scope representation:

(a) Noticed representation, in which an attorney and a party notice the court and other parties of the limited scope representation. (C.R.C., Rules 3.35(c)(1), 3.36.)

(b) Undisclosed representation, in which the limited scope representation is limited to drafting documents and no court appearances. (C.R.C., Rules 3.35(c)(2), 3.37.)

The following Judicial Council Forms have been adopted for use in limited scope representations:

Judicial Council Form No. MC-950 [Notice of Limited Scope Representation; Mandatory Use].

Judicial Council Form No. MC-955 [Application to be Relieved As Attorney On Completion of Limited Scope Representation; Optional Use].

Judicial Council Form No. MC-956 [Objection to Application to be Relieved as Attorney On Completion of Limited Scope Representation; Optional Use].

Judicial Council Form No. MC-958 [Order on Application to be Relieved As Attorney On Completion of Limited Scope Representation; Optional Use].

(4) *Advocacy*. Attorneys represent clients before courts and administrative agencies. (See C.E.B., Civil Appellate Practice 3d; C.E.B., Elder Law Litigation; 52 *A.B.A.J.* 159 [observing that lawyer as advocate not only represents clients but helps to shape law]; 56 *A.B.A.J.* 460 [training lawyers in advocacy]; 60 *A.B.A.J.* 175 [need for training and certification of specialist advocates]; 76 *Cal. L. Rev.* 313 [general theory of litigation advice and its regulation]; 102 *Harv. L. Rev.* 565 [legal advice about information to present in litigation: its effects and social desirability]; 54 *Hastings L. J.* 695 [discussing inherent positive social good in representing business interests and ordinary individuals on fee-for-services basis]; 1 *West L.A. L. Rev.* 1 [methods for training lawyers in advocacy]; *Cal. Civil Practice*; 61 *Am.Jur. Trials* 269 [preparation of witnesses]; see also practice works listed in 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §§1, 2, 42.)

(5) *Negotiation*. Attorneys negotiate matters other than the settlement of a lawsuits; e.g., the preparation or termination of a lease or contract, the purchase or sale of a business, the formation of a partnership or corporation. (See Frascogna & Hetherington, *Lawyer's Guide to Negotiation* (2001); C.E.B., *Construction Contracts, Defects, and Litigation*, Chap. 2; C.E.B., *Real Property Sales Transactions* 4th, Chap. 1.) (On settlement of litigation, see *infra*, §7.)

(6) *Public responsibilities*. Attorneys often have public responsibilities, e.g., urging improvements in the legal system, molding public opinion on matters within the special competence of attorneys, and seeking public office. (See 58 *A.B.A.J.* 805 [professional privilege and responsibility]; 60 *A.B.A.J.* 821 [conflict between Bar's private economic interests and public interests]; 60 *A.B.A.J.* 1517 [corporation lawyer's social responsibilities]; 67 *A.B.A.J.* 1127 [impact on administration of justice of nonadversarial aspects of law practice]; 61 *Cal. L. Rev.* 1189 [attorney's responsibility under federal and state securities laws]; 66 *Cal. L. Rev.* 669 [suggesting that different principles should apply to nonadversary roles of attorneys]; 80 *Harv. L. Rev.* 814 [law reform in interest of the poor]; 18 *Santa Clara L. Rev.* 1054 [community law: alternative approach to public legal services]; 28 *Stanf. L. Rev.* 207 [perspectives on public interest law]; on lawyer's obligation to accept employment, see *infra*, §8; on providing legal services for the poor, see *infra*, §14; on lawyer's responsibility to provide pro bono services, see *infra*, §50 et seq.; on lawyer's responsibilities under the A.B.A. Model Rules of Professional Conduct, see A.B.A. Model Rules, Rule 6.1 (Pro Bono Publico Service).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Drafting documents*. See C.E.B., *Ground Lease Practice* 2d.(5) *Negotiation*. See 7 *Pepperdine Dispute Resolution L. J.* 425 [ways to achieve more effective negotiations; case studies].



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C. Nature and Function of Attorney.

4. Preventive Law.

1 Witkin Cal. Proc. Attys § 6

[§ 6] Preventive Law.

Preventive law has been described as a proactive approach to lawyering by which a client's legal rights are maximized and the legal risks are minimized. (See 37 Cal. Western L. Rev. 15 [Preventive Law and Therapeutic Jurisprudence].) Unlike the normal remedial law practice--in which the legally significant events occur prior to the attorney-client interview--preventive law practice requires consultation before these events take place, often with the client unaware of the need. For the attorney, this involves the multiple roles of planner, draftsman, and counselor. Hence, the attorney engages not only in the initial planning of a client's affairs but continues to scrutinize and supervise the client's legal activities. The process may also require cooperation between the attorney and other professionals in fields such as banking or insurance. (See Preventive Law Reporter; 38 So. Cal. L. Rev. 377 [Symposium on Preventive Law]; 38 So. Cal. L. Rev. 391, 431 [legal audits for businesses]; 48 So. Cal. L. Rev. 760 [preventive law bibliography]; <http://www.preventivelawyer.org> [National Center for Preventive Law].)

The possible ethical challenge of an attorney's initiative in informing clients of legal needs requiring attention has been eliminated by *Rule 1-400(C) of the Rules of Professional Conduct*. This activity is not improper solicitation of professional employment. (See *infra*, §417.)

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CHAPTER I - Attorneys

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C. Nature and Function of Attorney.

5. Settlement.

1 *Witkin Cal. Proc. Attys* § 7

[§ 7] Settlement.

Settlement is the voluntary termination of a controversy and is an integral part of an attorney's practice. The law favors settlement (see *Cassin v. Financial Indem. Co.* (1958) 160 C.A.2d 631, 636, 325 P.2d 228), and familiarity with its strategies and techniques is vital to the successful representation of clients. (For comprehensive discussions, see 4 C.E.B., Civ. Proc. Before Trial 4th, Chap. 46; Cal. Civil Practice, 4 Procedure §27:1 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings Before Trial 2d, §5.1 et seq.; Rutter Group, Civil Proc. Before Trial, Chap. 12; on income tax aspects of settlement, see Cal. Civil Practice, 3 Procedure §27:4; on authority of attorney to settle, see *infra*, §246.)

The settlement process consists of three distinct phases:

(1) *Evaluation*. The attorney must evaluate the case to determine the strengths and weaknesses of both sides. (For techniques of evaluation, see 3 C.E.B., Civil Proc. Before Trial 3d, §65.14 et seq; C.E.B., 1 Condemnation Practice 3d, §7.1 et seq.; 22 *Stanf. L. Rev.* 67 [formulae for assessing client's "bargaining limit" in specific cases].)

(2) *Negotiation*. The heart of the process involves negotiation with opposing counsel to reach a favorable settlement. (For negotiation techniques, see 3 C.E.B., Civil Proc. Before Trial 4th, Chap. 46; C.E.B., 1 Condemnation Practice 3d, §7.11 et seq.; see also 26 *U.C.L.A. L. Rev.* 701 [lawyer as negotiator]; 31 *U.C.L.A. L. Rev.* 754 [alternative framework for legal negotiation].) A settlement brochure--essentially a written version of the negotiating party's evaluation of the case--is frequently used on behalf of the plaintiffs. (See 4 *Am.Jur. Trials* 411 et seq. [sample brochure].) In California, the Rules of Court provide for settlement conferences to encourage this method of termination of litigation. (See C.R.C., Rule 3.1380 et seq. [settlement conference at trial]; C.R.C., Rule 8.248 [settlement conference on appeal]; Cal. Civil Practice, 3 Procedure §27:35 et seq.; 7 *Cal. Proc.* (5th), *Trial*, §53; 9 *Cal. Proc.* (5th), *Appeal*, §768.)

(3) *Writing*. The settlement terms are reduced to writing. (For discussions and forms, see 3 C.E.B., Civil Proc. Before Trial 4th, Chap. 46; Cal. Civil Practice, 3 Procedure §27:41 et seq.)

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6. Obligation To Accept Employment.

1 Witkin Cal. Proc. Attys § 8

[§ 8] Obligation To Accept Employment.

Guidance on whether an attorney must accept proffered employment is found in a general statutory pronouncement and in rules of ethics set forth in the A.B.A. Model Rules of Professional Conduct, and in the California Rules of Professional Conduct.

Under *B. & P.C. 6068(h)*, an attorney has a duty "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."

The A.B.A. Model Rules deal with this subject in Rule 6.1, Pro Bono Publico Service, and Rule 6.2, Accepting Appointments.

The California Rules of Professional Conduct prohibit an attorney from seeking, accepting, or continuing employment where the objective of the employment is improper. (Rule 3-200; see *infra*, §434.)

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D. Law Practice.

1. Certification of Specialists.

a. In General.

1 Witkin Cal. Proc. Attys § 9

[§ 9] In General.

Certification as a specialist is not required to practice in any field of law. (C.R.C., Rule 9.35(c).) However, in order to identify for the public those attorneys who have demonstrated proficiency in specified fields and "to encourage attorney competence," the State Bar has established a program for certifying legal specialists and has promulgated rules, regulations, and standards to implement and govern the program. (C.R.C., Rule 9.35; Rules Governing State Bar Program for Certifying Legal Specialists, Rule 1.0.) (See Rutter Group, Professional Responsibility, §1:125 et seq.) These rules are usually published in the sources that publish the Rules of Court. The rules and other information are also available on the State Bar website: www.calbar.ca.gov.

Certification requires that an attorney meet specified requirements as to practice and education and pass a written examination. Recertification is required every 5 years. (See Rules 4.0 [eligibility], 6.0 [education], 12.0 [recertification]; *In the Matter of Mudge* (1993) 2 Cal. State Bar Ct. Rptr. 536, 540 [application for certification could not be summarily denied solely on basis of past discipline].) The rules also provide for suspension or revocation of a specialist's certification on failure to comply with the requirements of the program. (C.R.C., Rule 9.35(d); Rules 13.0, 14.0; Rule 15.0 [hearing regarding denial or suspension].)

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D. Law Practice.

1. Certification of Specialists.

b. Certified Specialties.

1 Witkin Cal. Proc. Attys § 10

[§ 10] Certified Specialties.

The State Bar certifies attorneys in the following areas of practice:

(1) *Appellate Law*. (See Standards for Certification and Recertification in Appellate Law; C.E.B., Civil Appellate Practice 3d; C.E.B., Civil Writ Practice 3d; C.E.B., Appeals and Writs in Criminal Cases 2d; 9 *Cal. Proc.* (5th), *Appeal*, §1 et seq.)

(2) *Bankruptcy Law*. (See Standards for Certification and Recertification in Bankruptcy Law; Rules Governing State Bar Program for Certifying Legal Specialists, Rule 4.2.3 [must be admitted to at least one U.S. District Court in California]; 9 *Am.Jur.2d* (1999 ed.), *Bankruptcy* §1 et seq.; 4 *Cal. Proc.* (5th), *Pleading*, §§146, 147; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §514 et seq.)

(3) *Criminal Law*. (See Standards for Certification and Recertification in Criminal Law; C.E.B., Appeals and Writs in Criminal Cases 2d; C.E.B., Criminal Law; C.E.B., Criminal Law Forms Manual 2d; C.J.E.R., California Judges Benchbook: Domestic Violence Cases in Criminal Court 3d; C.J.E.R., California Judges Benchbook: Search and Seizure 2d; C.J.E.R., Felony Sentencing Handbook; 1 *Cal. Crim. Law* (3d), *Introduction to Crimes*, §1 et seq.; 4 *Cal. Crim. Law* (3d), *Introduction to Criminal Procedure*, §1 et seq.)

(4) *Estate Planning, Trust and Probate Law*. (See Standards for Certification and Recertification in Estate Planning, Trust and Probate Law; C.E.B., Decedent Estate Practice; C.E.B., Drafting California Irrevocable Trusts 3d; C.E.B., Drafting California Revocable Trusts 4th; C.E.B., Estate Planning; C.E.B., Probate Workflow Manual; C.E.B., Trust and Probate Litigation; C.E.B., Will Drafting 3d; 14 *Summary* (10th), *Wills and Probate*, §1 et seq.)

(5) *Family Law*. (See Standards for Certification and Recertification in Family Law; Cal. Civil Practice, Family Law Litigation; Cal. Transaction Forms, Family Law; C.E.B., Domestic Partnerships; C.E.B., Practice Under the California Family Code; C.E.B., Juvenile Dependency Practice; Rutter Group, Family Law; 10 *Summary* (10th), *Parent and Child*, §1 et seq.; 11 *Summary* (10th), *Husband and Wife*, §1 et seq.; 11 *Summary* (10th), *Community Property*, §1 et seq.; on limited scope representation in family law matters, see C.R.C., Rules 5.70, 5.71; 11 *Summary* (10th),

Husband and Wife, §74.)

(6) *Immigration and Nationality Law*. (See Standards for Certification and Recertification in Immigration and Nationality Law; Rules Governing State Bar Program for Certifying Legal Specialists, Rule 4.2.2 [must meet definition of "attorney" as specified, and be in good standing with Board of Immigration Appeals].)

(7) *Taxation Law*. (See Standards for Certification and Recertification in Taxation Law; C.E.B., *Tax Practice*; 9 *Summary* (10th), *Taxation*, §1 et seq.)

(8) *Workers' Compensation Law*. (See standards for Certification and Recertification in Workers' Compensation Law; Rules Governing State Bar Program for Certifying Legal Specialists, Rule 4.2.1 [must be in good standing before Workers' Compensation Appeals Board]; Cal. Civil Practice, *Workers' Compensation* [discussion and forms]; C.E.B., *Workers' Compensation Practice* 4th; 2 *Summary* (10th), *Workers' Compensation*, §345 et seq.)

(9) *Franchise and Distribution Law*. (See standards for Certification and Recertification in Franchise and Distribution Law.)

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(4) *Estate Planning, Trust and Probate Law*. See C.E.B., *Decedent Estate Practice* 2d.



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2. Attorney Referral Services.

a. In General.

1 Witkin Cal. Proc. Attys § 11

[§ 11] In General.

(1) *Nature and Purpose.* Many bar associations have established attorney referral services to help people of moderate means find competent attorneys. (See *Emmons, Williams, Mires & Leech v. State Bar* (1970) 6 C.A.3d 565, 570, 86 C.R. 367, *infra*, §13; Rutter Group, Professional Responsibility, §1:480 et seq.; 11 A.L.R.3d 1206 [propriety of lawyer referral services]; on policy of State Bar, see *infra*, §13.) As commonly understood, an attorney referral service is a consumer-oriented organization that provides unbiased referrals to attorneys with appropriate expertise in the subject matter of the representation. (See A.B.A. Model Rules, Rule 7.2, Comment [6].)

Under the usual procedure, a party in need of legal assistance contacts a central office, which in turn refers the party to an attorney selected from a list of those who have indicated a willingness to accept cases. The attorney interviews the referred client at no cost. After this first interview, arrangements for legal services and fees are up to the attorney and the client. (See 12 U.C.L.A. L. Rev. 343 [suggesting that referral services are preferable alternative to group legal practice]; 2 J. Legal Advoc. & Prac. 83 [California's lawyer referral services].)

(2) *American Bar Association Rules.* The A.B.A. Model Rules of Professional Conduct permit participation in lawyer referral services (Model Rules, Rule 7.2), but an attorney may not allow the recommending party to direct the attorney's professional judgment in rendering legal services (Model Rules, Rule 5.4).

(3) *California Rules.* The California Rules of Professional Conduct encourage State Bar members to participate in lawyer referral services, provided that the service is established and operated in conformity with minimum standards established by the State Bar and does not interfere with the attorney's independent professional judgment or the attorney-client relationship. (Rule 1-600; see comment to *Rules of Professional Conduct, Rule 1-600*, *infra*, §420; on registration and minimum standards of lawyer referral services, see *infra*, §12.)

(4) *Immunity From Liability.* Professional societies operating referral services generally are immune from liability for the malpractice or other unprofessional conduct of an attorney to whom a person is referred, if the referral was made at no cost beyond the initial referral fee. (C.C. 43.95(a); on referral fees, see *infra*, §13.)

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2. Attorney Referral Services.

b. Standards and Certification.

1 Witkin Cal. Proc. Attys § 12

[§ 12] Standards and Certification.

(1) *In General.* *B. & P.C. 6155* prohibits the operation of an attorney referral service and the acceptance by attorneys of referrals, unless (a) the service is registered with the State Bar, (b) it conforms with minimum standards established by the State Bar or the Supreme Court, and (c) the combined charges to the client do not exceed the total cost that would normally be paid if a referral service were not involved. (*B. & P.C. 6155(a).*) With the approval of the Supreme Court, the State Bar is required to formulate and enforce rules and regulations establishing minimum standards for attorney referral services, providing for registration and certification of referral services, and requiring attorney participants to possess malpractice insurance or otherwise show financial responsibility. (*B. & P.C. 6155(f).*) Specified group or prepaid legal services plans, legal insurance plans, and programs designed to make referrals for pro bono representation are excluded from the provisions of *B. & P.C. 6155*. (*B. & P.C. 6155(c).*)

(2) *Rules, Regulations, and Standards.* The State Bar has adopted rules, regulations, and minimum standards pertaining to attorney referral services. (Rules and Regulations of the State Bar Pertaining to Lawyer Referral Services (Including Minimum Standards for a Lawyer Referral Service in California), Rule 1 et seq.) These rules are usually published in the sources that publish the Rules of Court. The rules and other information are also available on the State Bar website: www.calbar.ca.gov.

(3) *Policy and Purposes.* The policy of the State Bar is that every community be served by an attorney referral service. (Rule 3.1; Rule 4.1 [definition of "referral service"].) Authorized purposes include providing information about attorneys and legal services generally, improving the quality of available legal services, and providing "affordable legal services." (Rule 5.1; see Rule 12.5 [unless unreasonable and impractical, referral service must establish activities or arrangements that serve persons of limited means].)

(4) *Establishment and Certification.* Authority to operate a referral service is granted and may be revoked by the State Bar. (Rules 6, 19; on grounds for denial or revocation of certification, see *B. & P.C. 6155(g).*) Fees are imposed for an initial application for certification and for annual renewal. (Rule 9.) (On supervision of services, see Rule 10.1; on ownership restrictions, see *B. & P.C. 6155(b)*; Rule 10.4; on publicity programs, see Rule 14; on required records and reports, see Rule 15; on activities not constituting unlawful restraint on trade, see *B. & P.C. 6155(d)*; on permissible

joint advertising, see *B. & P.C. 6155(h)*.)

(5) *Membership*. Membership in a referral service must be open to all State Bar members with suitable experience who practice in the geographical area. (Rule 11.1.) The quality of service provided by panel attorneys must be evaluated at least once every 2 years. (Rule 11.4; on review of admission, suspension, and expulsion decisions, see Rule 11.5.) Applicants must have malpractice insurance and must agree in writing to abide by the rules and regulations of the service and, at the client's election, to submit a fee dispute to binding arbitration. (Rules 11.3, 11.2.)

(6) *Panels*. Each referral service must establish the number and variety of panels that will best enable it to make referrals that are responsive to individual client needs. (Rule 12.1.) Each service must establish specific subject matter panels and is encouraged to establish special panels, such as moderate and no fee panels, foreign language panels, and alternative dispute resolution panels. Eligibility for these panels must be determined on the basis of experience and other objective criteria; however, certification by the California Board of Legal Specialization as a legal specialist is sufficient qualification. A service may also maintain a general panel. (Rule 12.2.) (On minimum numbers of panel members, see Rule 12.4 [subject matter panels]; Rule 12.6 [total panel].) Panel members may be charged reasonable fees for participation. (Rule 17.) Referrals to panel members must be nondiscriminatory and on a rotational basis. (Rule 13.)

(7) *Consequences of Violations*. A person or entity who violates *B. & P.C. 6155* is liable for civil penalties under the unfair competition statutes (*B. & P.C. 17206, 17206.1, 17536*; see 13 *Summary* (10), *Equity*, §126). (*B. & P.C. 6156*.) Moreover, contracts to provide attorney referral services may be unenforceable where the provider has failed to register as required. (*Selten v. Hyon* (2007) 152 C.A.4th 463, 468, 60 C.R.3d 896 [where entity was not registered with State Bar, referral services constituted unlawful consideration that rendered contract illegal and unenforceable].)

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(8) *(New) Acceptance of Illegal Referrals*. An attorney does not accept an illegal referral under *B. & P.C. 6155* "merely because he or she was retained by someone who was operating an illegal referral service. ... [A]cceptance of an illegal referral by an attorney must be with knowledge of at least the nature of the referral business that violates the statute ... [o]therwise, attorneys who have accepted employment in good faith and without any awareness of an association with an illegal operation would fall within the proscription of the statute just by agreeing to represent clients." This would punish attorneys who have no knowledge of or complicity in an illegality, an outcome not intended by the Legislature in enacting *B. & P.C. 6155*. (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 C.A.4th 1489, 1521, 85 C.R.3d 268 [retainer agreements did not violate *B. & P.C. 6155* where there was no evidence that attorneys involved entered into agreements knowing that referrals were from illegal referral service].)



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2. Attorney Referral Services.

c. Referral Fees.

1 Witkin Cal. Proc. Attys § 13

[§ 13] Referral Fees.

The delicate question of fee-splitting with a lay person or organization (see *infra*, §§530, 531) arises in connection with the referral or forwarding fee paid by an attorney to a referral service.

In *Emmons, Williams, Mires & Leech v. State Bar* (1970) 6 C.A.3d 565, 86 C.R. 367, defendant San Joaquin County Bar Association created a service that differed from the usual organization in two respects: (a) The forwarding fee was payable not to the service but to the local Legal Aid Society; (b) the fee, one-third of the recovery, was the highest in the United States (most services charged from 10% to 20%). Plaintiff attorney registered with defendant's service and received a client with a medical malpractice claim. The claim was settled and a court-approved fee of \$ 48,000 was paid. Plaintiff then brought this action for declaratory relief, contending that the forwarding fee was illegal under the former Rules of Professional Conduct. *Held*, summary judgment for defendant affirmed. Although fee-sharing agreements with unlicensed persons are illegal, the collection of a forwarding fee by a bar association operating an attorney referral service is not. The American Bar Association has approved these fees, and none of the public policy objectives of the fee-splitting rule would be furthered by prohibiting the practice. (6 C.A.3d 570, 572.) "There are wide differences--in motivation, technique and social impact--between the lawyer reference service of the bar association and the discreditable fee-splitting featured in the disciplinary decisions. Prohibited fee-splitting between lawyer and layman carries with it the danger of competitive solicitation ... ; poses the possibility of control by the lay person, interested in his own profit rather than the client's fate ... ; facilitates the lay intermediary's tendency to select the most generous, not the most competent, attorney. ... None of these dangers or disadvantages characterizes the San Joaquin Bar Association's lawyer reference activity. The bar association seeks not individual profit but the fulfillment of public and professional objectives. It has a legitimate, nonprofit interest in making legal services more readily available to the public. When conducted within the framework conceived for such facilities, its reference service presents no risks of collision with the objectives of the canons on fee-splitting and lay interposition." (6 C.A.3d 573.) (On propriety of fee-splitting among attorneys, see *infra*, §160 et seq.)

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3. Legal Service Programs.

a. In General.

1 Witkin Cal. Proc. Attys § 14

[§ 14] In General.

The A.B.A. Model Rules of Professional Conduct encourage lawyers to provide professional services to, and financial support for, legal service organizations (Rule 6.1), and authorize lawyers to serve as directors, officers, or members (Rule 6.3). (See 7 *Am.Jur.2d* (2007 ed.), *Attorneys At Law* §10; on propriety of State Bar member's participation in legal service programs, see *Rules of Professional Conduct*, *Rule 1-600(A)*, *infra*, §420.)

Traditionally, legal service organizations have been privately financed, usually by contributions from attorneys and charitable organizations. (See 10 *Cal. Western L. Rev.* 503 [Impact of Federal Funding on Legal Aid]; 12 *U.C.L.A. L. Rev.* 459 [bibliography of Legal Aid Programs]; 43 *A.L.R.5th* 793 [propriety and enforcement of attorney's obligation to share fee award with public interest organization].) Other methods of financing include the following:

(1) The federally financed Legal Services Corporation, established under the Legal Services Corporation Act (42 *U.S.C.*, §2996 et seq.), which is directed by statute to explore alternative methods of delivering legal services, including judicare, vouchers, prepaid legal insurance, and contracts with law firms. (42 *U.S.C.*, §2996f(g).) The corporation provides financial support for legal assistance in noncriminal proceedings to indigents by means of grants and contracts to qualifying organizations. (42 *U.S.C.*, §§2996b(a), 2996f(a), 2996f(c).) The Act contains numerous restrictions designed to insulate the corporation and the services it supports from political and controversial activities. (42 *U.S.C.*, §2996f(b).) (See *Peretz v. Legal Aid Foundation of Los Angeles* (2004) 122 C.A.4th Supp. 1, 4, 18 *C.R.3d* 863 [regulations promulgated under Legal Services Corporation Act do not preempt C.C. 1717 (award of attorneys' fees in contract actions)].)

(2) Awards of costs and attorneys' fees to legal aid organizations successfully representing indigents. (See *Horn v. Swoap* (1974) 41 *C.A.3d* 375, 383, 384, 116 *C.R.* 113 [award made directly to legal aid association]; *Ferreira v. Swoap* (1976) 62 *C.A.3d* 875, 883, 133 *C.R.* 449 [award to successful plaintiff on condition that he donate proportionate amount to legal assistance foundation]; 7 *Cal. Proc.* (5th), *Judgment*, §287.)

(3) Prepaid legal service programs. (See *infra*, §§420, 535.)

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(New) Civil Legal Representation. Govt.C. 68650 and 68651, added in 2009 and effective July 1, 2011, require legal counsel to be appointed to "represent low-income parties in civil matters involving critical issues affecting basic human needs in those specified courts selected by the Judicial Council." (Govt.C. 68651(a).) The Judicial Council must develop one or more model pilot projects in selected courts for 3-year periods pursuant to a competitive grant process and request for proposals. Because of the significant percentage of parties not represented in family law matters, proposals to provide representation in child custody cases are deemed a high priority, especially where one party is already represented. (Govt.C. 68651(b).) The Judicial Council must conduct a study to demonstrate the effectiveness and continued need for the program, and report its findings and recommendations to the Governor and the Legislature on or before January 31, 2016. (Govt.C. 68651(c).)



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b. Attorneys' Trust Fund Program.

1. Establishment and Distribution of Funds.

1 Witkin Cal. Proc. Attys § 15

[§ 15] Establishment and Distribution of Funds.

The 1981 Legislature, finding that existing programs for providing legal services to indigents in civil matters were insufficiently funded and inadequate to meet indigents' needs (*B. & P.C. 6210*), enacted *B. & P.C. 6210* et seq. to provide funding. Originally, attorneys and law firms were required to deposit trust funds in interest-bearing demand trust accounts, from which the interest was paid to the State Bar for facilitate funding. (Former *B. & P.C. 6211(a)*.) The 2007 Legislature broadened the nature of the required account so that the funding requirements are as follows:

(1) Attorneys or law firms that receive or disburse trust funds must deposit or invest "all client deposits or funds that are nominal in amount or are on deposit or invested for a short period of time" in interest-on-lawyer trust accounts (IOLTA). (*B. & P.C. 6211(a)*.) The interest and dividends earned on these accounts must be paid to the State Bar. (*B. & P.C. 6211(a)*.) Payments must be made directly by the bank on a quarterly basis, or more frequently. (State Bar Rules Regulating Interest-Bearing Trust Fund Accounts For The Provision Of Legal Services To Indigent Persons, Rule 1.1.) An IOLTA may include an interest-bearing checking account, an investment sweep product that is a daily financial institution repurchase agreement or an open-end money-market fund, or another investment authorized by the California Supreme Court. (*B. & P.C. 6213(j)*.) (On specific compliance requirements for IOLTAs, see *B. & P.C. 6212*; for further guidelines and updated forms, see State Bar website: www.calbar.ca.gov.)

(2) The State Bar must distribute the funds received in accordance with *B. & P.C. 6216*. Eighty-five percent of the funds must be distributed to "qualified legal services projects." (*B. & P.C. 6216(b)*.) A qualified legal services project means either: (a) a nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar, or (b) a program operated exclusively in California by an accredited nonprofit law school that has quality control procedures approved by the State Bar and meets specified operating requirements. (*B. & P.C. 6213(a)*.)

(3) Indigents must meet eligibility guidelines (*B. & P.C. 6218*), and recipients of funds must comply with various requirements (*B. & P.C. 6217, 6221, 6222*). Funds may be used to provide legal assistance in criminal matters. (*B. & P.C. 6223*.) An applicant whose request for funding is denied is entitled to a hearing before the State Bar. (*B. & P.C.*

6224; on hearing procedure, see *Rules of Procedure of the State Bar, Rule 4301* et seq.; for definition of "indigent person," see *B. & P.C. 6213(d)*.)

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b. Attorneys' Trust Fund Program.

2. Program Is Constitutional.

1 *Witkin Cal. Proc. Attys* § 16

[§ 16] Program Is Constitutional.

In *Carroll v. State Bar* (1985) 166 C.A.3d 1193, 213 C.R. 305, the court held that the trust fund statute creates a mandatory program and rejected several constitutional challenges.

(a) The language of *B. & P.C. 6211(a)* is clear and unambiguous, and imposes a mandatory requirement to place all nominal or short-term deposits of client trust funds in an interest-bearing trust account and to pay the interest to the legal services program. *B. & P.C. 6211(b)*, which permits attorneys to create interest-bearing accounts and to pay the interest to the client, applies only to client deposits that are neither nominal nor short-term. (166 C.A.3d 1200.)

(b) The reference in *B. & P.C. 6211(a)* to "deposits that are nominal in amount or are on deposit for a short period of time" is not vague and ambiguous. As authorized by *B. & P.C. 6211(c)*, the State Bar has adopted a rule defining these funds as those for which it is impractical to segregate them to earn income for the client in light of the costs involved, and has provided guidelines to attorneys to determine whether these funds are nominal or short-term. (166 C.A.3d 1203.)

(c) Because the statute affects only those client deposits that individually cannot earn net income after offsetting transactional costs, there is no taking of property without compensation. (166 C.A.3d 1204.)

(d) Because the state has a legitimate interest in attempting to provide funds for indigent legal services, and the statute does not use a suspect classification or impinge on a fundamental interest, there is no denial of equal protection. (166 C.A.3d 1206.)

(e) The statute neither restricts the right to counsel nor imposes a tax on its exercise, and therefore does not violate the *Sixth Amendment*. (166 C.A.3d 1207.) (See *Brown v. Legal Foundation of Washington* (2003) 538 U.S. 216, 123 S.Ct. 1406, 1419, 155 L.Ed.2d 376, 394 [Washington state law that required interest on client trust funds to be transferred to nonprofit entity for legitimate public use did not violate Just Compensation Clause]; 117 Harv. L. Rev. 369 [just compensation and interest on lawyers' trust accounts; *Legal Foundation of Washington*].)

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4. Client Security Fund.

a. In General.

1 Witkin Cal. Proc. Attys § 17

[§ 17] In General.

(1) *Nature and Scope.* A significant area of client protection has been the establishment of client security funds to reimburse clients who have suffered losses through defalcations of their attorneys. Statutes and rules establishing these funds have been upheld against various constitutional attacks. (See *7 Am.Jur.2d (2007 ed.)*, *Attorneys at Law* §9; *53 A.L.R.3d 1298* [validity and construction of statutory client security fund].)

The Board of Governors of the State Bar has established a Client Security Fund "to relieve or mitigate pecuniary losses" caused by the dishonest conduct of active State Bar members, foreign legal consultants, and attorneys registered under the Multijurisdictional Practice Program. Payments from the fund are discretionary and are subject to regulations and conditions prescribed by the board. (*B. & P.C. 6140.5(a)*.) The State Bar disciplinary agency must provide information to prospective complainants concerning the fund. (*B. & P.C. 6092.5(g)*.) (On foreign legal consultants, see *infra*, §391; on rules affecting multijurisdictional practice, see *infra*, §392 et seq.)

(2) *Funding and Administration.* The annual membership fee for active and inactive State Bar members may be used in part to finance the fund and the costs of its administration. (See *B. & P.C. 6140.55*.) (See *Hersh v. State Bar (1972) 7 C.3d 241*, *101 C.R. 833*, *496 P.2d 1201* [review of legislation and propriety of first assessment following statute's enactment]; *Whittier Union High School Dist. v. Superior Court (1977) 66 C.A.3d 504*, *510*, *136 C.R. 86*, *infra*, §262 [urging both plaintiff and defendant to seek reimbursement from fund following fraud and embezzlement by plaintiff's attorney in obtaining and appropriating settlement without plaintiff's knowledge]; *Alvarado Community Hosp. v. Superior Court (1985) 173 C.A.3d 476*, *482*, *219 C.R. 52*, *infra*, §249 [where attorney settled action without authorization and absconded with proceeds, client's application to fund for reimbursement constituted ratification of settlement].)

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4. Client Security Fund.

b. Procedure for Reimbursement.

1 Witkin Cal. Proc. Attys § 18

[§ 18] Procedure for Reimbursement.

The Client Security Fund (CSF) was originally administered by the disciplinary board of the State Bar, and the Rules of Procedure in their initial form neither afforded claimants an opportunity to address the State Bar's proposed disposition of a claim nor did they permit compensation for attorneys representing claimants. As a result, *Saleeby v. State Bar* (1985) 39 C.3d 547, 216 C.R. 367, 702 P.2d 525, ordered the State Bar to reformulate its regulations to ensure that claimants were provided with an opportunity to be heard and to respond to the State Bar's proposed disposition, and to permit attorneys representing claimants to receive compensation. (39 C.3d 568, 573.) In response to *Saleeby*, the State Bar adopted Rules of Procedure, Client Security Fund Matters, in 1986 to govern proceedings on applications for reimbursement from the fund. (Rule 1.)

An applicant may seek reimbursement, up to a maximum of \$ 50,000 for the loss of money or property caused by the dishonest conduct of an active member of the State Bar. (Rules 2, 4(c); see Rule 6 [definition of "dishonest conduct"]; *Johnson v. State Bar* (1993) 12 C.A.4th 1561, 1565, 1566, 16 C.R.2d 6 [attorney's failure to return unearned portion of client's payment constituted wrongful taking within meaning of Rule 6(a)].) An application for reimbursement must be filed within 4 years after the applicant discovers or reasonably should have discovered the loss. (Rule 3.)

The fund is administered by a Client Security Fund Commission. (Rule 11; on composition of Commission, see Rule 12.) An application for reimbursement is screened by counsel, after which the Commission notifies both the applicant and the attorney of its tentative decision and gives them 30 days to file written objections and, if desired, to request an oral hearing. (Rules 14, 15.) The Commission then makes and serves its final decision. (Rules 15, 15.5.) The Commission's decision is subject to review by administrative mandamus in the superior court under *C.C.P. 1094.5*. (Rule 17.)

Attorneys are encouraged to represent applicants on a pro bono basis whenever possible. However, attorneys may also contract with applicants for attorneys' fees. (Rule 18.)

To the extent of a payment made from the fund, the State Bar is subrogated to the rights of the recipient against the

person or entity causing the recipient's pecuniary loss. The State Bar may bring an enforcement action within 3 years of the date of payment. (*B. & P.C. 6140.5(b).*) In addition, as a condition of continued practice or of reinstatement, an attorney whose actions have caused a payment from the fund must reimburse the fund for the payment, with interest, and must pay an assessment for the procedural costs of processing the claim. (*B. & P.C. 6140.5(c)*; Rule 5(b).) An assessment that is part of an order of public reproof or an order imposing discipline or accepting a resignation with a disciplinary matter pending is enforceable as a money judgment. (*B. & P.C. 6140.5(d).*)

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State Bar Rules: Under the new organizational structure of the State Bar Rules, provisions governing the Client Security Fund are now contained in State Bar Rules, Rule 3.240 et seq.

Maximum reimbursement: For losses occurring on or after January 1, 2009, the maximum allowable reimbursement is \$ 100,000. For losses occurring before January 1, 2009, the maximum allowable reimbursement is \$ 50,000. (Rule 3.434(A), as amended in 2009.)

Subrogation rights of State Bar: In *State Bar v. Statile (2008) 168 C.A.4th 650, 86 C.R.3d 72*, attorney S settled three actions against him brought by his client trust and successor trustee alleging misappropriated funds. The terms of the settlement agreement required S to resign from the Bar with charges pending, that S not object to future notices from the Client Security Fund (CSF) to pay claims from the settling plaintiffs for reimbursement, and that the failure to object would not constitute an admission by S of any charges alleged in the original action. S made payments and complied with all terms of the agreement. The CSF approved applications for reimbursement and paid sums to four trusts. The State Bar then brought an action against S alleging embezzlement, breach of fiduciary duty, and theft of client property, and sought amounts paid by the CSF. S cross-complained for declaratory relief, arguing that his obligation to the State Bar was limited to the obligations under the settlement agreement alone and not for amounts paid by the CSF. The trial court concluded that on making payment to the applicants, the State Bar became subrogated to the rights of the applicants against S as they existed on the date of payment and as defined and limited by the settlement agreement and was thus entitled only to S's remaining payments under the agreement. *Held*, reversed, and trial court ordered to enter judgment in favor of the State Bar on all its claims.

(a) The settlement agreement did not limit the State Bar's subrogation rights. *B. & P.C. 6140.5(b)* provides that the State Bar becomes subrogated to the rights of an applicant who receives payment from the CSF. The agreement specifically provided that the aggrieved parties could seek full reimbursement for their losses from the CSF and that S would not object. Moreover, S's agreement not to object acts as "a waiver of his present claim that the bar is precluded from enforcing its subrogation rights above what is owed under the settlement agreement. The statutory scheme contemplates that the CSF may seek reimbursement from a former attorney who caused a client monetary loss through its right of subrogation. ... By permitting the settling plaintiffs to seek reimbursement from the CSF, [S] implicitly acknowledged that the CSF would be permitted to seek reimbursement from him." (*168 C.A.4th 664.*)

(b) The State Bar's subrogation rights are statutory, not derivative, and under *B. & P.C. 6140.5(b)*, the State Bar acquired a cause of action against S that was separate from those actions held by the settling plaintiffs. Because the State Bar had no contractual relationship with S, it is doubtful that any action by S, or by S and the settling plaintiffs, could alter S's statutory obligation to the State Bar. But whether the parties could have limited the State Bar's subrogation rights need not be decided because the settlement agreement specifically provided that S would not object to the Bar (CSF) paying the settling plaintiffs. (*168 C.A.4th 666.*)



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5. Law Partnerships.

a. Partnership Practice.

1 Witkin Cal. Proc. Attys § 19

[§ 19] Partnership Practice.

(1) *In General.* A partnership is defined as an association of two or more persons to carry on as coowners a business for profit (*Corp.C. 16101(9)*.) This association is permissible and common among attorneys. (See *Rest.3d, The Law Governing Lawyers* §9(1); 448 A.B.A.J. 423; 49 A.B.A.J. 155; *Rules of Professional Conduct, Rule 1-100(B)(1)* ["law firm" means two or more attorneys who practice law and share its profits, expenses, and liabilities]; on enforceability of noncompetition agreements, see *infra*, §33 et seq.; on withdrawing partner's right to fees, see *infra*, §23; on relationship between client and attorney's partner, see *infra*, §44; on liability for acts of former partners, see *infra*, §307; on application of federal civil rights law prohibiting sex discrimination in employment to partnership decisions, see *Hishon v. King & Spalding* (1984) 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59; on partnership law generally, see 9 *Summary* (10th), *Partnership*, §1 et seq.)

(2) *Partnership With Nonattorney.* An attorney may not form a partnership with a nonattorney if any part of the partnership business involves the practice of law. (*Rule of Professional Conduct, Rule 1-310*; *infra*, §414; *Rest.3d, The Law Governing Lawyers* §10(2).)

(3) *Privilege Against Self-Incrimination.* A partner may not invoke the privilege against self-incrimination when ordered to produce the records of a law partnership, even though he or she may be individually under investigation and those records may be incriminating. (*Bellis v. United States* (1974) 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678, 2 *Cal. Evidence* (4th), *Witnesses*, §452.)

(4) *Agreement.* A partnership agreement should cover at least the following matters: (a) name and place of business; (b) term and purpose of partnership; (c) capital contributions, withdrawals, and accounts; (d) profits and losses; (e) management, salaries, and bonuses; (f) withdrawal of partners; (g) termination; (h) dissolution; (i) finances and records. (See *Cal Transactions Forms*, 4 *Business Entities*, §§17:46, 17:47; 3 *Am.Jur. Legal Forms* 2d (2003 ed.), §30:277 et seq. [partnership agreements]; 72 *A.L.R.3d* 1226 [construction and application of expulsion provision in agreement].)

(5) *Misleading Partnership Names.* *Rules of Professional Conduct, Rule 1-400* authorizes the State Bar Board of

Governors to adopt standards as to communications that are presumed to violate the rule with respect to advertising and solicitation. (Rule 1-400(E).) The standards adopted include communications in the form of a firm name, trade name, fictitious name, or other professional designation that state or imply a relationship between a member in private practice and a government agency or instrumentality or a legal services organization, or that falsely state or imply that a member is a partner, associate, officer, or shareholder of, or of counsel to, another lawyer or a law firm. (See *infra*, §416 et seq.) (See *Lyon v. Lyon* (1966) 246 C.A.2d 519, 528, 54 C.R. 829 [plaintiff solo attorney using name "Lyon and Lyon" after dissolution of firm was properly enjoined from using name; name did not honestly describe attorney's sole practice and potential clients drawn by name would not know they were dealing with plaintiff only]; A.B.A. Model Rules, Rule 7.5 [prohibiting misleading firm names but permitting use of trade names that are not misleading]; 6 A.L.R.4th 1251 [propriety, under state statutes or rules, of multistate law partnership or professional service corporation]; 26 A.L.R.4th 1083 [use of assumed or trade name as unethical conduct]; 33 A.L.R.4th 404 [validity, as applied to out-of-state firm, of state rule forbidding use of law firm name unless it contains only names of members of that state's bar].)

(6) *Change of Name When Attorney Resigns or Is Disbarred.* When an attorney is disbarred or resigns with charges pending, the attorney's name must be removed within 60 days from the business name, advertising, letterhead, and other material of the firm, partnership, corporation, or association. (*B. & P.C. 6132.*)

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5. Law Partnerships.

b. Limited Liability Partnership.

1 Witkin Cal. Proc. Attys § 20

[§ 20] Limited Liability Partnership.

Attorneys may do business as a registered limited liability partnership (LLP), thus limiting their personal liability for partnership debts and the malpractice of their partners. (*Corp.C. 16101(8)(A)*, 16951 et seq., 16306(c); see infra, §307; for complete discussion of registered limited liability partnerships, see 9 *Summary* (10th), *Partnership*, §122 et seq.; C.E.B., *Advising California Partnerships* 3d, Chap. 6; for forms related to limited liability partnerships, see Cal. Transactions Forms, 4 Business Entities §21:1 et seq.)

An LLP is managed, operated, and taxed on its income like a general partnership, and, unless specified otherwise in writing, each LLP partner has equal rights in the management and affairs of the LLP. (*Corp.C. 16401*). Each partner must be licensed to practice law (*Corp.C. 16101(8)(A)*), and the entity is required to maintain security against potential malpractice claims (*Corp.C. 16956*). To become an LLP, a partnership must file a registration with the Secretary of State, executed by one or more authorized partners, stating (1) the partnership's name, the address of its principal office, and the address of its agent for service, if applicable; (2) the partnership's business; and (3) that it is registering as an LLP. (*Corp.C. 16953*.) (On foreign limited liability partnerships, see *Corp.C. 16958*; on limited liability company as possible organizational form, see 9 *Summary* (10th), *Partnership*, §136 et seq.; Cal. Transaction Forms, 3 Business Entities, Chap. 16; for forms and fees, see Secretary of State's website: www.ss.ca.gov/business/llp/forms.)

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5. Law Partnerships.

c. Dissolution of Partnership.

1. In General.

1 Witkin Cal. Proc. Attys § 21

[§ 21] In General.

Failure to have a written agreement covering dissolution of the partnership may cause problems when that event occurs.

In *Jewel v. Boxer* (1984) 156 C.A.3d 171, 203 C.R. 13, the members of a law partnership without a written agreement dissolved it and formed two new firms. Active cases were kept by the particular attorneys who had handled them, and appropriate substitution of attorney forms were executed. In an action for an accounting, the trial judge allocated fees between the old and new firms on a quantum meruit basis. *Held*, judgment reversed.

(a) The original Uniform Partnership Act (subsequently repealed) provides that a dissolved partnership continues until unfinished business is wound up, and except for surviving partners, prohibits extra compensation for postdissolution services. In the absence of a contrary agreement, income generated in the winding-up process is allocated to the former partners according to their respective partnership interests. (156 C.A.3d 176.) The Act's application to "every trade, occupation, or profession" includes law partnerships. (156 C.A.3d 177.)

(b) Policy reasons support application of the rule against extra compensation to law partnerships. It prevents competition for the most remunerative cases during a partnership and for files and clients on dissolution of a partnership. The fiduciary duties of partners to complete unfinished business and to avoid any action for personal gain with respect to unfinished business will help to prevent undue hardship on any particular partner. (156 C.A.3d 179.)

(c) Net postdissolution income, not gross income, must be allocated to the former partners according to their partnership interests. Thus, reimbursement for reasonable overhead expenses attributable to the production of that income is permissible. (156 C.A.3d 180.)

(d) A law partnership may provide in a written agreement for the completion of unfinished business on dissolution. (156 C.A.3d 179, 180.) "The former partners must bear the consequences of their failure to provide for dissolution in a partnership agreement." (156 C.A.3d 180.)

The original Uniform Partnership Act has been superseded by the Uniform Partnership Act of 1994 (*Corp.C. 16100* et seq.). (See 9 *Summary* (10th), *Partnership*, §§15 et seq., 46 et seq.)

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2. What Constitutes Unfinished Business.

1 *Witkin Cal. Proc. Attys* § 22

[§ 22] What Constitutes Unfinished Business.

Unfinished business of a law firm includes all matters in progress, regardless of whether they are hourly rate cases or contingency fee cases. (*Rothman v. Dolin* (1993) 20 C.A.4th 755, 759, 24 C.R.2d 571 [relying on *Jewel v. Boxer* (1984) 156 C.A.3d 171, 203 C.R. 13, supra, §21, and *Fox v. Abrams* (1985) 163 C.A.3d 610, 210 C.R. 260, infra, §32].)

In *Grossman v. Davis* (1994) 28 C.A.4th 1833, 34 C.R.2d 355, a two-person law partnership of G and D represented a client in a personal injury action. After dissolution of the partnership, the client, represented by D, settled the action. One defendant paid \$ 60,000, but the other two, who were judgment-proof, stipulated to a \$ 540,000 judgment and assigned to the client any cause of action for bad faith against their insurer. D then prosecuted the bad faith action to a successful conclusion that produced attorneys' fees of \$ 121,872. *Held*, the attorneys' fees from the bad faith action were generated in the course of winding up the partnership's unfinished business.

(a) Under the fee agreement with the client, the fee amount was based on net recovery, which included the amount from both actions. The settlement of the personal injury action provided the assignment necessary for the bad faith action, and the two were inextricably linked by the identical motive of getting the maximum compensation for the client. (28 C.A.4th 1836, 1837.)

(b) Winding up a legal partnership's unfinished business may require the filing of new actions to bolster or facilitate predissolution lawsuits. Here, the bad faith action was a continuation by other means of the dissolved partnership's unfinished business in the personal injury action. The trial judge was therefore correct in awarding to G fees from the action proportionate to his partnership interest. (28 C.A.4th 1837.)

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d. Withdrawing Partner's Right to Fees.

1 Witkin Cal. Proc. Attys § 23

[§ 23] Withdrawing Partner's Right to Fees.

In *Champion v. Superior Court* (1988) 201 C.A.3d 777, 247 C.R. 624, the partnership agreement of a law firm contained the following provision (§9.9) for sharing fees between the partnership and a departing partner: "[I]n the event of termination or withdrawal all clients and client files remain the property of the Partnership and in the event that a client desires to have the withdrawing partner as his, her, or its attorney, he, she or it may do so but any fees realized in any such case shall remain the property and asset of the Partnership. The withdrawing partner shall be entitled to receive that percentage of the fees equal to his percentage in the Partnership at the time of his departure. The Firm shall have a lien on the case and its proceeds to protect and secure the Partnership's interest in such case or cases." (201 C.A.3d 780.)

B held a 51% interest in the firm of 15 attorneys; petitioner C, holding a 1.79% interest, resigned, and eight former clients of the firm elected to be represented by him. B and the remaining partners filed an action for a declaration of rights and duties of partners under the agreement, C cross-complained, asserting a different interpretation, and the trial court granted summary adjudication of the issue in favor of B and the remaining partners. C then sought mandamus to vacate the order. *Held*, writ granted; the agreement was unenforceable.

(a) *Violation of prohibition against unconscionable fee.*

(1) Former Rule 2-107 of the Rules of Professional Conduct prohibits an agreement to charge an illegal or "unconscionable" fee, and states that a fee is unconscionable "when it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community." (201 C.A.3d 782; on current Rule 4-200, prohibiting unconscionable fees, see *infra*, §454.)

(2) Under the agreement here, the firm would be entitled to receive almost all the legal fees recovered, regardless of how much preparation of the case was performed by the firm. "These fees have no relationship whatsoever to the amount of service provided or to be provided by the partnership to the client. No consideration is given to the stage of litigation at the time of departure. An agreement to share the fees in unfinished cases is not per se unconscionable. But the way in which this agreement shares the fees is unconscionable. A fee of this size, without any relationship to

services rendered, must 'shock the conscience of lawyers of ordinary prudence practicing' in the community." (201 C.A.3d 783.)

(b) *Violation of public policy favoring client's right to retain attorney of choice.*

(1) "Paragraph 9.9 purports to permit a client to elect representation by a withdrawing partner, but in most cases it denies the client such representation by denying the withdrawing partner reasonable compensation for representation. An attorney not formerly a partner may take the client's case encumbered only by the obligation to reimburse the [B] Law Firm in quantum meruit in case of recovery. ... By contrast, petitioner or another former partner could take the case only as a partially paid volunteer unless the amount of remaining work were small. Thus, as a practical matter, the client is deprived of representation by the very lawyer most familiar with the case and most desired by the client." (201 C.A.3d 783.)

(2) The firm members contend that a client has no reasonable expectation that an attorney leaving the law partnership will be able to continue to represent the client; he or she may go to work for the government or a corporation or turn to another kind of business. "But a sacrifice of the client's interest that might be acceptable to permit an individual attorney to change his or her career is not acceptable where motivated only by a partnership's desire to protect its expected profits. When an attorney remains willing and able to represent a client, representation should not be barred by an unconscionable partnership agreement with former partners." (201 C.A.3d 783.)

(c) *Partnership rule of sharing fees is inapplicable.* Petitioner suggested that a determination of legality could be made only by interpreting §9.9 to require sharing fees in all pending partnership cases. This suggestion, based on *Jewel v. Boxer* (1984) 156 C.A.3d 171, 203 C.R. 13, supra, §21, and *Fox v. Abrams* (1985) 163 C.A.3d 610, 210 C.R. 260, infra, §32, is unacceptable here, for it would impose on petitioner the burden of performing his share of the work in winding up unfinished partnership cases. (201 C.A.3d 784.)

(d) *Proper approach.* A withdrawing partner may represent a former client under the same terms as any other attorney, but must reimburse the firm for its contribution. "In the case of a partner who leaves with less than his or her share of the lucrative cases, this approach is better for the partnership than a dissolution and still protects the client's interest. In the case of a partner who takes more than his or her share of the lucrative cases, the partnership is not powerless to secure a more favorable result. It may elect to dissolve under paragraph 10 of the partnership agreement and wind up its financial affairs under the principles of *Fox v. Abrams* and *Jewel v. Boxer*. Thus, the partnership controls the decision whether to permit the withdrawing partner to represent the clients as would a stranger to the partnership or to wind up the partnership with a sharing of the fees and of the work on the unfinished cases." (201 C.A.3d 785.) (On enforceability of noncompetition agreements, see infra, §33 et seq.)

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6. Law Corporations.

a. In General.

1 Witkin Cal. Proc. Attys § 24

[§ 24] In General.

(1) *Statutory Authorization.* The Moscone-Knox Professional Corporation Act authorizes the incorporation of persons in certain professions (*Corp.C. 13401*), and *B. & P.C. 6160* et seq. specifically provide for law corporations. The statutes are supplemented by Law Corporation Rules of the State Bar. (On organization, operation, and regulation of professional corporations generally, see 9 *Summary* (10th), *Corporations*, §26 et seq.; see also Cal. Transactions Forms, 3 Business Entities §15:1 et seq. [discussion and forms relating to professional corporations]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §133 [professional service corporations]; 4 *A.L.R.3d* 383 [containing comprehensive bibliography on subject]; 6 *A.L.R.4th* 1251 [propriety of multistate professional corporations]; 39 *A.L.R.4th* 556 [liability of law corporation or members for malpractice and other torts of members].)

(2) *Definition.* A law corporation is a corporation that is registered with the State Bar of California and has a currently effective registration certificate issued by the State Bar under the Professional Corporation Act. The corporation is entitled to practice law, subject to "all applicable statutes, rules and regulations." (*B. & P.C. 6160*.)

(3) *No Exemption From Execution.* A law corporation is not entitled to the personal exemption from execution for personal property used in a profession. (*Canal-Randolph Anaheim v. Wilkoski* (1980) 103 C.A.3d 282, 293, 163 C.R. 30.)

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6. Law Corporations.

b. Organization and Name.

1 Witkin Cal. Proc. Attys § 25

[§ 25] Organization and Name.

(1) *Alternative Methods of Organization.* A law corporation may be organized under either the General Corporation Law (*Corp.C. 100* et seq.; see 9 *Summary* (10th), *Corporations*, §5 et seq.) or the Nonprofit Public Benefit Corporation Law (*Corp.C. 5110* et seq.; see 9 *Summary* (10th), *Corporations*, §251 et seq.). (*B. & P.C. 6161; Corp.C. 13406(b).*)

Nonprofit incorporation is allowed if (a) the corporation is a qualified legal services project or support center within the meaning of *B. & P.C. 6213* (supra, §15); or (b) the corporation meets all the requirements of the Nonprofit Public Benefit Corporation Law, all its members and directors are licensed to practice law in California, 70% of its clients are lower income persons or other persons who would not otherwise have access to legal services, and it does not enter into contingency fee contracts. (*Corp.C. 13406(b).*)

In *Frye v. Tenderloin Housing Clinic* (2006) 38 C.4th 23, 40 C.R.3d 221, 129 P.3d 408, defendant Tenderloin Housing Clinic (THC), a nonprofit public benefit corporation, was formed for purposes of preserving a low income neighborhood community through improvement in housing, particularly residential hotels, and assisting low and moderate income residents and tenants in asserting their legal rights. THC employed several attorneys who represented tenants in administrative and court proceedings and were required to convey to THC any legal fees received. In the underlying action, THC entered into a contingent fee agreement to represent plaintiff and other residential hotel tenants in an action against their landlords and secured a substantial jury award including attorneys' fees. After disbursements and the retention of fees, plaintiff sought, under multiple causes of action, recovery of money retained as fees. Most of the claims were summarily adjudicated in defendant's favor. The question remaining was whether THC was authorized to practice law, even though it did not meet the requirements of *Corp.C. 13406(b)*, which governs the incorporation of a professional law corporation as a nonprofit public benefit corporation. The Court of Appeal concluded that, because THC chose to practice as a nonprofit corporation, it was subject to the limitations imposed by *Corp.C. 13406(b)*, and was required to register with the State Bar under *B. & P.C. 6160* (infra, §27). *Held, Corp.C. 13406(b)* is not the sole source of authority under which a nonprofit corporation may practice law.

(a) The historical proscription on the corporate practice of law has been subject to both legislative and judicial exceptions, and there is no evidence that the Legislature, in enacting *Corp.C. 13406(b)*, intended to abrogate or

challenge the exceptions. (38 C.4th 39.) Moreover, "[g]rave First Amendments questions would be raised" by permitting the application of a statute that would prohibit a nonprofit law corporation such as THC from practicing law unless it was composed entirely of attorneys and devoted solely to serving the indigent. (38 C.4th 42, relying on *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, infra, §534.) Thus, *Corp.C. 13406(b)* "cannot be construed to govern all nonprofit corporations that provide legal services to third parties." (38 C.4th 45.)

(b) THC's failure to register with the State Bar or to comply with *Corp.C. 13406(b)* was not a cause of injury to plaintiff; plaintiff would have fared no better had THC registered or complied. In addition, as indicated by amicus curiae briefing from groups similar to THC who represent a wide political spectrum, under current law, those organizations are not required to register with the State Bar or to comply with *Corp.C. 13406(b)*. As the State Bar has indicated, it has not enforced *Corp.C. 13406(b)* with respect to those organizations. (38 C.4th 49.)

(c) "In view of the State Bar's experience in regulating the practice of law, its knowledge of the practical problems presented by various forms of law practice, and its ability to seek information and recommendations from the legal community and other interested persons, we believe the matter should be referred to the State Bar for further study, followed by a report and specific recommendations to this court." (38 C.4th 50.)

(2) *Name*. The corporate name and any name under which the corporation renders legal services must comply with the rules and regulations of the State Bar. (*B. & P.C. 6171(c)*.) The corporate name and any name under which the corporation practices law must comply with the Rules of Professional Conduct and must include the words "professional corporation" or other words or abbreviations indicating corporate existence. (Law Corporation Rules, Rule IV(A)(5).) The corporation must obtain and maintain a fictitious name permit when so required by the State Bar, and must pay an application and renewal fee for the permit in amounts determined by the State Bar. (*B. & P.C. 6171(d)*.)

When an attorney is disbarred or resigns with charges pending, the attorney's name must be removed within 60 days from the business name, advertising, letterhead, and other material of the corporation. (*B. & P.C. 6132*.)

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c. Directors, Officers, and Shareholders.

1 *Witkin Cal. Proc. Attys* § 26

[§ 26] Directors, Officers, and Shareholders.

(1) *Directors and Officers.* With the exception of corporations having only one shareholder, each director and officer of the corporation must be both a shareholder (Law Corporation Rules, Rule IV(A)(2)(b)) and an active member of the State Bar or an attorney licensed in the jurisdiction where the attorney practices (*B. & P.C. 6165*; see *Corp.C. 13403*).

(2) *Shareholders.* Each shareholder must be an active member of the State Bar or an attorney licensed in the jurisdiction where the attorney practices. (*B. & P.C. 6165*; Law Corporation Rules, Rule IV(A)(2)(a).) Shares of deceased, ineligible, or disqualified persons must be sold and transferred to the corporation or its shareholders within 6 months after the death of the shareholder or within 90 days after the shareholder becomes disqualified or ineligible. (*B. & P.C. 6171(a)*; Law Corporation Rules, Rule IV(C)(2).) Corporate income attributable to professional services rendered by a disqualified person cannot accrue to the benefit of that person or to that person's shares. (*B. & P.C. 6166*; Law Corporation Rules, Rule IV(C)(5).)

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d. Certificate of Registration.

1 Witkin Cal. Proc. Attys § 27

[§ 27] Certificate of Registration.

(1) *In General.* A law corporation must possess a certificate of registration issued by the State Bar in order to render legal services. (*B. & P.C. 6160, 6161.*) The application for a certificate, on a form supplied by the State Bar, must be signed and verified by a corporate officer. (*B. & P.C. 6161; Law Corporation Rules, Rules II, III(A).*) The applicant must supply the following documents or information: (1) A copy of the articles of incorporation, certified by the Secretary of State. (2) A copy of the bylaws, certified by the corporation's secretary. (3) The names and addresses of the corporation and its officers, directors, shareholders, members, and employees who will render professional services, the address of each office, and fictitious names the corporation intends to use. (*B. & P.C. 6161.*) For each shareholder who is licensed in a foreign country but not the United States, the application also must include a certificate from that country verifying the shareholder's status as an attorney in good standing. (*B. & P.C. 6161.*) The application form is available at the State Bar's website: www.calbar.ca.gov.

(2) *Review of Denial.* If the application is refused, the applicant may request a review within 60 days of notice of the refusal. (See Law Corporation Rules, Rule III(C).)

(3) *Effective Date.* The certificate of registration is effective on the date all documents are supplied by the applicant, unless a later date is requested or an earlier date would be in the interests of justice and good cause is shown. (Law Corporation Rules, Rule III(B).)

(4) *Annual Renewal.* The certificate of registration must be renewed annually. (*B. & P.C. 6161.1.*) Filing an annual report and paying applicable fees and penalties (*infra*, §28) constitutes annual renewal. (*B. & P.C. 6163(a).*)

(5) *Failure To Comply.* Failure to comply with the registration requirements may result in an order to cease and desist, suspension, or revocation of registration. However, if there is no allegation of negligent performance or that a client relied on the existence of a corporate entity or was injured by the law corporation's delinquency, disgorgement of fees would be disproportionate to the alleged wrong, i.e., failure to register. (*Olson v. Cohen (2003) 106 C.A.4th 1209, 1215, 131 C.R.2d 620* [defendant's demurrer was affirmed where plaintiff sought disgorgement of legal fees collected by law corporation during period while unregistered but voluntarily registered before complaint was filed]; *Steven M.*

Garber & Associates v. Eskandarian (2007) 150 C.A.4th 813, 820, 59 C.R.3d 1 [law firm need not be registered as professional law corporation to file action to recover fees; following *Olson*.)

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e. Operation and Regulation.

1 Witkin Cal. Proc. Attys § 28

[§ 28] Operation and Regulation.

(1) *Professional Services.* Each person who will render professional services must be licensed either in California or in the jurisdiction where the person practices. (*B. & P.C. 6161*; Law Corporation Rules, Rule IV(A)(4).)

Law corporations are subject to all statutes, rules, and regulations governing professional conduct, and are prohibited generally from doing or failing to do an act constituting a cause for discipline of a State Bar member. (*B. & P.C. 6167*; see *infra*, §480 et seq.) They are, however, exempt from certain statutory prohibitions against unauthorized practice of law. (*B. & P.C. 6127.5*.) Law corporations are subject to the disciplinary powers and authority of the Supreme Court and the State Bar. (*B. & P.C. 6172*.) The term "law firm," as used in the Rules of Professional Conduct, includes a law corporation employing more than one lawyer. (Rule 1-100(B); see *infra*, §478.) (See *T & R Foods v. Rose* (1996) 47 C.A.4th Supp. 1, 8, 10, 56 C.R.2d 41 [under *B. & P.C. 6167*, law corporation cannot be used to shield attorney from personal liability for professional negligence; sole shareholder of law corporation who contracted with and performed services for client was responsible for ensuring that client's funds were placed in trust account and was personally liable for failure to do so].)

(2) *Required Reports.* A law corporation must file an annual report with the State Bar, showing the corporation's qualification and compliance with applicable statutes, rules, and regulations. (*B. & P.C. 6163(a)*; Law Corporation Rules, Rule VI(A).) In addition, any change in directors, officers, legal employees, or share ownership, and amendments to the corporation's articles or bylaws must be reported to the State Bar within 30 days of the change. (*B. & P.C. 6162*; Law Corporation Rules, Rule VI(B).) Each report must be accompanied by a filing fee (Law Corporation Rules, Rule VI(C)), and must be signed and verified by a corporate officer (Law Corporation Rules, Rule II). The State Bar may impose a penalty for the late filing of the annual report; the penalty may not exceed double the amount of the filing fee. (*B. & P.C. 6163(a)*.) Report forms are provided by the State Bar. (Law Corporation Rules, Rules VI(A), VI(B).) Forms are available on State Bar website: www.calbar.ca.gov.

If a law corporation fails to file its annual report and pay the required fee, its certificate of registration must be suspended 60 days after written notice of the delinquency (*B. & P.C. 6163(b)*), but may be reinstated on the filing of all delinquent reports and payment of all accrued fees and penalties (*B. & P.C. 6163(c)*).

A law corporation that is incorporated as a nonprofit public benefit corporation (*supra*, §25) and is a recipient of funding in good standing under *B. & P.C. 6213(c)* is deemed to have satisfied the filing requirements of *B. & P.C. 6161.1* (*supra*, §27), 6162, and 6163. (*Corp.C. 13406(c)*.)

(3) *Authorized Fees*. The Board of Governors has set the following fees:

(a) Certificate of registration: \$ 200.

(b) Annual reports: \$ 50.

(c) Reports regarding change of name: \$ 25.

(d) Reports regarding changes in shareholders, officers, or directors: \$ 25.

(e) Reports requiring increase in malpractice coverage: \$ 25.

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f. Security for Claims.

1 Witkin Cal. Proc. Attys § 29

[§ 29] Security for Claims.

As a condition of obtaining a certificate of registration (*supra*, §27), a law corporation must provide and maintain security for claims of clients against it for errors and omissions. (*B. & P.C. 6171(b)*.) The security may consist of insurance or a written agreement of the shareholders that they will jointly and severally guarantee payment by the corporation. (*B. & P.C. 6171(b)*); Law Corporation Rules, Rule IV(B) [stating amount of insurance required].) (See *Beane v. Paulsen* (1993) 21 C.A.4th 89, 95, 96, 98, 26 C.R.2d 486 [under *B. & P.C. 6171(b)* and Law Corporation Rules, Rule IV(B), former shareholder attorneys had joint and several liability to former client as guarantors of law corporation's financial responsibility for malpractice; notice to client of corporation's dissolution could not release shareholders from liability for negligent acts already committed].)

The corporation must file with the State Bar a copy of all notices from insurance companies concerning termination or cancellation of its insurance. (Law Corporation Rules, Rule VI(B).)

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g. Cancellation or Revocation of Certificate.

1 Witkin Cal. Proc. Attys § 30

[§ 30] Cancellation or Revocation of Certificate.

(1) *Voluntary Cancellation.* The board of directors of a law corporation may, by resolution, request the cancellation of the corporation's certificate of registration. Cancellation is effective as of the date of receipt of the request by the State Bar unless (a) a later date is requested, or (b) an earlier date would be in the interests of justice and good cause is shown. (Law Corporation Rules, Rule V(B).)

(2) *Cancellation on Death of Sole Shareholder.* A law corporation's certificate of registration is deemed cancelled 6 months and 1 day after the death of its sole shareholder. The certificate may be cancelled sooner on a written request from the shareholder's personal representative or sole heir or from the person to whom the shares passed by will or operation of law. (*B. & P.C. 6171.1.*)

(3) *Involuntary Suspension or Revocation.* A law corporation's certificate of registration may be suspended or revoked for failure to comply with the Law Corporation Rules, the State Bar Act, the Rules of Professional Conduct, the Professional Corporations Act, or the General Corporations Law. (Law Corporation Rules, Rule V(A); on investigation and proceedings against law corporation, see *infra*, §31.)

(4) *Distribution of Fees.* On dissolution of a law corporation, all matters in progress constitute the unfinished business of the corporation, and, under *Jewel v. Boxer* (1984) 156 C.A.3d 171, 203 C.R. 13, *supra*, §21, and *Fox v. Abrams* (1985) 163 C.A.3d 610, 210 C.R. 260, *infra*, §32, the partners are entitled to share in the fees received in pending cases in accordance with their partnership interests. (See *Rothman v. Dolin* (1993) 20 C.A.4th 755, 757, 759, 24 C.R.2d 571 [unfinished business of law corporation includes both hourly rate cases and contingency fee cases; on dissolution, partners with equal shares were entitled to share equally in fees received].)

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h. Investigation and Proceedings Against Corporation.

1 Witkin Cal. Proc. Attys § 31

[§ 31] Investigation and Proceedings Against Corporation.

(1) *Investigation by State Bar.* The State Bar is authorized to investigate the conduct of law corporations. The Board of Governors, or its authorized committee, has the power to issue subpoenas, administer oaths, examine witnesses, and compel the production of records. The investigation is private and confidential, except to the extent that disclosure is required if a cease and desist order is issued and there are subsequent proceedings. (*B. & P.C. 6168.*)

(2) *Notice To Show Cause.* If there is reason to believe that a law corporation has violated the provisions of *B. & P.C. 6160* et seq., the Professional Corporation Act, or "other pertinent statute, rule, or regulation," the State Bar may issue a notice to show cause why it should not order the corporation to cease or desist from such activity or suspend or revoke the corporation's registration certificate. Service of a copy of the notice must be made on the corporation in the same manner as service of summons on a California corporation. (*B. & P.C. 6169(a)*; see Law Corporation Rules, Rule V(C).)

(3) *Hearing, Findings, and Recommendation.* A hearing on the notice to show cause is held before a standing or special committee appointed by the Board of Governors. Both the State Bar and the corporation are entitled to representation by counsel, and to issue subpoenas, present evidence, and examine and cross-examine witnesses. (*B. & P.C. 6169(b)*.) The committee must specify its findings in writing and must recommend that (a) the proceeding be dismissed, or (b) the cease and desist order issue, or (c) the corporation's certificate of registration be suspended or revoked. (*B. & P.C. 6169(c)*.)

(4) *Review.* A written petition for review may be filed with the State Bar by either the corporation or the State Bar within 20 days after service of the findings and recommendation. The decision is reviewed by the Board of Governors or an authorized committee, which may take additional evidence, adopt new or amended findings, and make "such order as may be just" as to the notice to show cause. (*B. & P.C. 6169(c)*.) The corporation may petition the Supreme Court for review. (*B. & P.C. 6170.*) A petition for review by the Supreme Court must be filed within 60 days after written notice of the action is mailed to the petitioner. (*C.R.C., Rule 9.13(d)*.)

(5) *Requirements Are Not Applicable to Specified Proceedings.* The provisions of *B. & P.C. 6169(a)*, (b), and (c) do

not apply to the suspension or revocation of a corporation's certificate of registration because of the death of a sole shareholder, as provided in *B. & P.C. 6171.1* (supra, §30), or because of failure to file the annual report, as provided in *B. & P.C. 6163* (supra, §28), or because of failure to renew the certificate of registration, as provided in *B. & P.C. 6161.1* (supra, §27) and 6163 (supra, §§27, 28). (*B. & P.C. 6169(d)*.)

(6) *Rules of Procedure*. The State Bar Rules of Procedure apply to revocation proceedings insofar as they are not inconsistent with *B. & P.C. 6163, 6168, 6169, 6170, and 6171.1*. (Law Corporation Rules, Rule V(D).)

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6. Law Corporations.

i. Resignation of Attorneys.

1 Witkin Cal. Proc. Attys § 32

[§ 32] Resignation of Attorneys.

In *Fox v. Abrams* (1985) 163 C.A.3d 610, 210 C.R. 260, several attorneys resigned from a law corporation and started a new one. Active cases were divided between the original corporation and the new corporation. In consolidated actions over the division of fees, the trial court proceeded on the assumption that the departing shareholders were, under the terms of a written buy-sell agreement, entitled to payment on the basis of their percentage interests in the original firm, but that the remaining shareholder was entitled only to quantum meruit under *Fracasse v. Brent* (1972) 6 C.3d 784, 100 C.R. 385, 494 P.2d 9, *infra*, §216, and judgment was entered under this theory. *Held*, reversed.

(a) The written buy-sell agreement was intended to deal with the death, disability, or disqualification from legal practice of a shareholder, and the parties probably never contemplated that it would be exercised by a member who resigned to practice law in competition with the original firm. (163 C.A.3d 615.) Under the circumstances here, characterization of one side as leaving and the other side as remaining is arbitrary and serves no good purpose; and the agreement does not prevent application of the same formula to both the departing and the remaining shareholders. (163 C.A.3d 615.) Fees derived from unfinished business should therefore be divided on the basis of the formula in *Jewel v. Boxer* (1984) 156 C.A.3d 171, 203 C.R. 13, *supra*, §21. (163 C.A.3d 617.)

(b) Although *Jewel* involved a partnership and this case involves a law corporation, the same principles apply. *Jewel* was based not only on partnership law, but on sound policy reasons and on the fiduciary obligations of law partners. These obligations continue to exist even when partners practice together in the form of a law corporation. Under the circumstances here, application of the *Jewel* formula is fair to both sides and prevents competition for work in progress. (163 C.A.3d 616, 617.)

Under *Jewel* and *Fox*, the unfinished business of a law corporation includes all matters in progress, regardless of whether they are hourly rate cases or contingency fee cases. (See *Rothman v. Dolin* (1993) 20 C.A.4th 755, 759, 24 C.R.2d 571.)

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7. Agreements Restricting Law Practice.

a. General Rule and Exceptions.

1 Witkin Cal. Proc. Attys § 33

[§ 33] General Rule and Exceptions.

Rules of Professional Conduct, Rule 1-500(A) (infra, §419) states the general rule that an attorney may not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts the right of an attorney to practice law. (See A.B.A., Model Rules, Rule 5.6; *Rest.3d, The Law Governing Lawyers* §13.) There are three exceptions:

(1) An agreement that is part of an employment, shareholders', or partnership agreement among members, provided the restrictive agreement does not survive the termination of the particular relationship. (*Rules of Professional Conduct, Rule 1-500(A)(1).*)

(2) An agreement that requires payments to an attorney on the attorney's retirement from the practice of law. (*Rules of Professional Conduct, Rule 1-500(A)(2).*)

(3) An agreement that is authorized by *B. & P.C. 6092.5(i)* (agreements in lieu of disciplinary proceedings; infra, §563) or *B. & P.C. 6093* (conditions of probation; infra, §643). (*Rules of Professional Conduct, Rule 1-500(A)(3).*)

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7. Agreements Restricting Law Practice.

b. Agreements Not To Compete.

1. Agreements Are Not Prohibited.

1 Witkin Cal. Proc. Attys § 34

[§ 34] Agreements Are Not Prohibited.

In *Haight, Brown & Bonesteel v. Superior Court* (1991) 234 C.A.3d 963, 285 C.R. 845, plaintiff law partnership (HBB) had a partnership agreement with noncompetition provisions providing that withdrawing partners agreed not to represent a client previously represent by HBB within 12 months preceding the date of withdrawal, and that if a partner did represented such a client the withdrawing partner would forfeit all rights and interests, financial and otherwise, to which the partner would otherwise be entitled as a departing partner.

Seven partners withdrew and established a new partnership (DCC), and plaintiff brought a declaratory relief action seeking a declaration that the DCC partners were not entitled to any of the HBB capital accounts, assets, or accounts receivable. The DCC partners answered and cross-complained, seeking a declaration that the provisions were illegal and void. The trial court granted judgment on the pleadings in favor of the DCC partners on the "forfeiture provision." *Held*, the provisions were not invalid on their face; mandamus issued directing the trial court to determine whether the provisions amounted to an agreement for liquidated damages or an agreement for a forfeiture.

(a) *B. & P.C. 16602* provides that a partner may agree that on dissolution of the partnership the partner will not carry on a similar business within a specified area so long as any other member of the partnership or a person deriving title to the business or goodwill carries on a like business. (234 C.A.3d 963; see 1 *Summary* (10th), *Contracts*, §585.) The statute has never been amended to prohibit attorneys from availing themselves of the contractual right it contains. (234 C.A.3d 968.)

(b) *California Rules of Professional Conduct, Rule 1-500*, provides that an attorney may not be a party to an agreement that "restricts the right of a member to practice law." However, restrictive covenants are not prohibited if they are part of a partnership agreement, provided that the restrictive agreement does not survive termination of the partnership relation. (234 C.A.3d 968; see *supra*, §33 and *infra*, §419.) Properly construed, this rule does not prohibit an agreement by a withdrawing partner to compensate his former partner if he chooses to represent its clients. "Such a construction represents a balance between competing interests. On the one hand, it enables departing attorneys to withdraw from a partnership and continue to practice law anywhere within the state, and to be able to accept

employment should he choose to so do from any client who desires to retain him. On the other hand, the remaining partners remain able to preserve the stability of the law firm by making available the withdrawing partner's share of capital and accounts receivable to replace the loss of the stream of income from the clients taken by the withdrawing partner to support the partnership's debts." (234 C.A.3d 969.)

(c) Nothing in the limited record necessarily requires a finding that the provision calls for a "forfeiture" or "penalty." The word "forfeits" is not dispositive; the court must interpret an agreement so as to avoid a forfeiture if such an interpretation is reasonable. (234 C.A.3d 971.) Without additional evidence "it cannot be determined whether the sum of money the DCC partners will waive should they choose to compete with their former partners can be characterized as a forfeiture when compared to their gain, and the partnership's loss, resulting from the clients whose business they have undertaken. We merely hold [the provision] is not invalid on its face." (234 C.A.3d 971.)

(d) "We recognize the personal and confidential relationship which exists between lawyers and their clients. We do not, however, believe that such a relationship places lawyers in a class apart from other business and professional partnerships. We find no reason to treat attorneys any differently from professionals such as physicians or certified public accountants, for example, by holding that lawyers may not enter into noncompetition agreements in accordance with" *B. & P.C. 16602*. (234 C.A.3d 971.)

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7. Agreements Restricting Law Practice.

b. Agreements Not To Compete.

2. Rule of Reason Applies.

1 *Witkin Cal. Proc. Attys* § 35

[§ 35] Rule of Reason Applies.

In *Howard v. Babcock* (1993) 6 C.4th 409, 25 C.R.2d 80, 863 P.2d 150, partners in a law firm executed a partnership agreement. Article X provided: "Should more than one partner, associate or individual withdraw from the firm prior to age sixty-five (65) and thereafter within a period of one year practice law ... together or in combination with others, including former partners or associates of this firm, in a practice engaged in the handling of liability insurance defense work ... within the Los Angeles or Orange County Court system, said partner or partners shall be subject, at the sole discretion of the remaining nonwithdrawing partners to forfeiture of all their rights to withdrawal benefits other than capital as provided for in Article V." (6 C.4th 412.) Article V provided that a withdrawing general partner would be paid "his or her capital interest," and a sum "equal to the share in the net profit of the firm that the withdrawn ... partner would have received" during the first 12 months after withdrawal if he had remained with the firm. (6 C.4th 412.)

Four years later plaintiff lawyers gave notice of termination, and within a month entered into business in Orange County as a general partnership handling liability defense work, taking with them 200 clients of their former law firm. Defendants operated as a new general partnership under the original name, and tendered payment to plaintiff for their capital share, but refused to compensate them for accounts receivable or to acknowledge that they had any interest in work in progress or unfinished business. Plaintiffs sued for an accounting, defendants filed a cross-complaint, and the parties stipulated that the issue of validity of Article X should be tried first by the court. The trial court determined that Article X was valid, but the Court of Appeal declared it void under *Rules of Professional Conduct, Rule 1-500. Held*, reversed, and matter remanded to the trial court for a determination whether the terms of the agreement are reasonable.

(a) Under *B. & P.C. 16602*, a partner may, on or in anticipation of dissolution of the partnership, agree not to carry on a similar business in specified areas so long as any other member or any person deriving title to the business or its goodwill carries on a like business. (6 C.4th 416.) This statutory language has been relied on in enforcing covenants not to compete in the professions, including accounting and physicians. (6 C.4th 416; see 1 *Summary* (10th), *Contracts*, §585.) "In fact, these agreements typically do not actually prohibit competition, but rather place a price on competition"; i.e., the withdrawing partner may contract that if he exercises that privilege he will compensate his former partners to some extent at least for the business that he expects to take from them. (6 C.4th 416.) However, the "rule of reason"

applies to evaluate the noncompetition agreement: the amount must represent a reasonable endeavor to estimate a fair compensation for the loss, and must bear some reasonable relation to the loss. (6 C.4th 416.)

(b) *Haight, Brown & Bonesteel v. Superior Court* (1991) 234 C.A.3d 963, 285 C.R. 845, supra, §34, held that B. & P.C. 16602 applies to attorneys. The statute speaks in general terms, and nothing in the language or legislative history suggests an intent to create an exception for lawyers. (6 C.4th 417, 418.)

(c) This court has the authority to prescribe rules of professional conduct for lawyers and to impose a higher standard of conduct on lawyers than that applicable to other professionals. (6 C.4th 418.) In this case, the Court of Appeal, plaintiffs, and the State Bar argue that *Rule 1-500 of the Rules of Professional Conduct* has already imposed such a higher standard, which prohibits partners in law firms from entering into noncompetition agreements. This reasoning is not persuasive and the correct interpretation of Rule 1-500 is set forth in *Haight*. (6 C.4th 419.)

(d) The assertion that the practice of law is not comparable to a business is not reflective of reality; commercial concerns are now openly recognized as important. "Not only has the law firm culture changed but, as in other businesses, lawyers now may advertise their services and may even communicate by letter with persons unknown to them, suggesting the possibility of employment. ... Thus the general rules and habits of commerce have permeated the legal profession." (6 C.4th 423.) The same relaxation of the traditional rule can be seen in Rule 2-300 (infra, §428) regarding sale of good will in a law firm. (6 C.4th 423.)

One justice dissented, arguing that the Court of Appeal correctly held that Rule 1-500 controls and prohibits noncompetition agreements. (6 C.4th 426.)

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8. Sale of Law Practice.

1 *Witkin Cal. Proc. Attys* § 36

[§ 36] Sale of Law Practice.

Formerly, an attempt to sell the goodwill of a law practice was considered contrary to public policy and agreements purporting to do so were held invalid and unenforceable. (See *Geffen v. Moss* (1975) 53 C.A.3d 215, 226, 125 C.R. 687.) However, *Rules of Professional Conduct, Rule 2-300* (infra, §428), overturning the result in *Geffen v. Moss*, permits the sale of all or substantially all of an attorney's law practice, including goodwill, to another attorney or law firm, subject to specified conditions (*Rules of Professional Conduct, Rule 2-300(A), (B)*). (See A.B.A. Model Rules of Professional Conduct, Rule 1.17.)

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9. Advertising for Legal Services.

a. In General.

1 Witkin Cal. Proc. Attys § 37

[§ 37] In General.

B. & P.C. 6157 et seq. comprise a comprehensive regulatory scheme governing advertising by attorneys. The provisions apply generally to attorneys, law partnerships, law corporations, attorney referral services, advertising collectives, cooperatives, or other individuals, including nonlawyers, or groups advertising the availability of legal services. (*B. & P.C. 6158.5*.) The provisions do not limit or preclude the enforcement of other provisions of law, the Rules of Court, or the Rules of Professional Conduct. (*B. & P.C. 6159.2(a)*.) Nor do they limit the right of advertising protected by the federal or state Constitutions. (*B. & P.C. 6159.2(b)*.) (See *Rules of Professional Conduct, Rule 1-400*, infra, §416 et seq. [advertising and solicitation]; A.B.A. Model Rules of Professional Conduct, Rule 7.1 et seq. [information about legal services]; on advertising and solicitation activity subject to discipline, see infra, §515 et seq.)

B. & P.C. 5499.30 governs advertising for workers' compensation legal services. An advertisement purporting to provide legal services for obtaining workers' compensation benefits, including referring potential clients to an attorney, must include the name of at least one attorney associated with the individual, firm, or organization doing the advertising. (*B. & P.C. 5499.30*.)

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b. Definitions.

1 Witkin Cal. Proc. Attys § 38

[§ 38] Definitions.

The following definitions govern construction of *B. & P.C. 6157* et seq.:

(1) "Member" means a member in good standing of the State Bar, including agents of the member, and law firms or law corporations doing business in California. (*B. & P.C. 6157(a)*.)

(2) "Lawyer" means a member of the State Bar or a person who is eligible to practice law in another state or federal court or in a foreign country and includes the lawyer's agents and law firms or law corporations doing business in California. (*B. & P.C. 6157(b)*.)

(3) "Advertise" or "advertisement" means communications disseminated by an electronic or print medium (including newspapers and billboards), or by mailing to the general public and not a specific person, that solicits employment of legal services provided by a member, is directed to the general public, and is paid for by or on behalf of an attorney. (*B. & P.C. 6157(c)*.)

(4) "Electronic medium" means television, radio, or computer networks. (*B. & P.C. 6157(d)*.)

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9. Advertising for Legal Services.

c. Requirements.

1 Witkin Cal. Proc. Attys § 39

[§ 39] Requirements.

(1) *Prohibitions.* An advertisement may not contain false, misleading, or deceptive statements or fail to state facts necessary to make the statements, in light of the circumstances under which they are made, not false, misleading, or deceptive. (*B. & P.C. 6157.1*). In addition, an advertisement may not contain or refer to any of the following:

(a) A guarantee or warranty of the outcome of a legal matter as a result of representation by the attorney. (*B. & P.C. 6157.2(a)*.)

(b) Statements or symbols stating that the attorney can generally obtain "immediate cash or quick settlements." (*B. & P.C. 6157.2(b)*.)

(c) An impersonation of the name, voice, photograph, or electronic image of (1) a person other than the attorney, directly or implicitly purporting to be an attorney (*B. & P.C. 6157.2(c)(1)*); or (2) a person, directly or implicitly purporting to be a client of the attorney, or a dramatization of events, unless the advertisement discloses the impersonation or dramatization (*B. & P.C. 6157.2(c)(2)*).

(d) A spokesperson, including a celebrity spokesperson, unless the spokesperson's title is disclosed. (*B. & P.C. 6157.2(c)(3)*.)

(e) A statement that an attorney offers representation on a contingent basis, unless the statement advises whether a client will be held responsible for costs advanced by the attorney if no recovery is obtained; no disclosure is required if the client will not be held responsible for costs. (*B. & P.C. 6157.2(d)*.)

(2) *Required Disclosures.* If an advertisement is not paid for by the attorney on whose behalf it is made, the ad must disclose any business relationship, past or present, between the attorney and the person paying. (*B. & P.C. 6157.3*.)

If an advertisement is created or disseminated by an attorney referral service, it must disclose whether attorneys paid any consideration, other than a proportional share of the actual costs, to be included on the organization's referral list, panel, or system. (*B. & P.C. 6157.4*.)

(3) *Special Rules for Immigration and Naturalization Services.* An advertisement by an attorney to provide immigration and naturalization services must include a statement, in the same language as the ad, that the attorney is an active State Bar member and licensed to practice in California. If the ad concerns a multi-attorney law firm or law corporation, it must state that the services provided are by an active State Bar member or by a person supervised by an active member. However, these requirements do not apply to classified or yellow pages listings in a telephone or business directory where the ad is three lines or less and contains only a name, address, and telephone number. (*B. & P.C. 6157.5(a), (b).*) Failure to comply with *B. & P.C. 6157.5* is cause for discipline. (*B. & P.C. 6157.5(d).*) Attorneys employed by public agencies or registered nonprofit entities are exempt from these requirements. (*B. & P.C. 6157.5(c).*) (On requirements for immigration consultants generally, see *B. & P.C. 22442.2.*)

(4) *Records.* A copy of an advertisement must be retained for 1 year by the member or person who pays for it. (*B. & P.C. 6159.1.*)

(5) *Report of Violations.* The court must report the name, address, and professional license number of persons found in violation of *B. & P.C. 6157* et seq. to the appropriate professional licensing agency for review and possible disciplinary action. (*B. & P.C. 6159.*)

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(1) *Prohibitions.*(f) (*New*) *Legal aid:* In 2009, the Legislature declared that the term "legal aid" is commonly understood to mean free legal assistance for the poor, but that the term is often used by for-profit organizations that charge a fee for their services. Thus, *B. & P.C. 6159.5* et seq. were added to restrict the use of the term "legal aid." (*B. & P.C. 6159.5.*) A "legal aid organization" means a nonprofit organization that provides civil legal services for the poor without charge. (*B. & P.C. 6159.51.*) Accordingly, it is unlawful for a person or organization to use the term "legal aid," "legal aide," or confusingly similar terms, in the name of the business or to advertise services "unless the person or organization is a legal aid organization subject to fair use principles for nominative, descriptive, or noncommercial use." (*B. & P.C. 6159.52.*) Consumers injured by a violation of *B. & P.C. 6159.52* may seek injunctive relief, restitution, and damages. (*B. & P.C. 6159.53(a).*)



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9. Advertising for Legal Services.

d. Electronic Media.

1. Requirements and Presumptions.

1 Witkin Cal. Proc. Attys § 40

[§ 40] Requirements and Presumptions.

(1) *General Requirements.* In advertising by electronic media, to comply with *B. & P.C. 6157.1* and *6157.2* (supra, §39), the message as a whole, considering the combined effect of words, sounds, background, action, symbols, visual image, and other techniques, may not be false, misleading, or deceptive, and must be factually substantiated, i.e., capable of verification by a credible source. (*B. & P.C. 6158.*) (See *20 A.L.R.6th 385* [propriety of radio and television attorney advertising].)

(2) *Messages Presumed To Be False, Misleading, or Deceptive.* There is a rebuttable presumption, affecting the burden of producing evidence, that the following messages are false, misleading, or deceptive within the meaning of *B. & P.C. 6158*:

(a) A message as to the ultimate result of a specific case or cases presented out of context without adequate information as to the facts or law giving rise to the result. (*B. & P.C. 6158.1(a).*)

(b) Depiction of an event through methods such as displays of injuries, accident scenes, or portrayals of other injurious events (whether or not accompanied by sound effects) which may give rise to a claim for compensation. (*B. & P.C. 6158.1(b).*)

(c) A message referring to or implying money received by or for a client in a particular case or cases, or to potential monetary recovery for a prospective client. This includes references to a specific dollar amount, characterization of a sum of money, monetary symbols, or the implication of wealth. (*B. & P.C. 6158.1(c).*)

(3) *Information Presumed To Be in Compliance.* Under *B. & P.C. 6158.2*, the following information is presumed to be in compliance with the requirements for advertising by electronic media, if the message as a whole is not false, misleading, or deceptive:

(a) Names (including those of law firms and professional associates), addresses, telephone numbers, and the

designation "lawyer," "attorney," "law firm," or the like.

(b) Fields of practice, limitation of practice, or specialization.

(c) Fees for routine legal services, subject to the requirements of *B. & P.C. 6157.2(d)* (supra, §39) and the Rules of Professional Conduct.

(d) Date and place of birth.

(e) Dates and places of bar admissions.

(f) Schools attended, dates of graduation, degrees, and other scholastic distinctions.

(g) Public or quasi-public offices.

(h) Military service.

(i) Legal authorship.

(j) Legal teaching positions.

(k) Memberships, offices, and committee assignments in bar associations.

(l) Memberships and offices in legal fraternities and societies.

(m) Technical and professional licenses.

(n) Memberships in scientific, technical, and professional associations and societies.

(o) Foreign language ability of the attorney or a member of the attorney's firm.

(4) *Required Disclosures.* In addition to other required disclosures, an advertisement in the electronic media that conveys a message portraying a result in a particular case or cases must disclose, orally or in print, either (a) the factual and legal circumstances that justify the result portrayed, including the basis for liability and the nature of injury or damage sustained, or (b) that the result portrayed was dependent on the facts of that case and that the results will differ if based on different facts. However, the disclosure alone may not rebut a presumption created in *B. & P.C. 6158.1*. (*B. & P.C. 6158.3.*)

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CHAPTER I - Attorneys

Witkin Summary of California Law

I. INTRODUCTION

D. Law Practice.

9. Advertising for Legal Services.

d. Electronic Media.

2. Violation Procedure.

1 Witkin Cal. Proc. Attys § 41

[§ 41] Violation Procedure.

(1) *Complaint.* A person claiming a violation of *B. & P.C. 6158, 6158.1, or 6158.3* (supra, §40) may file a complaint with the State Bar. The complaint must (a) name the advertiser, (b) describe the advertisement, and (c) specifically identify the alleged violation. A copy of the complaint must be served simultaneously on the advertiser. (*B. & P.C. 6158.4(a)*); on State Bar's maintenance of records of complaints and classification of claimants as vexatious litigants, see *B. & P.C. 6158.4(j)*.)

(2) *Voluntary Withdrawal of Advertisement.* Within 9 days after service of the complaint, the advertiser may voluntarily withdraw the advertisement and notify the State Bar of the withdrawal. (*B. & P.C. 6158.4(a)*.) Also, if the State Bar determines that there is substantial evidence of a violation, the attorney may withdraw the advertisement from broadcast within 72 hours of that determination. (*B. & P.C. 6158.4(b)(1)*.) If the advertisement is withdrawn, no further action may be taken by the complainant. (*B. & P.C. 6158.4(a)*, *B. & P.C. (b)(1)*.)

(3) *Review by State Bar.* The advertiser must provide a copy of the advertisement to the State Bar for review within 7 days of service of the complaint. Within 21 days from delivery, the State Bar must determine whether substantial evidence of a violation exists. (*B. & P.C. 6158.4(a)*.)

(4) *Civil Enforcement.* If the State Bar determines that substantial evidence of a violation exists, and the attorney fails to withdraw the advertisement within 72 hours, a civil enforcement action may be commenced within 1 year of the State Bar decision. (*B. & P.C. 6158.4(b)(2)*.) The maximum recovery is \$ 5,000 for each individual broadcast in violation of *B. & P.C. 6158, 6158.1, or 6158.3*. (*B. & P.C. 6158.4(e)*.) If the State Bar determines that there is no substantial evidence of a violation, a civil enforcement action may not be filed. (*B. & P.C. 6158.4(b)(3)*.)

(5) *Declaratory and Injunctive Relief.* A person who is the subject of a complaint or a complainant affected by the State Bar's decision may bring an action in superior court seeking declaratory and injunctive relief. (*B. & P.C. 6158.4(c)*.) If the court declares that the advertisement is in violation of *B. & P.C. 6158, 6158.1, or 6158.3*, and if the attorney (a) has failed to withdraw the advertisement despite a State Bar finding of a violation, or (b) rebroadcasts the

advertisement, a civil enforcement action may be filed or maintained. (*B. & P.C. 6158.4(c)(1), (c)(2).*) If the court declares that the advertisement does not violate the statutes, the attorney may broadcast or continue broadcasting the advertisement. (*B. & P.C. 6158.4(c)(1), 6158.4(c)(2).*)

The court's decision on the lawfulness of the advertisement is binding in a civil enforcement action to the extent that the effect is supported by the doctrine of collateral estoppel or res judicata. (*B. & P.C. 6158.4(c)(1), (c)(2).*)

(6) *Disciplinary Action.* A violation of *B. & P.C. 6158, 6158.1, or 6158.3* is cause for discipline by the State Bar. (*B. & P.C. 6158.7.*)

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II. ATTORNEY-CLIENT RELATIONSHIP

A. Creation of Relationship.

1. Contract of Employment.

1 Witkin Cal. Proc. Attys § 42

[§ 42] Contract of Employment.

(1) *In General.* An attorney may make an express contract of employment with a client. The contract is frequently evidenced by a letter to the client with a duplicate signed by the client. (See C.E.B., Civil Litigation Forms Manual, Chap. 1 [establishing attorney-client relationship]; Rutter Group, Professional Responsibility, §3:2; *infra*, §§154, 155.)

Often, however, the relationship is informally created by acts of the parties prior to or independent of a written contract. (See *Cohen v. Berman* (1931) 113 C.A. 132, 297 P. 968 [case referred with retainer fee by New York attorneys; clients informally agreed to pay attorney additional reasonable fee for services]; *Brydonjack v. Rieck* (1935) 5 C.A.2d 219, 222, 42 P.2d 336.) And the relationship may arise from a preliminary consultation by a prospective client seeking and receiving legal advice, even though no formal contract of employment or representation in litigation results from the meeting. (*Miller v. Metzinger* (1979) 91 C.A.3d 31, 39, 40, 154 C.R. 22.) (See *Pound v. DeMera DeMera Cameron* (2005) 135 C.A.4th 70, 76, 36 C.R.3d 922, *infra*, §114 [attorney-client relationship was formed when attorney being interviewed for possible representation of controlling shareholders was given confidential information by corporate counsel conducting interview]; *Rest.3d, The Law Governing Lawyers* §14; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §137.)

(2) *Attorney for Insured and Insurer.* The unique relationship among an attorney, an insured, and the insurer was examined in *Gulf Ins. Co. v. Berger, Kahn, Shafon, Moss, Figler, Simon & Gladstone* (2000) 79 C.A.4th 114, 93 C.R.2d 534. Plaintiff insurer sued defendant law firm for malpractice arising from defendant's representation of plaintiff's insureds. Although the insureds had retained defendant originally and signed defense guidelines with a negotiated hourly rate, all subsequent correspondence and dealings were between defendant and plaintiff. Nevertheless, the trial court determined that plaintiff lacked standing because the insureds, not plaintiff, had retained defendant originally. *Held*, summary judgment for defendant reversed.

(a) Defendant assumed that, as between the insurer and the insured, only one can establish an attorney-client relationship with the insured's attorney and that the relationship is established only by the first to contact that counsel. But this argument "belies the tripartite relationship that exists between the insurer, the insured and counsel defending the insured." (79 C.A.4th 126.)

(b) Defendant was counsel for both the insureds and plaintiff. Although the insureds first contacted and retained defendant, they clearly did so with the understanding that they had to select counsel acceptable to plaintiff. Moreover, it is elemental that the attorney-client relationship between a client and retained counsel arises from a contract. Here, all subsequent interaction between defendant and plaintiff reflected an agreement between them. Thus, an attorney-client relationship existed as a matter of law. (79 C.A.4th 127.)

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2. Employee, Independent Contractor, or Agent.

1 *Witkin Cal. Proc. Attys* § 43

[§ 43] Employee, Independent Contractor, or Agent.

An attorney may be an employee. (See *Casselman v. Hartford Acc. & Indem. Co.* (1940) 36 C.A.2d 700, 712, 98 P.2d 539 [attorney was experienced investigator employed to investigate accident for insurance company]; 16 A.L.R.5th 239 [in-house counsel's right to maintain action for wrongful discharge]; on attorneys for governmental agencies, see *infra*, §54 et seq.)

Normally, however, the practicing attorney's relationship with a client is that of an independent contractor. (See *Otten v. San Francisco Hotel Owners Assn.* (1946) 74 C.A.2d 341, 343, 168 P.2d 739; *Merritt v. Reserve Ins. Co.* (1973) 34 C.A.3d 858, 880, 110 C.R. 511, citing the text [attorney engaged by liability insurer to conduct defense of action against insured is independent contractor, and insurer is not liable to insured for any alleged negligence in attorney's handling of case]; *Worthington v. Unemp. Ins. App. Bd.* (1976) 64 C.A.3d 384, 387, 134 C.R. 507 [formerly employed attorney who commenced practice by himself was independent contractor in this practice]; *Lynn v. Superior Court* (1986) 180 C.A.3d 346, 349, 225 C.R. 427 [following *Merritt*; attorney retained to bring wrongful eviction action is independent contractor, and client is not liable for attorney's torts]; *Foster v. San Luis Obispo* (1993) 14 C.A.4th 668, 673, 17 C.R.2d 730 [following *Merritt*; county was not liable for negligence of attorney it appointed, as independent contractor, to represent indigent criminal defendant].)

In *Associated Indem. Corp. v. Industrial Acc. Com.* (1943) 56 C.A.2d 804, 133 P.2d 698, the court said: "[W]e do not hold that the relationship of employer and employee cannot exist when an attorney is employed to perform professional services for his employer, and when the employer reserves the right to control the work of the attorney, as in the case of the employment of an attorney for fixed hours at a fixed compensation. But ... where such control was not retained and where there was present each of the three factors determining the independent contractor relationship, we must hold that the attorney was not an employee entitled to compensation." (56 C.A.2d 810.)

Whether an employee or an independent contractor, an attorney will usually be the agent of the client in transactions in which the attorney acts for the client. (See *Sullivan v. Dunne* (1926) 198 C. 183, 192, 244 P. 343; Rest.2d, Agency §1 and Comment; *infra*, §235.) An important incident of the agency relationship is the doctrine of imputed notice (principal bound by notice to agent). (See 3 *Summary* (10th), *Agency and Employment*, §150 et seq.)

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3. Relationship With Partners and Employees.

1 Witkin Cal. Proc. Attys § 44

[§ 44] Relationship With Partners and Employees.

The attorney-client relationship also arises between the client and the attorney's partners and employees. Thus, a surviving partner is under a duty to perform a partnership contract, in the absence of the client's election to terminate. (*Little v. Caldwell* (1894) 101 C. 553, 559, 36 P. 107.) Moreover, *Raskin v. Superior Court* (1934) 138 C.A. 668, 670, 33 P.2d 35, held that an employed attorney is an attorney for his employer's client, entitled to act as such even though not the attorney of record. "We will take judicial notice of the fact that in California it is, and for a long time has been, a general custom sanctioned by recognition of the courts for attorneys at law singly and by firms to employ attorneys at law to assist in legal work placed in their care, including appearances in court without the formality of being made attorneys of record." (For discussion of law practice by partnerships, see *supra*, §19; on liability of partners for wrongful act of one partner, see *infra*, §307.)

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4. Association for Particular Case.

1 Witkin Cal. Proc. Attys § 45

[§ 45] Association for Particular Case.

In *Wells Fargo & Co. v. San Francisco* (1944) 25 C.2d 37, 152 P.2d 625, S, not an attorney of record, had a default judgment entered in favor of plaintiff, appearing as "one of the attorneys for plaintiff" and referring to his association with the firm handling plaintiff's case. *Held*, his act was authorized. Although the general rule states that the attorney of record has the exclusive right to appear in court and control the proceedings (see *infra*, §78), "[i]f the attorney of record ... associates another attorney with him, it rests with them to divide the duties concerning the conduct of the cause." (25 C.2d 43.) The substitution requirements of C.C.P. 284 and 285 (*infra*, §§80, 81) are not applicable "unless the associated attorney attempts to act as the sole attorney rather than as an associated attorney and to convert his association into a substitution for the attorney of record." (25 C.2d 43.) (See *Streit v. Covington & Crowe* (2000) 82 C.A.4th 441, 444, 98 C.R.2d 193, citing the text [attorney specially appearing in lieu of attorney of record for single motion was representing client's interests and had attorney-client relationship with client].)

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5. Appointed Counsel.

a. Criminal and Quasi-Criminal Proceedings.

1 Witkin Cal. Proc. Attys § 46

[§ 46] Criminal and Quasi-Criminal Proceedings.

(1) *Criminal Cases.* The constitutional right of an indigent defendant to appointed counsel in all significant steps in a criminal trial is established by decisions of the United States Supreme Court and implemented by California statutes. This subject is fully covered in another work. (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §89 et seq. [interrogation and *Miranda* rules]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §143 et seq. [trial]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §163 [compensation of appointed counsel]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §164 et seq. [appointment of public defender]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §172 [determination of indigency]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §178 et seq. [reimbursement for cost of court-appointed counsel]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §199 et seq. [competency of appointed counsel]; 6 *Cal. Crim. Law* (3d), *Criminal Judgment*, §193 [coram nobis]; 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §27 et seq. [counsel on appeal].)

An attorney should not seek to be excused from appointment to represent a defendant who is unpopular or who the attorney believes is guilty. (See A.B.A. Model Rules of Professional Conduct, Rule 6.2 [avoiding appointment only for good cause].) However, an attorney may properly withdraw from representation of a criminal defendant who intends to commit perjury. (See *infra*, §73.)

(2) *Juvenile Court Proceedings.* Appointment of counsel in the juvenile court is afforded as follows:

(a) *Dependency proceedings.* A minor and a parent or guardian of the minor have a right to be represented by counsel at every stage of the proceedings. If the minor or the parent or guardian is indigent, counsel must be appointed. (Welf.C. 316, 317, 349; see 10 *Summary* (10th), *Parent and Child*, §570 et seq.)

(b) *Delinquency proceedings.* A minor and a parent or guardian of the minor have a right to be represented in delinquency hearings by counsel of their choice. If the minor or the parent or guardian is indigent, counsel must be appointed. (Welf.C. 634, 679; see 10 *Summary* (10th), *Parent and Child*, §788 et seq.)

(c) *Miranda rule.* The *Miranda* rule establishing the right to silence and counsel applies to minors in juvenile court proceedings. (See Welf.C. 627.5; 10 *Summary* (10th), *Parent and Child*, §792 et seq.)

(d) *State prison commitment.* In a proceeding for commitment to state prison after the expiration of control of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, a minor is entitled to counsel and, if indigent, counsel must be appointed. (See Welf.C. 1781; 3 *Cal. Crim. Law (3d)*, *Punishment*, §91.)

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b. Commitment Proceedings.

1 Witkin Cal. Proc. Attys § 47

[§ 47] Commitment Proceedings.

(1) *Narcotics Commitment.* Prior to the court hearing required for the commitment of an indigent narcotics addict or person in imminent danger of addiction, the judge must appoint counsel to represent that person. (Welf.C. 3051 [addict convicted of crime]; Welf.C. 3104 [right to counsel]; Welf.C. 3108 [rights of person committed]; *People v. Moore* (1968) 69 C.2d 674, 681, 72 C.R. 800, 446 P.2d 800.)

A person seeking review by habeas corpus of certification for intensive treatment as a user of narcotics or restricted dangerous drugs has a right to court-appointed counsel. If the person so elects, the court must immediately appoint the public defender or another attorney to assist in preparing the petition and for representation in the proceedings. However, the person must pay the cost of legal service if able to do so. (Welf.C. 5254.1, 5276; on involuntary treatment of users of narcotics or restricted dangerous drugs, see Welf.C. 5225 et seq., 5340 et seq.; on civil commitment of addict, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §127 et seq.)

(2) *Commitment of Alcoholic.* A person seeking review by habeas corpus of certification for intensive treatment as a chronic alcoholic has a right to court-appointed counsel. The appointment provisions are the same as those on appointment of counsel on commitment of users of narcotics or dangerous drugs. (Welf.C. 5254.1, 5276; on involuntary treatment of chronic alcoholics, see Welf.C. 5225 et seq.; 3 *Cal. Proc.* (5th), *Actions*, §88.)

(3) *Imminently Dangerous Person.* At the time of filing of a petition for postcertification treatment of an alleged imminently dangerous person, the court must appoint the public defender or another attorney to represent the person if the person is financially unable to provide his or her own attorney. (Welf.C. 5302.)

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c. Ordinary Civil Proceedings.

1 Witkin Cal. Proc. Attys § 48

[§ 48] Ordinary Civil Proceedings.

(1) *No Constitutional Right.* There is no constitutional right to appointment of counsel for the plaintiff or defendant in a civil proceeding, no matter what the nature of the case or the poverty of the party. The privilege of proceeding *in forma pauperis* merely excuses the payment of court costs and compliance with a statutory requirement of security for costs. (See 3 *Cal. Proc.* (5th), *Actions*, §416 et seq.; *Hunt v. Hackett* (1973) 36 *C.A.3d* 134, 137, 111 *C.R.* 456, citing the text [no common law right]; *People v. \$ 30,000 United States Currency* (1995) 35 *C.A.4th* 936, 944, 41 *C.R.2d* 748 [no right to counsel for in rem forfeiture proceeding]; *Iraheta v. Superior Court* (1999) 70 *C.A.4th* 1500, 1503, 83 *C.R.2d* 471 [no due process right to appointment of counsel for indigent defendant in civil action to abate conduct of criminal street gangs as public nuisance].)

(2) *Agencies Providing Representation.* The lack of a constitutional right is a theoretical deprivation often without practical significance. Indigent persons with meritorious claims or defenses are frequently represented, without charge, by attorneys furnished by legal aid organizations (*supra*, §14 et seq.). Also, the public defender may, on request, defend an indigent person in civil litigation if, in the public defender's judgment, the person is being persecuted or unjustly harassed. (*Govt.C.* 27706(c); see *Hunt v. Hackett, supra*, 36 *C.A.3d* 138.) (On appointment of public defender in designated civil cases, see *Govt.C.* 27706; on reimbursement for cost of court-appointed counsel, see *Govt.C.* 27712.)

(3) *Assignment To Protect Interests of Party.* Assignment of counsel in civil cases is authorized by statute or judicial decision to provide representation where the interested party is unable to protect his or her interests. (See *C.C.P.* 373.5 [appointment of guardian ad litem, and authorization of expense of attorneys' fees, for representation of unborn or unascertained person with interest in property].) (On appointment of counsel for military service defendants, see 50 *U.S.C. Appx.*, §521 [Servicemembers Civil Relief Act].)

In a proceeding to declare a minor free of parental custody, the court must consider whether the child's interests require the appointment of counsel and, if so, must appoint counsel for the child. (*Family C.* 7861.) Counsel must also be appointed for a parent who appears and is unable to afford counsel. (*Family C.* 7862.) (See 10 *Summary* (10th), *Parent and Child*, §335 et seq.)

(4) *No Appointment Against Party's Wishes.* The court may not appoint counsel to represent a competent person against that person's wishes. In *Estate of Bodger (1954) 128 C.A.2d 710, 276 P.2d 83*, a testamentary trustee appealed from an order determining fees. Petitioner, the sole beneficiary of the trust income, was satisfied with the trustee's position, but the probate court, without notice to petitioner, appointed M, an attorney, as counsel to represent the beneficiaries in resisting the appeal. On certiorari, the order of appointment was annulled as an unwarranted invasion of petitioner's rights, with possibilities "too ominous" to leave the matter to be decided on a later appeal from an order awarding M his fee. "There is no law authorizing the superior court to appoint an attorney for a competent party to an action or a proceeding where such person has notice of the proceedings before the court and is capable of selecting an attorney. Furthermore, such person is free to disavow such appointment by the court and such service as the attorney might perform." (128 C.A.2d 714.)

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d. Indigent Prisoner Defendant in Civil Action.

1 Witkin Cal. Proc. Attys § 49

[§ 49] Indigent Prisoner Defendant in Civil Action.

In *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, P, charged with theft, was convicted of receiving stolen property, and was placed on 3 years' probation. The owner of the property then filed a civil action against P for damages arising from the theft, and P's attorney in the criminal case filed an answer. P's probation was subsequently revoked and he was sentenced to prison. His attorney then withdrew because of no likelihood of payment of the fee for representation in either the criminal or the civil case. P's request to the Department of Corrections to allow him to attend the civil trial was denied, and, in his absence, a default judgment was entered against him. He unsuccessfully sought relief by a motion to vacate in the superior court and mandamus in the Court of Appeal. The Supreme Court then granted a hearing and issued an alternative writ of mandamus to explore the constitutional questions raised by this denial of an indigent prisoner's right to appear and to be represented by counsel in a civil case.

(a) The denial of an indigent prisoner's access to the court is a violation of both equal protection and due process, and there is no compelling state interest to justify the infringement of those rights. (17 C.3d 919, 922.) To grant the prisoner both the right to appointed counsel and the right to a personal appearance would give the indigent prisoner more rights than are available to an ordinary indigent civil litigant. However, to allow the prisoner only the right to appearance would not effectively protect the prisoner's rights. Although in some cases a continuance of the action might be feasible, in many situations it would substantially impair the interest of the plaintiff. (17 C.3d 924.)

(b) In cases in which a continuance is not a satisfactory alternative "the only feasible method of granting access rights to indigent prisoners is appointment of counsel. Whether counsel will be drawn from the ranks of legal aid attorneys, other public or privately funded lawyers serving the disadvantaged, public defenders if so authorized to act, or the private bar, is a question that we leave to the sound discretion of trial courts. We recognize, of course, that funds for payment for the services of the appointed attorneys are unavailable until such time as authorized by the Legislature. ... All we hold is that denial of appointed counsel to an indigent prisoner, when no other relief will preserve his right of access to the courts, is constitutionally impermissible." (17 C.3d 923.)

(c) This is not an absolute right; it comes into existence "only when a prisoner is confronted with a bona fide legal action threatening his interests." Hence, the trial court should first determine whether the prisoner is indigent; then, if a

continuance is not feasible, it should ascertain "whether the prisoner's interests are actually at stake in the suit and whether an attorney would be helpful to him under the circumstances of the case." Thus, if the prisoner is not contesting the action or any aspect of it there is no need of counsel; but "if he plans to defend the action and an adverse judgment would affect his present or future property rights," an attorney should be appointed. (17 C.3d 924.)

(d) In some instances it may also be desirable for the prisoner to testify. Accordingly, on motion, the trial court may determine that testimony of a prisoner defendant is necessary for due process, and it may attempt to arrange for the prisoner's presence with the Department of Corrections. It cannot command the department, but if the department refuses, "the court may order a continuance or employ other alternatives to transporting the prisoner, such as recording his testimony or if feasible holding a portion of the trial at the prison." (17 C.3d 925.)

Payne was distinguished in *Goodhue v. Tureaud* (1979) 100 C.A.3d 205, 160 C.R. 677. Defendant was convicted of kidnaping, robbery, and oral copulation, and, on affirmance of the criminal judgment, the victim brought this civil action against defendant and obtained a default judgment for compensatory and punitive damages. Defendant's subsequent motion to set aside the default was denied on the ground that he had been personally served with the summons and complaint and with the request to enter default, and took no steps to protect his interests. The constitutional rights referred to in *Payne* "are subject to waiver through failure to timely assert them." (100 C.A.3d 212.) Defendant, with ample opportunity to defend the action "at a meaningful time and in a meaningful manner" calculated that he could "convert the shield of due process into a sword" solely because he was incarcerated. (100 C.A.3d 214.)

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5. Appointed Counsel.

e. Representation Without Compensation.

1. In General.

1 Witkin Cal. Proc. Attys § 50

[§ 50] In General.

The opinion in *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, supra, §49, left open the matter of compensation of counsel appointed to defend a prisoner in a civil action, but suggested that public funds could not be used without legislative authorization and that attorneys might be expected to serve gratuitously. (17 C.3d 924.) A.B.A. Model Rules of Professional Conduct, Rule 6.1 provides that attorneys have a basic responsibility to provide pro bono services without fee or at reduced fees, but no enforcement mechanism is provided. Thus, the need for attorneys to provide pro bono services, and the possibility of imposing a mandatory obligation, have been the subject of continuing commentary. (See *Conservatorship of Scharles* (1991) 233 C.A.3d 1334, 1342, 285 C.R. 325, 3 Cal. Proc. (5th), *Actions*, §§102, 103; *B. & P.C.* 6073 [stating pro bono policy expectations for practicing attorneys and sanctioning financial support to organizations providing free legal services]; 84 *Harv. L. Rev.* 410 [models for structuring public service program in private law firm]; 19 *Loyola L.A. L. Rev.* 325 [financing the right to counsel]; 29 *Loyola L.A. L. Rev.* 909 [ethical evaluation of mandatory pro bono]; 16 *Pepperdine L. Rev.* 355 [Mandatory Pro Bono: The Path to Equal Justice]; 28 *Santa Clara L. Rev.* 195 [statutory proposal for compensation]; 12 *Southwestern U. L. Rev.* 493 [proposal for mandatory public service for attorneys]; 17 *Southwestern U. L. Rev.* 351 [civil litigants' right to counsel, attorney's duty to serve without compensation, and payment by society for representing indigents in civil litigation]; 52 *U.C.L.A. L. Rev.* 1 [institutionalization of pro bono]; 21 *Western State L. Rev.* 483 [historical analysis and case study of pro bono services]; 36 *A.L.R.3d* 1221 [attorney's refusal to accept appointment to represent indigent, or to proceed in defense, as contempt]; 52 *A.L.R.4th* 1063 [court appointment of attorney to represent indigent in civil action without compensation]; on compensation of attorneys appointed to represent indigent criminal defendants, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §163.)

In *Mallard v. United States Dist. Court for Southern Dist. of Iowa* (1989) 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318, the Court interpreted 28 U.S.C., §1915(d) (now 28 U.S.C., §1915(e)(1)), which provides that a court "may request an attorney to represent" an indigent person in a civil case. The majority held that the statute did not authorize the court to require an unwilling attorney to do so. A concurring justice made this observation: "Our decision today speaks to the interpretation of a statute, to the requirements of the law, and not to the professional responsibility of the

lawyer. Lawyers, like all those who practice a profession, have obligations to their calling which exceed their obligations to the State. Lawyers also have obligations by virtue of their special status as officers of the court. Accepting a court's request to represent the indigent is one of those traditional obligations. Our judgment here does not suggest otherwise. To the contrary, it is precisely because our duties go beyond what the law demands that ours remains a noble profession." (*109 S.Ct. 1823, 104 L.Ed.2d 332.*)

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e. Representation Without Compensation.

2. Early Cases.

1 *Witkin Cal. Proc. Attys* § 51

[§ 51] Early Cases.

In *Fresno v. Superior Court* (1978) 82 C.A.3d 191, 146 C.R. 880, two convicted persons were defendants in wrongful death actions. Legal Services, a publicly funded organization, represented one, but because of a potential conflict of interest, could not represent the other. The superior court judge appointed M, an attorney engaged in private practice, to represent him, and after performing the services M sought and received an award of \$ 600 as fees, payable out of the county general fund. *Held*, mandamus issued to compel setting aside the order. Under the pronouncements of *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, *supra*, §49, no public funds can be so expended without legislative authority. (82 C.A.3d 196, 197.) An elaborate dissenting opinion took the opposite position, collecting the case law and commentaries on the issue whether professional attorneys can be required to serve without compensation, and arguing that the court has inherent power to award fees from public funds in the *Payne* situation.

In *Tulare v. Ybarra* (1983) 143 C.A.3d 580, 192 C.R. 49, the court declared that, under *Payne* and *Fresno*, the lack of public funds is not a valid reason for refusal to appoint counsel. Attorneys, under their statutory duty not to reject the cause of the defenseless or oppressed (*B. & P.C. 6068(h)*, *supra*, §8), must serve gratuitously. The opinion added two practical observations: (a) "There is no clear line between gratuitous services reasonably requested of private attorneys and unfair, burdensome appointments only the most dedicated counsel may willingly provide. Nevertheless, attorneys have a duty to provide these services as the need arises. Ideally, the court will not be required to appoint an unwilling attorney." (143 C.A.3d 586.) (b) "We recommend participation of the local bar association to help the court avoid arbitrary appointments." (143 C.A.3d 587.)

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1 *Witkin Cal. Proc. Attys* § 52

[§ 52] Factors To Consider.

In *Yarbrough v. Superior Court* (1985) 39 C.3d 197, 216 C.R. 425, 702 P.2d 583, Y was convicted of second degree murder for the shooting death of C in the Brass Rail Bar, and received a sentence of 17 years to life. C's son filed a complaint for wrongful death against the Brass Rail Bar, its owner and bartender, and Y, seeking \$ 1 million in general and punitive damages. Y was served with summons, and W, the attorney who had represented Y in the criminal trial by appointment, appeared specially to move for appointment and compensation of counsel in this civil case, alleging that Y was totally indigent and unable to retain an attorney, and that a default judgment would raise an issue of liability of the county and state from refusal to appoint counsel under *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, supra, §49, and the federal Civil Rights Act, 42 U.S.C., §1983. The county opposed, asserting that it lacked funds, that the court had no power to order compensation, and that appointment of counsel would not significantly affect the outcome of the civil action. The trial court, recognizing Y's right to counsel and the court's authority to order appointment, nevertheless concluded that it had no power to make compensation a county charge; and, because W had indicated that he would refuse to serve without compensation, the judge entered an order "Denying Appointment and Compensation of Counsel." *Held*, mandamus issued to compel further proceedings by the trial court to comply with the *Payne* guidelines.

(a) *Trial court's authority and discretion.* In *Payne*, the court held that, under the federal and state constitutions, (1) an indigent prisoner who is a defendant in a bona fide legal action threatening the prisoner's interests is entitled to access to the courts; (2) the trial court has discretion to determine how access is to be achieved; and (3) at times, appointment of counsel may be the only alternative. "We made it clear, however, that the trial court's authority to appoint counsel is independent of its power to order compensation." (39 C.3d 200.) "We reaffirm *Payne*." (39 C.3d 200.) Motions for appointment of counsel are essentially ex parte; thus, the burden is on the trial court "to recognize the unusual case where future property rights are genuinely at stake." (39 C.3d 201.)

(b) *Payne guidelines must be followed.*

(1) The suggestion of amici curiae that there should be a formal hearing at which the plaintiff must appear and

show that the prisoner could in fact respond in damages is too rigid. However, the trial court may seek attendance of the plaintiff for the information; and, where abatement or stay of the action is contemplated, the plaintiff should be given an opportunity to be heard. (39 C.3d 204.)

(2) An assessment must be made of the indigent's assertion that his interests are "actually at stake." (39 C.3d 204.) The court should evaluate the potential for loss to the prisoner, "weighing such factors as age, term of incarceration, employment history, education, skills, family background and the likelihood of inheriting or otherwise obtaining property. The court may also consider the prisoner's prospects for earning money while in prison and accumulating sums to satisfy a civil judgment--royalties from books and songs come to mind. Undoubtedly there are other sources that might prove fruitful." (39 C.3d 205.)

(3) "[T]he trial court must determine that counsel will be helpful to the prisoner *under the circumstances of the case*." (39 C.3d 205.)

(4) The trial court must consider whether access can be provided by abating the matter until the prisoner is released. This is not a reasonable alternative when the plaintiff may suffer substantial prejudice, but where, as here, the issue of liability is a foregone conclusion unless the judgment is reversed on appeal, the potential for prejudice is minimal. "[P]laintiff's hope of recovery from an incarcerated indigent defendant cannot possibly take wing until his release from prison." (39 C.3d 206.) Other defendants would not be affected: The proceedings may be deferred only as to the incarcerated defendant. (39 C.3d 206, footnote 7.)

(c) *Other matters not decided*. "We are fully aware that we have not dealt with the issues which have triggered the flood of amicus briefs mentioned in footnote 1: the power of the trial court to appoint an unwilling attorney to represent an incarcerated civil defendant, as well as its power and duty to provide funds for counsel's services and costs and, of course, the source of such funds. The fact that we find that it would be premature to discuss these issues in this particular case should not be interpreted to mean that we find the courts are powerless in those regards. The problem is, however, primarily a legislative one. It is our hope that the Legislature, working closely with the State Bar and other interested groups, will use the respite afforded by our disposition on this case to enact a fair legislative solution to the vexing problems which, for the time being, have been placed on the judicial backburner." (39 C.3d 207.)

One justice dissented, asserting that the main issue--compensation of the appointed attorney--should be faced now, and that no attorney should be forced to represent anyone without adequate compensation. (39 C.3d 208.)

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4. No Forced Representation Without Compensation.

1 *Witkin Cal. Proc. Attys* § 53

[§ 53] No Forced Representation Without Compensation.

In *Cunningham v. Superior Court* (1986) 177 C.A.3d 336, 222 C.R. 854, the county brought a paternity action against M, an indigent. C was appointed to provide pro bono representation, but he refused and was found in contempt. *Held*, certiorari issued to compel the trial court to vacate its orders of appointment and contempt.

(a) Relying on footnote 6 of *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, *supra*, §49, the trial court argued that, under *B. & P.C. 6068(h)* (*supra*, §8), an attorney must represent an indigent defendant gratuitously where the Legislature has not appropriated funds for payment. "We disagree with this conclusion because we do not believe the *Payne* majority intended to make a ruling with such profound constitutional implications, based on dicta in a footnote." (177 C.A.3d 341.)

(b) Other courts accept that attorneys may be forced to serve without compensation because the practice of law is a professional privilege, a condition of which is the duty to represent indigents without compensation. (177 C.A.3d 342.) "Those courts that comprise the so-called majority view look wistfully back upon a halcyon era when it was imagined that members of the legal profession, without any hesitation, stepped forward to provide free representation for indigents." (177 C.A.3d 343.) However, today's attorney no longer holds a privileged position and faces ever increasing costs in operating a law office. (177 C.A.3d 345, 346.)

(c) Because the right to pursue a particular profession is not a fundamental one, petitioner's equal protection challenge must be reviewed under the rational relationship test. (177 C.A.3d 348.) However, while assistance of the poor is a legitimate state function, "this goal cannot be accomplished at the expense of one particular group of people. It is a denial of equal protection when the government seeks to charge the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons." (177 C.A.3d 348.) "An attorney who is appointed to represent an indigent without compensation is effectively forced to give away a portion of his property--his livelihood. Other professionals, merchants, artisans, and state licensees, are not similarly required to donate services and goods to the poor." (177 C.A.3d 348.)

(d) Requiring attorneys to represent indigent paternity defendants without compensation might not offend constitutional principles if all attorneys bore the burden evenly. However, "insuperable obstacles" prevent a fair allocation of pro bono work among all lawyers, and to select only a subclass, such as trial lawyers, would be unfair, because these lawyers have no special privileges not shared by other lawyers. (177 C.A.3d 349, 350.) In short, "equal protection principles are violated when one attempts to apply a general rule of forced pro bono representation on such a diverse class as lawyers." (177 C.A.3d 351.)

(e) "Two constitutional rights conflict here. On the one hand, indigent defendants are constitutionally entitled to legal counsel in state-initiated paternity actions. On the other, it is a denial of equal protection of the law to require a particular class of persons to pay for the cost of this representation. It would be ironic to provide justice to the indigent litigant but to deny it to his attorney." (177 C.A.3d 351.) The Legislature, which created the statute permitting the state to prosecute a paternity action against an indigent, also has the obligation to provide the financial support, including compensation of counsel, necessary to meet constitutional requirements. (177 C.A.3d 351, 352.)

(f) There are policy disadvantages of forced representation without compensation, including the danger that the indigent defendant would be denied the right to effective assistance of counsel. (177 C.A.3d 353.) The trial judge may appoint qualified counsel willing to serve without compensation; if unsuccessful in appointing such counsel, the trial judge may not proceed unless reasonable compensation for appointed counsel is provided by the county or state. (177 C.A.3d 357.)

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1. Attorney General as Counsel.

1 Witkin Cal. Proc. Attys § 54

[§ 54] Attorney General as Counsel.

The Attorney General is the state's chief law officer. (Cal. Const., Art. V, §13; on powers and duties of Attorney General, see generally 4 *Cal. Crim. Law* (3d), *Introduction to Criminal Procedure*, §14 et seq.; see also 7 *Am.Jur.2d* (2007 ed.), *Attorney General* §1 et seq.) The Attorney General is the legal adviser to each state department in all matters relating to that department and its officers. (*Govt.C. 11157*.) With certain exceptions (see *infra*, §56), no state agency may employ legal counsel other than the Attorney General in any matter in which the agency is interested. (*Govt.C. 11042*; see *Govt.C. 11043* [except as provided, laws authorizing state agencies to employ legal counsel other than Attorney General are to be construed to refer to Attorney General].) Except with respect to state officers and agencies that are exempt by statute (see *infra*, §56), the Attorney General's written consent is required before counsel may be employed to represent a state agency or employee in a judicial proceeding. (*Govt.C. 11040(c)*.)

Unless there is a conflict of interest requiring special counsel for an agency or officer, the Attorney General acts both as a representative of the public interest and as counsel for the state agency or officer involved in the litigation. (*D'Amico v. Board of Med. Examiners* (1974) 11 *C.3d* 1, 15, 112 *C.R.* 786, 520 *P.2d* 10.) (On conflict of interest, see *infra*, §55.)

The Attorney General may appoint assistants and deputies and delegate to them all duties performed by the Attorney General. (*Govt.C. 12502*; see *People v. Birch Sec. Co.* (1948) 86 *C.A.2d* 703, 196 *P.2d* 143.) These assistants and deputies, with a few exceptions, are civil service employees. (Cal. Const., Art. VII, §§1(a), 4(c), 4(m).) The Attorney General is an elected state officer and not a civil service employee. (Cal. Const., Art. VII, §4(c).)

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2. Conflict of Interest.

1 *Witkin Cal. Proc. Attys* § 55

[§ 55] Conflict of Interest.

In *People v. Brown* (1981) 29 C.3d 150, 172 C.R. 478, 624 P.2d 1206, a legal foundation and the Public Employees Service Association brought a mandamus proceeding to compel the Governor, the Controller, the Public Employment Relations Board, and the State Personnel Board to perform their constitutional and statutory duties without regard to the provisions of the State Employer-Employee Relations Act (SEERA), contending that the Act was unconstitutional. The Attorney General, as designated counsel for the Governor and the other state officers and agencies involved, gave legal advice to the State Personnel Board after it had been served with summons. However, shortly thereafter the Attorney General commenced the present mandamus proceeding against the Governor and other state agencies, asking for relief similar to that sought by the first petitioners. On motion of the Governor, the Attorney General was enjoined from proceeding in the matter and his petition was dismissed.

(a) The Attorney General is subject to the general rules governing attorneys' conflicts of interest (see *infra*, §§103 et seq., 513, 514). (29 C.3d 154, 155.) The Legislature has impliedly recognized that a conflict might arise because of the duality of the Attorney General's functions (representative of a state agency and guardian of the public interest), by giving the Attorney General the right to withdraw from representation of his or her statutory clients and to permit them to engage private counsel (*Govt.C. 11040*, *infra*, §56). (29 C.3d 157.)

(b) "We find nothing in that circumstance, however, to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship. In short, the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients." (29 C.3d 157.)

One justice dissented, asserting that the decision may deprive the Attorney General of his traditional authority to challenge the constitutional basis of actions by public officials. (29 C.3d 160.)

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3. Exceptions.

1 Witkin Cal. Proc. Attys § 56

[§ 56] Exceptions.

(1) *In General.* The general prohibition against employment of legal counsel other than the Attorney General (*Govt.C. 11042*, *supra*, §54) is subject to exceptions. *Govt.C. 11041(a)* excepts the following state officers and agencies:

(a) Regents of the University of California.

(b) Trustees of the California State University.

(c) Legal Division of the Department of Transportation.

(d) Division of Labor Standards Enforcement of the Department of Industrial Relations.

(e) Workers' Compensation Appeals Board.

(f) Public Utilities Commission.

(g) State Compensation Insurance Fund.

(h) Legislative Counsel Bureau.

(i) Inheritance Tax Department.

(j) Secretary of State.

(k) State Lands Commission.

(l) Alcoholic Beverage Control Appeals Board (except when the board affirms the decision of the Department of Alcoholic Beverage Control).

(m) Department of Education.

(n) State Treasurer (with respect to bonds).

(2) *Statutory Authority To Employ Counsel*. Other agencies and officers are exempt from the operation of *Govt.C. 11042* because they have statutory authority to employ legal counsel. (*Govt.C. 11041*; on the power of state agencies and officers to hire private attorneys for special services, see *infra*, §65.) These include the following:

(a) Department of General Services (*Govt.C. 14610*).

(b) Department of Transportation (*Sts. & H.C. 138*).

(c) Department of Water Resources (*Water C. 127*).

(d) Water Resources Control Board (*Water C. 186*). (See *State Water Resources Control Bd. v. Superior Court* (2002) 97 C.A.4th 907, 916, 118 C.R.2d 784 [although trial court correctly held that *Water C. 186* precluded Attorney General from representing both Water Resources Control Board and Department of Fish and Game in same water law action, it erred in concluding that department could not retain separate counsel, thus permitting Attorney General to represent board].)

(3) *Permission of Attorney General To Employ Counsel*. Any state agency or employee may engage private counsel in any matter in which the agency or employee is interested, after first having obtained the written consent of the Attorney General. (*Govt.C. 11040(a)*; see *California Air Resources Bd. v. Hart* (1993) 21 C.A.4th 289, 298, 26 C.R.2d 153 [*Health & Saf.C. 7* and 43154(b), construed in light of *Govt.C. 11040*, permits Attorney General to delegate in writing to legal counsel of California Air Resources Board power to bring civil action for violation of air pollution control laws].) However, the Legislature's intent is to enhance efficiency and economy in state government by employment of the Attorney General to represent state agencies and employees. (*Govt.C. 11040(b)*.) And some agencies with authority to employ counsel (e.g., the Secretary of State and the State Lands Commission) do in fact make extensive use of the services of the Attorney General.

(4) *Status of Counsel*. Attorneys appointed or employed by state officers and agencies are usually civil service employees. (See Cal. Const., Art. VII, §§1, 4.)

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b. State Legislative Counsel.

1 Witkin Cal. Proc. Attys § 57

[§ 57] State Legislative Counsel.

Govt.C. 10200 provides for a Legislative Counsel, in charge of the Legislative Counsel Bureau. (The Bureau is commonly known as The Office of the Legislative Counsel.) Although the Legislative Counsel is selected by concurrent resolution of the Legislature at the beginning of each regular session (*Govt.C. 10201*), in practice the Legislative Counsel and staff are permanent employees. The Legislative Counsel maintains an attorney-client relationship with members of the Legislature and the Governor. (*Govt.C. 10207*.)

Chosen by the Legislature, the Legislative Counsel is not a civil service employee. (Cal. Const., Art. VII, §4(a).) Moreover, the Legislative Counsel is entitled to two deputies exempt from civil service. (Cal. Const., Art. VII, §4(m).) The other staff attorneys in the Legislative Counsel Bureau are civil service employees. (Cal. Const., Art. VII, §1(a).)

The Legislative Counsel prepares and assists in the preparation, amendment, and consideration of legislation, on request or on suggestion as provided in *Govt.C. 10230* et seq. (*Govt.C. 10231*.) Requests and suggestions may be made by a state agency (*Govt.C. 10232*), an individual member of the Legislature (*Govt.C. 10233*), the Governor, the Senate, the Assembly, a legislative committee (*Govt.C. 10234*), or a judge of a California court (*Govt.C. 10237*). Under certain circumstances, the Legislative Counsel may "cooperate" with proponents of initiatives (*Govt.C. 10243*) and with educational institutions (*Govt.C. 10245*).

On request, the Legislative Counsel may provide legal services to the State Auditor (*Govt.C. 10232.5*) and may provide oral or written opinions and additional legal services to the Governor (*Govt.C. 10235*).

The Legislative Counsel is a member of the State Commission on Uniform State Laws (*Govt.C. 8261*) and on request may assist the commission in performing its duties (*Govt.C. 8273*). The Legislative Counsel also sits as an ex officio member of the California Law Revision Commission. (*Govt.C. 8281*.) (See *Schabarum v. California Legislature* (1998) 60 C.A.4th 1205, 1221, 1230, 70 C.R.2d 745 [discussing scope of Legislative Counsel's duties and holding that separate budget for Legislative Counsel is constitutional].)

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1. In General.

1 Witkin Cal. Proc. Attys § 58

[§ 58] In General.

There are usually three public attorney offices at the county level: (1) a county counsel appointed by the Board of Supervisors (*Govt.C. 27640*), who must be furnished with necessary assistants (*Govt.C. 27644*); (2) a public defender (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §164 et seq.); and (3) a district attorney (see 4 *Cal. Crim. Law* (3d), *Introduction to Criminal Procedure*, §14 et seq.). (See *Mize v. Crail* (1973) 29 *C.A.3d* 797, 803, 106 *C.R.* 34, *infra*, §256 [authority of county counsel to take appeal despite public administrator's decision not to appeal]; *Ward v. Superior Court* (1977) 70 *C.A.3d* 23, 138 *C.R.* 532, *infra*, §138 [under Los Angeles County Charter, county counsel has only one client, the county, and represents county officers only in their representative capacities].)

The Board of Supervisors controls the conduct of litigation in which the county, or a public entity of which the board is the governing body, is a party, and, by a two-thirds vote, may employ counsel to assist the district attorney, county counsel, or other counsel for the county or entity in litigation. The board may also authorize nonattorney county officials to initiate and conduct small claims court litigation on behalf of the county. (*Govt.C. 25203*; see *Harvey v. Butte* (1988) 203 *C.A.3d* 714, 721, 726, 250 *C.R.* 65 [only constraint imposed by *Govt.C. 25203* on employment of outside counsel is that specific services must be authorized by two-thirds vote].) Where the charter does not provide for a county counsel, the board may employ an attorney to assist the district attorney in civil legal matters. (*Govt.C. 31001*.)

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2. Allocation of Functions.

1 Witkin Cal. Proc. Attys § 59

[§ 59] Allocation of Functions.

Where there is a county counsel, the district attorney generally provides criminal legal services as the county counsel provides civil legal services. However, the functions of the two offices may sometimes overlap. In *Rauber v. Herman* (1991) 229 C.A.3d 942, 280 C.R. 785, the court held that the district attorney could represent the county in a hearing under Welf.C. 10950 et seq. (Aid to Families with Dependent Children Program).

(a) Under Govt.C. 26529 and 27642, a county counsel generally supplants a district attorney in providing civil legal services. (229 C.A.3d 947.) However, certain functions, though civil in nature, are closely related to criminal law enforcement and may be performed by the district attorney. (229 C.A.3d 948.) The implementation and enforcement of the AFDC program is such a function. (229 C.A.3d 949.)

(b) Either the district attorney or the county counsel may represent a county at a Welf.C. 10950 hearing, in a county where there is a county counsel. "No statute or other authority prohibits a county counsel from performing hybrid legal functions, as long as the county counsel takes no action amounting to criminal law enforcement. Further, no statute definitively allocates the performance of hybrid legal functions between the county counsel and the district attorney." (229 C.A.3d 952.) (See *In re Dennis H.* (2001) 88 C.A.4th 94, 98, 105 C.R.2d 705 [district attorney improperly participated in juvenile dependency hearing where there was no statutory authorization to do so; distinguishing *Rauber*].)

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3. Representation of Judges and Courts.

aa. General Rule: Representation by County Counsel.

1 Witkin Cal. Proc. Attys § 60

[§ 60] General Rule: Representation by County Counsel.

The county counsel is authorized to represent judges and courts where those duties do not interfere or conflict with the counsel's other duties. The county counsel may, on request, represent the superior court of the county or any judge of the court, in (1) all matters and questions of law relating to the judge's duties, and (2) all civil actions and proceedings in which the court or judge, in an official capacity, is concerned or is a party. (*Govt.C. 27647(a)*.) County counsel may also represent, on request, a judge who is a witness in an official capacity. (*Govt.C. 27647(a)*, 68111.) (See *James G. v. Superior Court* (2000) 80 C.A.4th 275, 278, 95 C.R.2d 135 [where county counsel's effective representation of superior court in writ proceeding requires disclosure of sealed confidential information, county counsel should file appropriate motion with appellate court demonstrating why requested information is necessary].)

The authorization under *Govt.C. 27647(a)* does not extend to the following actions or proceedings:

(1) Criminal proceedings in which a judge is a defendant. (*Govt.C. 27647(b)(1)*.)

(2) Grand jury proceedings. (*Govt.C. 27647(b)(2)*.)

(3) Proceedings before the Commission on Judicial Performance. (*Govt.C. 27647(b)(3)*.)

(4) Civil actions or proceedings arising from facts under which the judge was convicted of a criminal offense. (*Govt.C. 27647(b)(4)*.)

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bb. Exception: Private Counsel Where Conflict Exists.

1 *Witkin Cal. Proc. Attys § 61*

[§ 61] Exception: Private Counsel Where Conflict Exists.

When a judge is otherwise entitled to representation by statute (including *Govt.C. 27647*, supra, §60), and the county counsel declines because of a conflict of interest, the judge is entitled to recover, from the appropriate public entity, reasonable attorneys' fees incurred in retaining private counsel. (*Govt.C. 27648*.)

Govt.C. 27648 was narrowly construed in *Municipal Court v. Placer* (1988) 200 C.A.3d 1173, 1177, 246 C.R. 413. The county counsel filed a petition for mandamus on behalf of the county probation department, challenging official actions of municipal Judge R, and the county public defender filed a petition for habeas corpus on behalf of a convicted defendant, alleging that Judge R abused his discretion in imposing an unreasonable sentence. In both situations, the county counsel refused to represent the judge, who then retained private counsel and sought reimbursement for substantial fees incurred (in excess of \$ 9,000 in one case and in excess of \$ 13,000 in the other). The county denied the claim. *Held*, judgment on demurrer for defendant county affirmed.

(a) Plaintiffs' theory was that, under *Govt.C. 27647*, a judge is entitled to representation in every matter that involves his or her duties; but the scope of the statute is not so sweeping. "Each year thousands of appealable orders and judgments are rendered by the trial courts of this state. In addition, countless nonappealable orders are the subject of writ proceedings in higher courts. Broadly speaking, when such an order or judgment is challenged by appeal or writ it can be said the challenge raises a 'question ... of law pertaining to any of such judge's duties,' or is otherwise a matter 'in which with respect to the court's or judge's official capacity, such court or judge is concerned. ... ' Yet, in our view, it is inconceivable that the Legislature intended sections 27647 and 27648 to authorize trial courts and judges to retain counsel to represent them in all such matters at the expense of the taxpayers." (200 C.A.3d 1178.)

(b) *Municipal Court v. Bloodgood* (1982) 137 C.A.3d 29, 186 C.R. 807, is distinguishable. Municipal court judges brought an action against the county to enforce collection of attorneys' fees of private counsel employed to represent the courts with respect to a proposed reduction in the courts' budget. Thus, the matter involved the duties of judges within the meaning of *Govt.C. 27647*, for the budget as proposed by the county threatened to erode the ability of the courts to

guarantee basic constitutional rights. (200 C.A.3d 1179.) Here, however, the first proceeding involved merely a matter of statutory construction, and the second only the propriety of a particular sentence; neither posed any threat to the ability of the court to perform its functions. (200 C.A.3d 1179.)

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d. Cities.

1 *Witkin Cal. Proc. Attys* § 62

[§ 62] Cities.

A city council may appoint a city attorney (*Govt.C. 36505*) whose duties include advising city officials in all legal matters pertaining to city business (*Govt.C. 41801*), framing ordinances and resolutions required by the legislative body (*Govt.C. 41802*), and performing other legal services required by the legislative body (*Govt.C. 41803*). With the district attorney's consent, the city attorney may also prosecute misdemeanors committed within the city. (*Govt.C. 41803.5*.)

The city attorney must perform legal services as required by the legislative body, but cannot appear and defend an action against the city until the legislative body has given its authorization to do so. (See *Tri-Cor v. Hawthorne* (1970) 8 C.A.3d 134, 138, 87 C.R. 311 [city attorney lacked authority to bind city to written arbitration agreement].)

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e. Districts.

1 Witkin Cal. Proc. Attys § 63

[§ 63] Districts.

Different methods are used to provide legal services for various districts. Thus, for example, a Community Services District may employ its own counsel. (*Govt.C. 61060(g)*.)

The governing board of a school district may choose to appoint legal counsel to render legal advice to the superintendent, the board, and other officers and employees. (*Educ.C. 35041.5*.)

The legal counsel of the governing board of a school or community college district must represent the district personnel commission; but if counsel refuses, the commission may employ its own attorney. Counsel's failure to respond within 15 days to a written request for representation is deemed a refusal of representation. Further, counsel must refuse to represent the commission when counsel knows, or should know, that a conflict exists between the interests of the commission and those of the governing board or school district. (*Educ.C. 45313* [school districts]; *Educ.C. 88132* [community college districts].) (See *Personnel Com. of Barstow Unified School Dist. v. Barstow Unified School Dist.* (1996) 43 C.A.4th 871, 892, 50 C.R.2d 797 [because personnel commission lacked standing to bring suit against school district, district was not required under *Educ.C. 45313* to pay attorneys' fees incurred by commission in doing so].)

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f. Private Counsel for Special Services.

1 Witkin Cal. Proc. Attys § 64

[§ 64] Private Counsel for Special Services.

(1) *Attorney General.* The Attorney General may employ special counsel for two purposes: (a) to act in the Attorney General's place to recover property subject to escheat (*Govt.C. 12542*), and (b) to conduct a criminal prosecution within a county when the district attorney is disqualified (*Govt.C. 12553*). (*Govt.C. 12520(a)*.) However, *Govt.C. 12520(a)* does not affect the Attorney General's right to employ counsel to represent or assist in representing state agencies, including the Attorney General and the Department of Justice, or to represent a state employee if the representation meets specified standards for the use of personal services contracts under *Govt.C. 19130(b)* (3 *Summary* (10th), *Agency and Employment*, §19). (*Govt.C. 12520(b)*.) (See *California Air Resources Bd. v. Hart* (1993) 21 *C.A.4th* 289, 299, 300, 26 *C.R.2d* 153 [term "special counsel," as used in *Govt.C. 12520*, refers to counsel hired with public funds from private sector to perform services for state; because general counsel of California Air Resources Board already is employed by state agency, delegation to general counsel of power to bring civil action does not involve employment of special counsel].)

(2) *Other State Officers and Agencies.* Special counsel for other state officers and agencies is occasionally permitted under specified circumstances: (a) Real Estate Commissioner in conservatorship and liquidation proceedings for real property securities dealers (*B. & P.C. 10239.23*); (b) Harbor Improvement Bond Committee (*Harb. & Nav.C. 3920*); (c) State Personnel Board (*Govt.C. 18656*); (d) Governor (*Govt.C. 12013*).

(3) *Counties and Municipalities.* A county Board of Supervisors may contract with qualified persons to furnish special legal services to the county, a county officer or department, or a district or court in the county. (*Govt.C. 31000*; see *Govt.C. 25203*, *supra*, §58 [board may employ counsel to assist in litigation]; *Harvey v. Butte* (1988) 203 *C.A.3d* 714, 726, 250 *C.R. 65* [concluding, on elaborate review of case law, that *Govt.C. 25203* governs circumstances in which board of supervisors may contract with outside counsel for litigation services].) The legislative body of a public or municipal corporation or district may also contract with qualified persons to furnish special legal services to the corporation or district. (*Govt.C. 53060*.)

(4) *Other Special Services.* Apart from these specific exemptions, the power of governmental agencies to employ private attorneys is restricted to situations in which the necessary services cannot be performed by attorneys selected

under the provisions of the Civil Service Act (*Govt.C. 18500 et seq.*). (See *Jaynes v. Stockton* (1961) 193 C.A.2d 47, 52, 54, 14 C.R. 49 [services required must in fact be special; "[t]he law will not indulge an implication that a public agency has authority to spend public funds which it does not need to spend"]; *State Comp. Ins. Fund v. Riley* (1937) 9 C.2d 126, 135, 69 P.2d 985; cf. *Denio v. Huntington Beach* (1943) 22 C.2d 580, 591, 140 P.2d 392 [upholding employment of special counsel by municipal corporation]; *Burum v. State Comp. Ins. Fund* (1947) 30 C.2d 575, 580, 184 P.2d 505 [circumstances held to justify employment of special counsel]; *Evans v. Superior Court* (1939) 14 C.2d 563, 96 P.2d 107 [same]; *Estate of Schnell* (1947) 82 C.A.2d 170, 174, 185 P.2d 854 [similar problem arising under county charter; circumstances held to justify employment of special counsel by public administrator].)

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g. Private Practice and Public Litigation.

1 Witkin Cal. Proc. Attys § 65

[§ 65] Private Practice and Public Litigation.

Statutes frequently prohibit public attorneys from representing ordinary litigants. Thus, the Attorney General may not engage in private law practice or be associated directly or indirectly with an attorney in private practice. (*Govt.C. 12504.*) A public defender in first, second, and third class counties is prohibited from engaging in private law practice. (*Govt.C. 27705.*) (See *Madera v. Gendron (1963) 59 C.2d 798, 31 C.R. 302, 382 P.2d 342* [upholding former *Govt.C. 28135*, prohibiting district attorney of Madera County from engaging in private practice]; *6 A.L.R.3d 562* [constitutionality and construction of statute prohibiting prosecuting attorney from engaging in private practice of law].)

Other statutes prohibit public attorneys from acting in litigation when a governmental agency is a party. Thus, a district attorney may not assist in the defense of a person accused of a crime in any county. (*Govt.C. 26540.*) Also, a district attorney may not assist in the defense of a condemnation action in the district attorney's county when the state or a state agency is a party unless the county or a county officer in an official capacity is a defendant. (*Govt.C. 26541.*) Similarly, neither a district attorney nor a county counsel may act as the attorney for a private plaintiff in an action or proceeding in which "a city, district, or political subdivision of the State is a party defendant." (*Govt.C. 26543.*)

A city attorney is responsible for the enforcement of local ordinances. Hence, despite the absence of express statutory disqualification, public policy is opposed to the appointment of the city attorney to represent indigent defendants charged with violations of state law. (*People v. Rhodes (1974) 12 C.3d 180, 186, 115 C.R. 235, 524 P.2d 363.*) However, a city attorney whom the city expressly relieves from prosecutorial responsibilities, or that attorney's partner or associate, may defend a person against criminal charges other than a violation of the city's ordinances. The accused must knowingly waive any objection to a potential conflict of interest. (*Govt.C. 41805.*)

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1. Operation of Law.

a. Death or Incapacity of Attorney.

1 Witkin Cal. Proc. Attys § 66

[§ 66] Death or Incapacity of Attorney.

(1) *In General.* The attorney is, ordinarily, an agent (see *supra*, §43); hence, an attorney's death or incapacity terminates the relationship just as it does any other agency not coupled with an interest. (See *C.C.P.* 286 [recognizing death as termination]; *C.E.B.*, 1 Civil Proc. Before Trial 4th, §4.38 et seq.; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §180; 3 *Summary* (10th), *Agency and Employment*, §205.) (On duty of notice to clients, cocounsel, opposing counsel, and adverse parties, if unrepresented, see *infra*, §82 et seq.)

(2) *Continuing Representation by Surviving Partners.* When the representation is by a partnership, the death of one partner does not automatically terminate a contract, nor does it give the surviving partners an election to terminate. In *Little v. Caldwell* (1894) 101 C. 553, 36 P. 107, the court conceded that a *client* who contracts for services of a firm would normally be entitled to the participation of all of its members and perhaps might be relieved from any obligation on the death of a member. (101 C. 559.) However, "the option to declare the contract terminated for such a cause is with the client, and if he does not do so, but is willing to intrust the survivor with the further management of the litigation in which the firm was employed, the survivor is bound to complete the unfinished contract for the benefit of the partnership." (101 C. 559, 560.)

(3) *Suspension or Disbarment.* Another cause of termination recognized by *C.C.P.* 286 is suspension from practice, which necessarily includes disbarment. The suspended or disbarred attorney cannot practice law and hence, for practical purposes, is incapacitated. (See *B. & P.C.* 6117; *Lovato v. Santa Fe Int. Corp.* (1984) 151 C.A.3d 549, 553, 198 C.R. 838, citing the text [service on attorney during period of suspension does not provide constructive notice to client].)

(4) *Statutory Notice Requirement.* When an attorney "dies, or is removed or suspended, or ceases to act as such," *C.C.P.* 286 protects the client by prohibiting the taking of "any further proceedings" against the client until the adverse party gives written notice to appoint another attorney or appear in person. (See *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 C.A.3d 725, 741, 743, 216 C.R. 300 [motion to dismiss for failure to answer interrogatories is "proceeding" within meaning of *C.C.P.* 286; therefore, where party's attorney was suspended from practice 32 days before motion was heard, and opposing party had not given required notice, court had no authority to proceed and order of dismissal was void]; for forms of notice, see *C.E.B.*, 1 Civil Proc. Before Trial 4th, §4.68.) However, *C.C.P.* 286 is

not jurisdictional, and the requirement may be waived; e.g., where the evidence shows that the client is fully aware of the attorney's death. (*California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 C.A.2d 715, 734, 37 C.R. 1; see *Unwin v. Barstow-San Antonio Oil Co.* (1918) 36 C.A. 508, 509, 172 P. 622 [voluntary formal appearance of client is waiver of right to statutory notice].)

(5) *Mandatory Time Limits Are Not Suspended.* A client is not relieved from the effect of the running of mandatory time limits, such as the statute of limitations, dismissal periods, or the time to file notice of appeal, by the intervening death or incapacity of the client's attorney. (See *Larkin v. Superior Court* (1916) 171 C. 719, 724, 154 P. 841; *Voinich v. Poe* (1921) 52 C.A. 597, 601, 199 P. 74.)

West's Key Number Digest, Attorney and Client 76(2), 76(3)

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1 Witkin Cal. Proc. Attys § 67

[§ 67] Death or Incapacity of Client.

Under agency principles similar to those involving the death or incapacity of an attorney (*supra*, §66), the death or incapacity of the client (principal) terminates the authority of the attorney (agent). (*Sullivan v. Dunne* (1926) 198 C. 183, 192, 244 P. 343 ["the law of principal and agent is generally applicable to the relation of attorney and client ... insanity or incapacity of the client will, therefore, operate as a termination of the authority of the attorney"]; *Swartfager v. Wells* (1942) 53 C.A.2d 522, 527, 128 P.2d 128 [death]; see C.E.B., 1 Civil Proc. Before Trial 4th, §4.37; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §179.)

An exception, however, is recognized for "a special contract of employment, such as a specific contract to conduct a suit to final judgment, or some agreement on a fee for the entire case." (*Estate of Mallory* (1929) 99 C.A. 96, 104, 278 P. 488.) Also, the right of appeal is safeguarded by statute. Under C.C.P. 903, either the decedent's attorney of record in the court in which the judgment was rendered or the executor or administrator of the decedent's estate may file a notice of appeal within the time during which the decedent could have filed it. (See 9 *Cal. Proc.* (5th), *Appeal*, §53.)

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2. Voluntary Withdrawal by Attorney.

a. Right To Withdraw.

1. In General.

1 Witkin Cal. Proc. Attys § 68

[§ 68] In General.

An attorney may terminate the relationship under ordinary circumstances when no litigation involving the representation is pending. Even if there is an existing contract of employment, specific performance of such a close personal relationship will not be granted to either party. (See 13 *Summary* (10th), *Equity*, §48; C.E.B., 1 Civil Proc. Before Trial 4th, §4.19 et seq.; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §181; 6 *A.L.R.4th* 342 [withdrawal as malpractice]; on client's remedy for breach, see *Lane v. Storke* (1909) 10 C.A. 347, 352, 101 P. 937 [pleading was insufficient for failure to show damage]; on client's right to continuance to procure new legal representation, see *Vann v. Shilleh* (1975) 54 C.A.3d 192, 126 C.R. 401, 7 Cal. Proc. (5th), *Trial*, §15; for disciplinary rule, see *infra*, §450 et seq.; on withdrawal in criminal case, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§182, 183.)

In *Ferruzzo v. Superior Court* (1980) 104 C.A.3d 501, 163 C.R. 573, attorney F, representing a corporation, moved for leave to withdraw because of the corporation's lack of cooperation and nonpayment of fees. The trial judge denied the motions on the ground that the corporation could not be permitted to represent itself. *Held*, mandamus issued to compel granting the motions. The effect of withdrawal would not be unauthorized self-representation; the corporation would either obtain new counsel or forfeit its rights in the pending litigation. (104 C.A.3d 504.)

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a. Right To Withdraw.

2. Motion To Withdraw.

1 Witkin Cal. Proc. Attys § 69

[§ 69] Motion To Withdraw.

(1) *In General.* If litigation is pending, an attorney of record who seeks to withdraw without the consent of the client should make a noticed motion or application to the court. (*C.C.P. 284(2)*; see *Cassel v. Gregori (1937) 28 C.A.2d Supp. 769, 70 P.2d 721*; *C.E.B., 1 Civil Proc. Before Trial 4th, §§4.21 et seq.; 4.64 et seq. [forms]*; *Cal. Civil Practice, 2A Procedure §§14:13, 14:14; infra, §80.*) An attorney's failure to withdraw in matters in which the attorney's wrongful act or omission is alleged tolls the limitations period for a malpractice action arising out of the matter. (*C.C.P. 340.6, 3 Cal. Proc. (5th), Actions, §631.*)

(2) *Notice and Form.* The notice of motion must be directed to the client and must be made on Judicial Council Form No. MC-051 [Notice of Motion and Motion to Be Relieved as Counsel--Civil]. (*C.R.C., Rule 3.1362(a).*) No memorandum of points and authorities is required. (*C.R.C., Rule 3.1362(b).*)

(3) *Declaration.* The motion must be accompanied by a declaration using Judicial Council Form No. MC-052 [Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil]. (*C.R.C., Rule 3.1362(c).*)

(4) *Service.* The notice and declaration must be served on the client and on all other parties. If served on the client by mail under *C.C.P. 1013* (see *6 Cal. Proc. (5th), Proceedings Without Trial, §22*), they must be accompanied by a declaration stating facts showing that either (a) the service address is the current residence or business address of the client, or (b) the service address is the last known residence or business address of the client, and the attorney has been unable to locate a more current address after making reasonable efforts to do so. "Current" means that the address was confirmed within 30 days prior before the motion was filed. Merely demonstrating that the notice was sent to the client's last known address and was not returned is insufficient by itself to demonstrate that the address is current. Also, in mailed service, *C.C.P. 1011(b)* applies; i.e., service may be made by delivery to the clerk of the court if the client's address is unknown (see *Cal. Proc. (5th), Proceedings Without Trial, §19*). (*C.R.C., Rule 3.1362(d).*)

(5) *Order.* The order relieving counsel must be prepared on Judicial Council Form No. MC-053 [Order Granting Attorney's Motion to Be Relieved as Counsel--Civil]. It must be lodged with the court and served on the client with the

moving papers. The order must specify scheduled hearing dates, including the date of trial, if known. A copy of the signed order must be served on the client and on all other parties. The court may delay the effective date of the order until proof of service of a copy of the signed order on the client has been filed with the court. (C.R.C., Rule 3.1362(e).)

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(4) *Service.* C.R.C., Rule 3.1362(d) was amended in 2008 to provide that, in addition to the notice and declaration, the proposed order must also be served on the client and all other parties.

(5) *Order.* C.R.C., Rule 3.1362(e) was amended in 2008 to delete the requirement of service of the proposed order on the client. That requirement is now contained in C.R.C., Rule 3.1362(d).



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3. Discretion of Court.

1 *Witkin Cal. Proc. Attys* § 70

[§ 70] Discretion of Court.

If the attorney fails to seek an order under *C.C.P. 284(2)* (supra, §69), may the attorney nevertheless terminate the representation by simply withdrawing? Or if the attorney applies for the order, is the trial court without discretion to deny the application and compel the attorney to continue the representation in a pending matter? The answer lies in the concept of the attorney as more than an agent; an attorney is an officer of the court, bound by certain ethical rules and subject to the control of the court in the interests of justice.

In *De Recat Corp. v. Dunn* (1926) 197 C. 787, 242 P. 936, defendant's attorney, whose fee for previous services had not been paid, sought to withdraw on the day before trial, by serving and filing a notice of "resignation." The trial court proceeded to trial and judgment without the statutory notice by the adverse party as provided in *C.C.P. 286* (supra, §66). *Held*, the trial court did not err; defendant was still represented by his attorney and the court had jurisdiction to proceed. The phrase "ceases to act as such" in *C.C.P. 286* refers to ceasing to act *as an attorney* and not to the attorney's refusal to proceed in a particular case while continuing the practice of law. Otherwise the statute could be used as a means of collusion between attorney and client to delay the proceedings. Moreover, an attorney of record cannot withdraw from a case without the consent of the client or an order of court. (197 C. 790.) (See *Linn v. Superior Court* (1926) 79 C.A. 721, 725, 250 P. 880 [no abuse of discretion in denying motion to withdraw; case had been advanced on calendar and withdrawal might require continuance, which would work serious prejudice to opposing party].)

In *Manfredi & Levine v. Superior Court* (1998) 66 C.A.4th 1128, 78 C.R.2d 494, following months of intense litigation, the parties stipulated to binding arbitration. After 7 days in arbitration, plaintiffs filed for bankruptcy and obtained a stay of the proceedings. Defendants obtained a vacation of the stay and sought to resume the proceedings. Petitioner law firm, plaintiffs' counsel, claimed that it received "unsolicited and confidential information" that led petitioner to believe that it would be unethical to continue to represent plaintiffs. Moreover, independent counsel, a specialist in legal ethics, informed petitioner that petitioner could no longer represent plaintiffs. However, plaintiffs refused to substitute petitioner out of the case. In support of its *C.C.P. 284* motion to withdraw (supra, §69), petitioner made a blanket assertion that it could not continue to provide representation without violating the California Rules of Professional Conduct. When asked the nature of the conflict, petitioner invoked client confidentiality and would not

reveal on what facts the ethical conflict was premised. Given the lack of information, the trial judge was skeptical of petitioner's motive, stated that he viewed the motion as merely a delaying tactic, and denied the motion. *Held*, there was no abuse of discretion.

(a) In conflict of interest matters, if issues of confidentiality prevent counsel from full disclosure and the court accepts the good faith of counsel's representations, the court should find the conflict sufficiently established and permit withdrawal. (66 C.A.4th 1133, citing *Aceves v. Superior Court* (1996) 51 C.A.4th 584, 59 C.R.2d 280, 5 Cal. Crim. Law (3d), *Criminal Trial*, §188.) In some cases approving withdrawal, requesting counsel gave general, broad information; but it was sufficient to permit the court to make an informed decision, and there was otherwise no question concerning counsel's good faith or sincerity. (66 C.A.4th 1133, citing *Leveresen v. Superior Court* (1983) 34 C.3d 530, 194 C.R. 448, 668 P.2d 755, and *Uhl v. Municipal Court* (1974) 37 C.A.3d 526, 112 C.R. 478, 5 Cal. Crim. Law (3d), *Criminal Trial*, §192.)

(b) However, the trial court need not accept a sweeping claim of conflict and "rubber stamp" counsel's request to withdraw. Cases such as *Uhl* and *Aceves* do not abrogate the court's duty of inquiry or the attorney's obligation to provide information. Thus, the trial court has a duty to explore the conflict, and counsel has a corresponding duty to respond and describe the general nature as fully as possible within the confines of privilege. (66 C.A.4th 1134.) Here, petitioner merely told the trial judge of receiving unsolicited, confidential information that precluded further representation, but failed to supply even "the slightest inkling of the nature of the alleged conflict." (66 C.A.4th 1135, 1136.)

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4. Cases Involving Family Law or Minors.

1 Witkin Cal. Proc. Attys § 71

[§ 71] Cases Involving Family Law or Minors.

(1) *Family Law Litigation*. Because of the peculiar continuing aspects of family law litigation, an attorney who has represented a party continues to be the party's attorney after final judgment for the purpose of serving notice of subsequent proceedings. (*Reynolds v. Reynolds* (1943) 21 C.2d 580, 583, 134 P.2d 251.) To terminate this responsibility, C.C.P. 285.1 authorizes voluntary withdrawal on notice without consent or order, after entry of the final decree. Thus, an attorney of record for either party in a proceeding for dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, or for the support, maintenance, or custody of minor children may withdraw any time after a judgment in the action becomes final and prior to being served with pleadings or motion papers for a proceeding pending in the action. The attorney must file a notice of withdrawal that states (a) the date of entry of final decree or judgment, (b) the last known address of the party, and (c) that the attorney withdraws as the party's attorney. A copy of the notice must be mailed to the party at the last known address and must be served on the adverse party. (See Cal. Civil Practice, 2 Family Law Litigation §10:28; Judicial Council Form No. FL-960 [Notice of Withdrawal of Attorney of Record].)

(2) *Representation of Minor*. Court approval is required before an attorney can withdraw from representation of a minor who appears through a guardian ad litem, and approval ordinarily should not be given unless other qualified counsel is substituted. Thus, the purported substitution of a guardian ad litem as attorney in pro. per. was ineffective where the guardian ad litem was not an attorney and the court did not approve the substitution. (*Torres v. Friedman* (1985) 169 C.A.3d 880, 887, 888, 215 C.R. 604.)

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b. Ethical Considerations.

1. Rules of Professional Conduct.

1 Witkin Cal. Proc. Attys § 72

[§ 72] Rules of Professional Conduct.

(1) *A.B.A. Rules.* The A.B.A. Model Rules of Professional Conduct emphasize the need to decline or withdraw from representation if the client insists on conduct that is illegal or violative of the rules of professional conduct, and provide that a withdrawing attorney should take steps that are reasonably practicable to protect the client's interests. (Model Rules of Professional Conduct, Rule 1.16.)

(2) *California Rules.* The Rules of Professional Conduct, based in part on the A.B.A. Rules, specify in great detail the conditions under which an attorney may or must withdraw from employment. Like the A.B.A. Rules, the California rules emphasize the attorney's obligation to withdraw when necessary to avoid illegal or improper conduct and the importance of avoiding, to the extent possible, prejudice to the client's interests. (Rule 3-700; see *infra*, §450 et seq.; on withdrawal by attorney who may be called as witness, see *infra*, §462.)

The rules have been liberally construed to protect clients. (See *Vann v. Shilleh* (1975) 54 C.A.3d 192, 197, 126 C.R. 401, 7 Cal. Proc. (5th), Trial, §15 [no right to withdraw until steps are taken to avoid prejudice to client's rights]; *Chaleff v. Superior Court* (1977) 69 C.A.3d 721, 138 C.R. 735 [former rule was applicable to attorney appointed to advise defendant conducting his own criminal defense]; *Ramirez v. Sturdevant* (1994) 21 C.A.4th 904, 915, 26 C.R.2d 554, *infra*, §98 [under Rule 3-700 and C.C.P. 284 (supra, §69), attorney, either with client's consent or court's approval, may withdraw from case when withdrawal can be accomplished without undue prejudice to client's interests].)

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Witkin Summary of California Law

II. ATTORNEY-CLIENT RELATIONSHIP

B. Termination of Relationship.

2. Voluntary Withdrawal by Attorney.

b. Ethical Considerations.

2. When Defendant Intends To Commit Perjury.

1 *Witkin Cal. Proc. Attys § 73*

[§ 73] When Defendant Intends To Commit Perjury.

(1) *Right To Withdraw.* An attorney may properly withdraw from representation of a criminal defendant who intends to commit perjury. (*Nix v. Whiteside* (1986) 475 U.S. 157, 106 S.Ct. 988, 996, 89 L.Ed.2d 123, 136; see 13 *Hastings Const. L. Q.* 443 [Nix]; 13 *Hastings Const. L. Q.* 545 [legal ethics, client perjury, and privilege against self-incrimination].)

In *People v. Brown* (1988) 203 C.A.3d 1335, 250 C.R. 762, defendant was charged with theft and prior convictions. On the day set for trial, his court-appointed counsel moved to withdraw, and in an in camera hearing, stated that defendant insisted on giving testimony that counsel believed would be perjured. Defendant joined in the request, telling the court that if counsel himself did not feel that he could do a good job, defendant likewise felt that he could not. The trial judge denied the motion. Defendant then pleaded no contest, and on appeal, challenged the judge's ruling. *Held*, there was no abuse of discretion.

(a) The statutes and Rules of Professional Conduct make it clear that an attorney owes no duty to offer on the client's behalf testimony that is untrue, and that it is "appropriate under California law, even necessary," for the attorney to present a request to withdraw. (203 C.A.3d 1339.)

(b) When a motion to withdraw is made, the judge must balance the defendant's rights with the obligations of counsel and the orderly processes of the judicial system: (1) The judge must consider the defendant's fundamental right to testify even if contrary to counsel's advice, and must also consider the defendant's constitutional right to assistance of court-appointed counsel. (2) However, "[a] criminal defendant cannot be allowed to bring the judicial system to a halt, and endlessly avoid trial by using the simple expedient of informing defense counsel on the eve of trial that he or she intends to commit perjury at trial, thereby requiring counsel to move to withdraw, the court to grant the motion and continue the trial to allow the new counsel to prepare." (203 C.A.3d 1340.)

(2) *Options for Criminal Defense Attorney.* In *People v. Johnson* (1998) 62 C.A.4th 608, 72 C.R.2d 805, the court identified the following options available to a criminal defense attorney faced with an ethical conflict concerning

possible perjury by the client:

(a) Cooperating in presenting the defendant's testimony even when the defendant intends to commit perjury. (62 C.A.4th 620.)

(b) Persuading the defendant not to commit perjury. (62 C.A.4th 621.)

(c) Withdrawing from representation. (62 C.A.4th 622.)

(d) Disclosing the perjury to the court. (62 C.A.4th 623.)

(e) Allowing the defendant to testify using a narrative approach. (62 C.A.4th 624.)

(f) Refusing to permit the defendant to testify. (62 C.A.4th 625.)

After discussing each, the court concluded that the *narrative approach* represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's obligation not to participate in the presentation of perjured testimony. It permits the defendant to tell the jury the defendant's version of what occurred and allows the attorney to play a passive role. (62 C.A.4th 608.) *People v. Guzman* (1988) 45 C.3d 915, 248 C.R. 467, 755 P.2d 917, and *People v. Gadson* (1993) 19 C.A.4th 1700, 24 C.R.2d 219, both involving ineffective assistance of counsel, expressly approved use of the narrative approach. (62 C.A.4th 626.)

However, the narrative approach is but one option. In *People v. Jennings* (1999) 70 C.A.4th 899, 83 C.R.2d 33, defendant elected to testify regarding his alleged participation in several robberies. Defense counsel advised the trial judge that although he had told defendant "certain ethical conflicts and considerations" would limit his direct examination, defendant still wished to testify. The trial judge declined to question defendant and stated on the record that, essentially, he was satisfied with defense counsel's approach. In finding that defendant was not denied effective assistance of counsel, the court reviewed the options outlined in *Johnson* and stated: "Here, defense counsel appears to have believed he had persuaded Jennings to testify truthfully to the limited questions he was asking on direct examination. Counsel chose this solution to the conflict dilemma and represented to the court that Jennings agreed with such solution. While we would have preferred the court inquire personally of Jennings as to his understanding and agreement with counsel's representations, we cannot find the failure to do so prejudicial on this record. Although we determined in *Johnson* that 'the narrative approach best accommodates the competing interests of the defendant's constitutional right to testify and the attorney's ethical obligations' ... such is clearly not the only approach available under all circumstances that will accommodate those rights. ... We thus assume counsel considered the alternatives, chose the one he could ethically live with and discussed the matter with Jennings before Jennings decided to testify with limited questioning." (70 C.A.4th 908.)

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2. Voluntary Withdrawal by Attorney.

c. Legal Service Agency Attorney.

1 Witkin Cal. Proc. Attys § 74

[§ 74] Legal Service Agency Attorney.

A reduction in public funding of a legal service agency may create a serious ethical dilemma for agency attorneys whose ability to represent indigent clients is jeopardized. Thus, *C.C.P. 285.2* et seq. allow court-authorized withdrawal as follows:

(1) When reduced public funding "materially impairs a legal service agency attorney's ability to represent an indigent client," the court, on its own motion or that of the client or the attorney, must permit the attorney to withdraw on a showing that: (a) public funds are inadequate to continue effective representation of the client; (b) a good faith effort to find alternate representation was made; and (c) all reasonable steps to reduce legal prejudice to the client have been taken. (*C.C.P. 285.2.*)

(2) The client's indigency is not of itself sufficient cause to deny the request for withdrawal. (*C.C.P. 285.2.*)

(3) On granting the motion to withdraw, and in order to avoid legal prejudice caused by the withdrawal, the court may toll the running of any applicable statute of limitations, filing requirement, statute providing for mandatory dismissal, notice of appeal, or discovery requirement for up to 90 days. (*C.C.P. 285.3.*)

(4) On a showing of good cause, the court may appoint counsel to represent the indigent client without compensation. However, the attorney may recover any attorneys' fees and costs to which the client may be entitled. (*C.C.P. 285.4.*) (On factors court may consider in determining whether good cause exists, see *C.C.P. 285.4.*)

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3. Discharge of Attorney by Client.

a. Absolute Right To Discharge.

1 Witkin Cal. Proc. Attys § 75

[§ 75] Absolute Right To Discharge.

The same agency principles that permit an attorney to terminate an agency are applicable to the client. Here, however, there is no control by the court; the client's power to discharge the attorney, with or without cause, is recognized by *C.C.P. 284* as absolute. The leading case of *Gage v. Atwater* (1902) 136 C. 170, 68 P. 581, explains the rule as follows: "The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney. ... The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right." (136 C. 172.) The following cases are to the same effect:

Kirk v. Culley (1927) 202 C. 501, 505, 261 P. 994 ["This is true not alone under the law of agency, but is supported also by a well understood rule of public policy"].

Scott v. Superior Court (1928) 205 C. 525, 527, 271 P. 906 ["The petitioner has an absolute right to change her attorneys, in the absence of any relation of the attorneys to the subject matter of the action, and it is necessary only for her to request such change in order to justify the court in making an order therefor"].

Estate of Cazaurang (1934) 1 C.2d 712, 713, 36 P.2d 1069 ["We are not at liberty to weigh the reasons which may have prompted petitioner to ask for a change of her attorneys. Our only duty is to pass upon her legal right to make such change"].

Estate of Hardenberg (1936) 6 C.2d 371, 57 P.2d 914 [substitution order despite affidavit of attorney that client had been bribed or blackmailed into requesting it].

Echlin v. Superior Court (1939) 13 C.2d 368, 371, 90 P.2d 63 ["the right to an order of substitution would exist without section 284"].

Houghton v. Coberly (1962) 201 C.A.2d 820, 822, 20 C.R. 489 [executor's right to discharge attorney for estate]; *Estate of McManus* (1963) 214 C.A.2d 390, 396, 29 C.R. 543 [same].

Meadow v. Superior Court (1963) 59 C.2d 610, 616, 30 C.R. 824, 381 P.2d 648 [dissolution action].

If the discharge is without cause, the attorney has a right to recover fees (infra, §215 et seq.). Further, a third person who wrongfully procures the discharge may be liable for interference with contract. (*Herron v. State Farm Mut. Ins. Co.* (1961) 56 C.2d 202, 14 C.R. 294, 363 P.2d 310, 5 Summary (10th), *Torts*, §756; see 90 A.L.R.4th 621 [liability for interference with attorney-client relationship].)

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b. Power Coupled With Interest.

1 *Witkin Cal. Proc. Attys* § 76

[§ 76] Power Coupled With Interest.

An exception to the client's absolute right to discharge the attorney where the attorney is more than an agent and has a power coupled with an interest is often mentioned in dicta but appears to be almost entirely academic. The right to receive a part of the proceeds of the litigation as compensation for services, whether through a contingent fee contract, assignment, lien, or other formal device, is not an interest that makes the agency irrevocable. (*Scott v. Superior Court* (1928) 205 C. 525, 531, 271 P. 906; *O'Connell v. Superior Court* (1935) 2 C.2d 418, 422, 41 P.2d 334; *Estate of Cazaurang* (1934) 1 C.2d 712, 714, 36 P.2d 1069; *Telander v. Telander* (1943) 60 C.A.2d 207, 210, 140 P.2d 204 [former C.C. 137.5 (now *Family C.* 272), authorizing payment of fees directly to attorneys in marital actions, does not change rule]; *Fields v. Potts* (1956) 140 C.A.2d 697, 295 P.2d 965 [after discharge, attorney cannot intervene in main action on theory that attorney has interest in subject matter]; 3 *Summary* (10th), *Agency and Employment*, §220.)

Thus, a contingent fee agreement with an express provision for a lien on the cause of action and judgment does not give the attorney a power coupled with an interest. Hence, the attorney cannot intervene in the client's pending action or make a motion to establish a lien on any prospective recovery; the sole means of enforcement is an independent action against the client after the contingency has occurred, i.e., after the client has recovered judgment. (*Bandy v. Mt. Diablo Unified School Dist.* (1976) 56 C.A.3d 230, 233, 234, 126 C.R. 890.)

An unusual power coupled with an interest was recognized in *Redevelopment Agency of San Francisco v. Superior Court* (1961) 195 C.A.2d 591, 16 C.R. 45. Petitioner, seeking to condemn land in the city of San Francisco for redevelopment, agreed with the city to use the services of its city attorney. Then petitioner sought to substitute petitioner's own attorney. *Held*, because the project vitally affected the social and economic interests of the city, the authority of the city attorney to handle the litigation was coupled with an interest that precluded the city attorney's discharge. (195 C.A.2d 594.)

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4. Unwarranted Discharge by Court.

1 Witkin Cal. Proc. Attys § 77

[§ 77] Unwarranted Discharge by Court.

In *Cloer v. Superior Court* (1969) 271 C.A.2d 143, 76 C.R. 217, following an automobile collision between C and S, three actions were filed against them. C and S had the same insurer who engaged different attorneys for each defendant. The attorneys represented their clients to everyone's satisfaction, but one plaintiff moved for severance of the consolidated cases on the ground that defendants C and S were insured by the same company. The trial judge denied the motion for severance, and on his own motion and against objection of C and S, discharged their attorneys, leaving C and S without the representation to which their policies entitled them. *Held*, mandamus granted to compel setting aside the order and to permit representation by counsel as before. An attorney may represent parties with possibly conflicting interests if, after full disclosure, the parties consent to the dual representation (see *infra*, §130). Because there was no ethical violation and the parties were satisfied, the court's order was in excess of jurisdiction. (271 C.A.2d 145, 146.) (On similar holding in criminal case, see *Smith v. Superior Court* (1968) 68 C.2d 547, 68 C.R. 1, 440 P.2d 65, 5 Cal. Crim. Law (3d), *Criminal Trial*, §185.)

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5. Substitution of Attorneys.

a. Necessity of Formal Substitution.

1. Former Attorney's Authority.

1 Witkin Cal. Proc. Attys § 78

[§ 78] Former Attorney's Authority.

The representation by an attorney in pending litigation may terminate by operation of law, withdrawal, or discharge. (See *Hensley v. Caietti* (1993) 13 C.A.4th 1165, 1170, 16 C.R.2d 837, quoting the text; *Worthington v. Rusconi* (1994) 29 C.A.4th 1488, 1498, 35 C.R.2d 169 [continuity of representation depends not on client's subjective beliefs but on evidence of ongoing *mutual* relationship and activities in furtherance of relationship]; *supra*, §66 et seq.) However, the former attorney remains counsel of record, and has apparent authority to bind the client if opposing counsel has no knowledge of the termination. (See *Reynolds v. Reynolds* (1943) 21 C.2d 580, 584, 134 P.2d 251 [service of papers on old attorney, after final judgment of divorce, in proceedings to increase support award, was proper; court had continuing jurisdiction and litigation was deemed still pending]; *People v. Bouchard* (1957) 49 C.2d 438, 441, 317 P.2d 971 [prosecution's appeal from order setting aside information; opening brief was properly served on R, defendant's attorney of record, notwithstanding R's objection that she had no arrangements to represent defendant on appeal]; *Sherman v. Panno* (1954) 129 C.A.2d 375, 379, 277 P.2d 80 [notice of entry of judgment for plaintiff, mailed to defendants' former attorney before notice of substitution was received by plaintiff's attorney, was effective to start statutory time running on court's power to grant new trial]; *In re Marriage of Borson* (1974) 37 C.A.3d 632, 637, 112 C.R. 432, 11 Summary (10th), *Husband and Wife*, §9 [attorney discharged by client-wife could nevertheless move for attorneys' fees prior to formal substitution].)

In *People v. Hook* (1967) 248 C.A.2d 618, 56 C.R. 683, defendant landowner engaged attorney D to represent her in the state's action to condemn property for a freeway. D successfully negotiated an agreement to condemn additional property so as to give defendant a frontage road. Pursuant to the agreement, the action was dismissed and a new action was commenced to condemn the larger parcel. Defendant then advised D that his services were no longer required. D stated that an answer had to be filed, and filed it. Defendant then did nothing for 10 months until the time of the trial, when she contended that D had not been authorized to accept service in the second action or to represent her. *Held*, condemnation judgment affirmed. (a) The employment covered all matters pertaining to "the proposed acquisition of said real property," and hence continued despite the dismissal of the first action for technical reasons. (b) D's ostensible authority continued, and could be relied on by opposing counsel and the court, as defendant made no attempt to comply

with *C.C.P. 284* and *285*, the purpose of which is "to guide the courts and protect opposing litigants from just such behind the scenes activities as those involved here." (*248 C.A.2d 624.*)

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a. Necessity of Formal Substitution.

2. New Attorney's Authority.

1 *Witkin Cal. Proc. Attys* § 79

[§ 79] New Attorney's Authority.

(1) *Formal Substitution or Waiver.* The newly appointed attorney will not be recognized by the courts, and the attorney's acts will be ineffective, until formally substituted as the attorney of record or unless the opposing party, by dealing with the new attorney as an attorney, waives the failure to substitute. (See *McMunn v. Lehrke* (1915) 29 C.A. 298, 307, 155 P. 473; *Estate of Morgan* (1928) 94 C.A. 617, 620, 271 P. 762 [controversy over apportionment of fees between attorneys of record and respondent attorney engaged by administrator; formal substitution waived]; *Davis v. Rudolph* (1947) 80 C.A.2d 397, 402, 181 P.2d 765 [waiver]; *In re Marriage of Warner* (1974) 38 C.A.3d 714, 720, 113 C.R. 556, citing the text.)

In *Ross v. Ross* (1953) 120 C.A.2d 70, 74, 260 P.2d 652, where a waiver was shown, it was suggested that the trial judge has discretion to allow a special appearance by counsel in unusual circumstances. The appearance here was to set aside a default interlocutory divorce decree allowed improvidently by former counsel. (See *Carrara v. Carrara* (1953) 121 C.A.2d 59, 62, 262 P.2d 591 [substitution that consisted only of plaintiff's signed statement effecting substitution and not otherwise complying with statutory requirements was deemed sufficient where substitution was clearly intended, parties knew of change, and no one was misled]; *Baker v. Boxx* (1991) 226 C.A.3d 1303, 277 C.R. 409 [amended complaint filed and served by new attorney was effective to fulfill service of process requirements, even though new attorney had not filed and served formal substitution; actual authority was clear and adverse party was not misled; following *Carrara*].)

(2) *Associating Additional Counsel.* A distinction is made where the attorney of record is not discharged and superseded by new counsel, but simply associates another attorney. The *associate*, though the name does not appear of record, is an authorized representative of the client, and can act on the client's behalf without the formal procedure of substitution. (*Wells Fargo & Co. v. San Francisco* (1944) 25 C.2d 37, 43, 152 P.2d 625, *supra*, §45; see C.E.B., 1 Civil Proc. Before Trial 4th, §§4.15 et seq., 4.61.)

(3) *Jurisdictional Notice of Appeal.* The most serious consequences of failure to substitute appeared in the decisions dealing with the jurisdictional notice of appeal and notice of motion for new trial. Early cases required signing by the

attorney of record, and, if new counsel for the appellant or moving party had not been formally substituted, the new attorney's signature on the notice was wholly ineffective. (See *McMahon v. Thomas* (1896) 114 C. 588, 591, 46 P. 732 [notice of motion for new trial]; *Jackson v. Jackson* (1945) 71 C.A.2d 837, 838, 163 P.2d 780 [notice of appeal].) The Appellate Rules eliminate this danger in appeals by providing that the notice be signed by "[t]he appellant or by the appellant's attorney." (C.R.C., Rule 8.100(a)(1); see C.R.C., Rule 8.304 [appeal in noncapital criminal case].) Hence, a notice is sufficient if signed by an authorized attorney, though not of record. (*Estate of Hultin* (1947) 29 C.2d 825, 832, 178 P.2d 756; see 9 Cal. Proc. (5th), Appeal, §573.)

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5. Substitution of Attorneys.

b. Procedure.

1. In General.

1 Witkin Cal. Proc. Attys § 80

[§ 80] In General.

When substituted, the new attorney "steps into the place of his predecessor, and stands, with reference to the case and to the other party, precisely as did his predecessor." (*Smith v. Whittier* (1892) 95 C. 279, 289, 30 P. 529.) Substitution may be made in either of two ways:

(1) By *consent* of both client and attorney, filed with the clerk, or entered on the minutes. (*C.C.P.* 284(1); see Judicial Council Form No. MC-050 [Substitution of Attorney-Civil (Without Court Order)]; C.E.B., 1 Civil Proc. Before Trial 4th, §4.5; C.E.B., Civil Litigation Forms Manual, §3.1; 2C Am.Jur. P.P. Forms (2000 ed.), Attorneys at Law, Forms 100, 101.)

(2) By *noticed motion or application* of either client or attorney, followed by order of the court. (*C.C.P.* 284(2); see Judicial Council Form No. MC-051 [Notice of Motion and Motion To Be Relieved As Counsel--Civil]; Judicial Council Form No. MC-052 [Declaration In Support of Attorney's Motion To Be Relieved As Counsel--Civil]; Judicial Council Form No. MC-053 [Order Granting Attorney's Motion To Be Relieved As Counsel--Civil]; C.E.B., 1 Civil Proc. Before Trial 4th, §§4.7 et seq., 4.57; C.E.B., Civil Litigation Forms Manual, §3.3 et seq.; 2C Am.Jur. P.P. Forms (2000 ed.), Attorneys at Law, Form 104 et seq.)

Ordinarily, the trial court has no authority to deny a party's application for substitution of attorneys, and mandamus will lie to compel the order. (See *Scott v. Superior Court* (1928) 205 C. 525, 531, 271 P. 906; *O'Connell v. Superior Court* (1935) 2 C.2d 418, 421, 41 P.2d 334; *Hock v. Superior Court* (1990) 221 C.A.3d 670, 672, 270 C.R. 579 [local rule that required "leave of court" for consensual substitutions after trial setting conference conflicted with *C.C.P.* 284(1) and was void].) In limited circumstances, substitution may be denied. (See *Rundberg v. Belcher* (1897) 118 C. 589, 50 P. 670 [petition for mandamus denied; its allegations, narrowly construed, failed to show statutory 5-day notice of motion served on former attorney]; *Torres v. Friedman* (1985) 169 C.A.3d 880, 887, 215 C.R. 604, supra, §71 [guardian ad litem for minor may not consent to substitution of himself as attorney in pro. per. without approval of court].)

In a criminal case, a change of attorneys by consent under *C.C.P. 284(1)* occurs only when the person substituted in actually intends to act as an attorney. (See *In re Jackson* (1985) 170 C.A.3d 773, 780, 781, 216 C.R. 539 [where defendant did not intend to represent himself, filing of substitution that substituted defendant as attorney in pro. per., even though signed by both attorney and defendant, was properly treated as motion to withdraw under *C.C.P. 284(2)*, which required court approval and was denied].)

Because a California attorney apparently has no common law lien (see *infra*, §166), the court cannot make substitution conditional on the client's payment of compensation. The attorney's remedy is an action against the client for damages for breach or for the reasonable value of the attorney's services. (*Echlin v. Superior Court* (1939) 13 C.2d 368, 373, 90 P.2d 63.)

Substitution in a matter pending in an appellate court is governed by C.R.C., Rule 8.36(b), which requires an attorney to file a motion to withdraw. (See *Wright v. Security-First Nat. Bank of Los Angeles* (1939) 13 C.2d 139, 140, 88 P.2d 125; *Estate of Cazaurang* (1934) 1 C.2d 712, 717, 36 P.2d 1069; 9 Cal. Proc. (5th), Appeal, §25.)

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b. Procedure.

2. Notice of Substitution.

1 Witkin Cal. Proc. Attys § 81

[§ 81] Notice of Substitution.

When substitution is effected by consent or order under *C.C.P. 284* (supra, §80), notice must be given to the adverse party; until given, the adverse party must continue to recognize the former attorney. (*C.C.P. 285*; see *Sherman v. Panno* (1954) 129 C.A.2d 375, 378, 277 P.2d 80 [counsel for adverse party properly deals with former attorney, notwithstanding mailing of notice of substitution, until notice is actually received]; Judicial Council Form No. MC-050 [Substitution of Attorney--Civil (Without Court Order)]; C.E.B., 1 Civil Proc. Before Trial 4th, §§4.6, 4.55; C.E.B., Civil Litigation Forms Manual, §3.1; 2C Am.Jur. P.P. Forms (2000 ed.), Attorneys at Law, Form 103 et seq.)

While substitution of counsel on the date of a hearing is technically defective, the trial court has discretion to overrule an objection that is based on the failure to comply with *C.C.P. 284* where there is no showing that "the late filing of the substitution misled anyone or caused any prejudice." (*In re Marriage of Warner* (1974) 38 C.A.3d 714, 720, 113 C.R. 556.)

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6. Cessation of Law Practice.

a. Notice of Discipline.

1 Witkin Cal. Proc. Attys § 82

[§ 82] Notice of Discipline.

C.R.C., Rule 9.20 (former C.R.C., Rule 955) enables the California Supreme Court to require an attorney who has been disbarred, suspended, or who has resigned from practice while discipline is pending to take steps to ensure that the law practice is not left unattended as a consequence of the discipline.

(1) *Order.* The court may order the attorney (a) to notify all clients and cocounsel of the effective date of the attorney's disqualification to practice and, if a client has no other counsel, to notify the client to seek legal advice elsewhere, calling attention to any urgency in seeking substitute counsel; (b) to deliver to all clients their papers and property, or to notify them or their counsel when and where they may be obtained, calling attention to any urgency for obtaining them; (c) to refund all advanced but unearned fees; and (d) when pending litigation is affected, to notify opposing counsel (and unrepresented adverse parties) of the attorney's disqualification, and to file a copy of the notice with the appropriate court, agency, or tribunal. (C.R.C., Rule 9.20(a).) (For examples of orders, see *Lewis v. State Bar* (1973) 9 C.3d 704, 715, 108 C.R. 821, 511 P.2d 1173; *Schullman v. State Bar* (1973) 10 C.3d 526, 541, 111 C.R. 161, 516 P.2d 865; *Brody v. State Bar* (1974) 11 C.3d 347, 351, 113 C.R. 371, 521 P.2d 107; *Bushman v. State Bar* (1974) 11 C.3d 558, 570, 113 C.R. 904, 522 P.2d 312; *In re Silverton* (2005) 36 C.4th 81, 95, 29 C.R.3d 766, 113 P.3d 556.)

(2) *Manner of Notice.* All notices must be given by registered or certified mail, return receipt requested, and must designate an address for future communications. (C.R.C., Rule 9.20(b).)

(3) *Proof of Compliance.* Within the time prescribed by the court, an affidavit of compliance with the order must be filed with the clerk of the State Bar Court. The affidavit must designate an address for future communications. (C.R.C., Rule 9.20(c).)

(4) *Effect of Noncompliance.* Wilful failure to comply with the order is a ground for denial of reinstatement or readmission, or for disbarment, suspension, or revocation of probation of a suspended attorney. It may also be punished as a contempt or a crime. (C.R.C., Rule 9.20(d).) "Wilful" implies merely a purpose or willingness to commit the act or make the omission--as in contempt proceedings; bad faith is not a prerequisite to a finding of wilful failure to comply. (*Durbin v. State Bar* (1979) 23 C.3d 461, 467, 152 C.R. 749, 590 P.2d 876.)

(5) *Disciplinary Proceedings*. The Rules of Procedure of the State Bar govern proceedings for violations of C.R.C., Rule 9.20. (*Rules of Procedure, Rule 580* et seq.)

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Witkin Summary of California Law

II. ATTORNEY-CLIENT RELATIONSHIP

B. Termination of Relationship.

6. Cessation of Law Practice.

b. Statutory Protection of Clients and Others.

1. Nature and Scope of Statutes.

1 Witkin Cal. Proc. Attys § 83

[§ 83] Nature and Scope of Statutes.

(1) *In General.* C.R.C., Rule 9.20 (supra, §82) does not cover cases where clients are left unrepresented for reasons other than attorney discipline, does not ensure that substitute counsel will actually be obtained, does not protect the interests of third parties who might be affected by the lack of representation, and merely provides for additional discipline if its terms are not observed. *B. & P.C. 6180* et seq. solves that problem by permitting the superior court to assume jurisdiction when an attorney ceases practice. *B. & P.C. 6190* et seq. apply specifically to the assumption of jurisdiction over the practice of an incapacitated attorney. (See *infra*, §88.) *B. & P.C. 6185* authorizes the appointment of a practice administrator. (See *infra*, §87.)

(2) *Application of Statute.* When an attorney "dies, resigns, becomes an inactive member of the State Bar, is disbarred, or is suspended from the active practice of law and is required by the order of suspension to give notice of the suspension," a notice of cessation must be given (*infra*, §84), and the superior court may assume jurisdiction over the affected attorney's law practice (*infra*, §85 et seq.). (*B. & P.C. 6180.*) Thus, the statutory provisions apply whenever an attorney ceases law practice for the reasons stated and despite the attorney's compliance with an order under C.R.C., Rule 9.20 (*supra*, §82).

B. & P.C. 6180 et seq. do not apply to law partnerships and law corporations unless all partners or all shareholders cease practicing; nor do they apply to "legal services rendered as an employee, or under a contract which does not create the relationship of lawyer and client." (*B. & P.C. 6180.14.*) (On limitations on liability under *B. & P.C. 6180* et seq., see *B. & P.C. 6180.11.*)

In *Benninghoff v. Superior Court* (2006) 136 C.A.4th 61, 38 C.R.3d 759, B, an attorney who had resigned from practice with charges pending, represented professional licensees in state administrative hearings and federal prisoners in prison transfer applications. He solicited business through direct mail and the Internet, advertising his services as a "professional advocate." The California Medical Board eventually asked the State Bar to clarify whether B could represent parties in administrative hearings. While the State Bar investigated, two administrative law judges ruled that B was practicing law and granted petitions to disqualify B. On application from the State Bar, the trial court assumed

jurisdiction over B's practice under *B. & P.C. 6180* et seq. B petitioned for an extraordinary writ and partial stay to permit him to continue representing federal prisoners. *Held*, writ granted as to B's federal practice. California law bars B from practicing before state administrative boards. (*136 C.A.4th* 68.) However, the State Bar Act does not regulate federal practice. Thus, the court could not assume jurisdiction over B's federal practice; federal regulations govern and preempt California law prohibiting the unauthorized practice of law. (*136 C.A.4th* 74.)

(3) *Orders Are Not Appealable*. An order made under *B. & P.C. 6180* et seq. is not appealable, and may not be stayed by petition for a writ except as ordered by the superior court or the appellate court. (*B. & P.C. 6180.13*.)

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2. Notice of Cessation.

1 Witkin Cal. Proc. Attys § 84

[§ 84] Notice of Cessation.

(1) *Content.* The notice of cessation must contain the information required by any order disbarring, suspending, or accepting the resignation of the attorney, by any rule of the Supreme Court, Judicial Council, or State Bar, and by any order of a court having jurisdiction under *B. & P.C. 6180* et seq. or *6190* et seq. relating to incapacitated attorneys (infra, §88). Notices to courts and agencies must identify the pending matters affected by the lack of representation. (*B. & P.C. 6180.1.*)

(2) *Who Must Give Notice.* If the attorney is dead or incompetent, the attorney's personal representative, guardian, or conservator must give the notice; in other cases the affected attorney or someone authorized by the attorney must do so. If none of these is available, notice must be given by the person having custody and control of the attorney's files and records. (*B. & P.C. 6180.1.*)

(3) *Who Must Receive Notice.* The notice must be mailed to all persons having reason to be informed including existing clients, opposing counsel, courts and agencies in which the attorney has pending matters, any malpractice insurer, and the State Bar's Office of the Chief Trial Counsel. Regular mail is sufficient. (*B. & P.C. 6180.1.*)

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aa. Grounds and Procedure.

1 Witkin Cal. Proc. Attys § 85

[§ 85] Grounds and Procedure.

(1) *Application.* Despite compliance with the notice requirements of *B. & P.C. 6180.1* (supra, §84), a client, the State Bar, or an interested person or entity may request the superior court of the county where the attorney maintains or last maintained his or her practice, or where the attorney resides, to assume jurisdiction over the law practice or the court may do so on its own motion. (*B. & P.C. 6180.2*.) The specified applicants do not include opposing counsel, courts and agencies, or malpractice insurers, although they are entitled to notice under *B. & P.C. 6180.1*. (See supra, §84.)

The verified application must show (a) the death, disability, disqualification, etc., required by *B. & P.C. 6180*, and (b) facts supporting a belief that either (1) an unfinished client matter is unattended by other counsel, or (2) the interests of one or more clients or other interested persons or entities will be prejudiced if jurisdiction is not assumed. (*B. & P.C. 6180.3*.)

In a proceeding under *B. & P.C. 6180* et seq., the State Bar may intervene and assume primary responsibility for conducting the action. (*B. & P.C. 6180.2*.) (On assumption of jurisdiction over law practice following determination that person practicing was not member of State Bar, see *infra*, §405.)

(2) *Order To Show Cause and Interim Orders.* An order to show cause may be served on the attorney, personal representative, or custodian of the files and records, with a copy of the application, by personal delivery or by certified or registered mail, return receipt requested; if the State Bar is not the applicant, copies must be served in a similar manner on the State Bar's Office of the Chief Trial Counsel. The court may prescribe additional or alternative means of service and notice. (*B. & P.C. 6180.4*.)

If the court finds that it is probable that the application will be granted, and that delay will result in substantial injury to clients or others, the court may make interim orders, without notice or with notice as it deems appropriate. Orders must be served in the same manner as the order to show cause. If the application and order to show cause have not been served, they must be served with the interim order. (*B. & P.C. 6180.8*.)

(3) *Hearing and Assumption of Jurisdiction.* If the person served does not appear, the court may act on the verified application, or may require additional proof. On finding that the matters stated in the application are true, the court may assume jurisdiction of the law practice and appoint one or more active members of the State Bar to act under its direction. (*B. & P.C. 6180.5.*) If there is a pending probate, guardianship, or conservatorship proceeding, the court, on reasonable notice to the legal representative, may determine that the legal representative is subject to the court's orders. (*B. & P.C. 6180.9.*)

For the limited purposes of *B. & P.C. 6180.5*, the court has jurisdiction over the files and records and law practice of the affected attorney and may make orders necessary or appropriate to exercise this jurisdiction. A copy of an order must be provided to the State Bar's Office of the Chief Trial Counsel. (*B. & P.C. 6180.5.*)

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bb. Duties of Appointed Counsel.

1 Witkin Cal. Proc. Attys § 86

[§ 86] Duties of Appointed Counsel.

(1) *Authorized Duties.* The court may order appointed counsel to do any of the following:

(a) Examine the files and records of the law practice, and obtain information regarding pending matters that require attention. (*B. & P.C. 6180.5(a).*)

(b) Notify apparent clients of the attorney of the reason for the cessation of the law practice and inform them that it may be to their best interest to obtain other legal counsel. (*B. & P.C. 6180.5(b).*)

(c) Apply for an extension of time pending employment of other counsel by a client. (*B. & P.C. 6180.5(c).*)

(d) With the consent of a client who has not yet obtained other legal counsel, file notices, motions, and pleadings on behalf of the client where jurisdictional time limits are involved. (*B. & P.C. 6180.5(d).*)

(e) Give notice to appropriate persons and entities who may be affected, other than clients, of the cessation of the law practice. (*B. & P.C. 6180.5(e).*)

(f) Arrange for the surrender or delivery of clients' papers or property. (*B. & P.C. 6180.5(f).*)

(g) Arrange for the appointment of a receiver, where applicable, to take possession and control of bank accounts relating to the affected attorney's practice, including the general or office account and the clients' trust account. (*B. & P.C. 6180.5(g).*)

(h) Do other acts as the court may direct. (*B. & P.C. 6180.5(h).*)

(2) *Limitations.* Appointed counsel may not approve or disapprove of the employment of legal counsel, fix terms of legal employment, fix the compensation that may have been earned by the affected attorney, or supervise or conduct the

law practice; nor may appointed counsel, or counsel's partners, associates, or law corporation, accept employment as attorney for a client of the affected attorney, without prior court approval, except to the extent provided by *B. & P.C. 6180.5(c), (d).* (*B. & P.C. 6180.6, 6180.7.*)

(3) *Disclosures and Attorney-Client Privilege.* Appointed counsel must make disclosures only to the extent necessary to carry out the purposes of *B. & P.C. 6180* et seq. The attorney-client privilege extends to actions taken, and to communications by or to the appointed counsel, to the same extent it would have applied to communications by or to the affected attorney. (*B. & P.C. 6180.10.*)

(4) *Compensation and Expenses.* Appointed counsel generally must serve without compensation but is reimbursed for necessary expenses, as determined by the court, from the State Bar. The State Bar, in turn, may seek reimbursement from the affected attorney or the attorney's estate. The State Bar, in its discretion, may pay reasonable compensation to appointed counsel in cases where the State Bar determines that it was necessary for counsel to devote extraordinary time and services. (*B. & P.C. 6180.12.*)

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cc. Practice Administrator.

1 *Witkin Cal. Proc. Attys* § 87

[§ 87] Practice Administrator.

(1) *Appointment. B. & P.C. 6185* authorizes the superior court to appoint a practice administrator to take control of the practice of a disabled or deceased attorney when petitioned to do so by (1) the conservator of a disabled attorney (*Prob.C. 2468*), (2) the personal representative of a deceased attorney's estate (*Prob.C. 9764*), or (3) a trustee or trust beneficiary concerning the internal affairs or existence of a trust composed of the economic interests of the practice of a disabled or deceased attorney (*Prob.C. 17200(b)(22), (b)(23)*). (On petition and surety bond requirements, see *Prob.C. 2468* and *9764*.)

The practice administrator may not be the attorney representing the conservator or the personal representative. (*Prob.C. 2468(e), 9764(e)*.) However, the court must appoint an attorney nominated by the disabled or deceased attorney in a writing, including a will, unless to do so would be contrary to the best interests of the estate or create a conflict of interest among clients of the disabled or deceased attorney. (*Prob.C. 2468(f), 9764(f)*.)

(2) *Powers.* The practice administrator must be an active member of the State Bar, and may be granted one or more of the following powers with respect to the disabled or deceased attorney's practice:

(a) Take control of client trust accounts, business assets, equipment, client directories, and premises used in the practice. (*B. & P.C. 6185(a)(1)*.)

(b) Take control of and review client files. (*B. & P.C. 6185(a)(2)*.)

(c) Contact affected clients, if reasonably ascertainable, to advise them of conditions and the appointment of the practice administrator. (*B. & P.C. 6185(a)(3)*.)

(d) For pending cases, notify the appropriate courts and administrative bodies and opposing counsel and obtain additional time for new counsel for the affected clients. (*B. & P.C. 6185(a)(4)*.)

(e) Determine and pay liabilities from the assets of the practice. If the assets are insufficient, the practice administrator must apply to the personal representative for additional funds. If the amount needed is disputed, the practice administrator may apply to the court having jurisdiction over the estate for an order requesting funds from the estate. (*B. & P.C. 6185(a)(5).*)

(f) Employ persons as needed, including employees of the disabled or deceased attorney, to assist in the management, winding up, and disposal of the practice. (*B. & P.C. 6185(a)(6).*)

(g) Create a plan for disposition of the practice and, subject to the approval of the personal representative of the estate, agree to the sale of the practice and its goodwill. (*B. & P.C. 6185(a)(7).*)

(h) Subject to the approval of the personal representative of the estate, agree with successor counsel for applicable division of fees. (*B. & P.C. 6185(a)(8).*)

(i) Act as successor counsel for an affected client, subject to the prohibitions against soliciting cases. (*B. & P.C. 6185(a)(9).*)

If uncertain how to proceed, the practice administrator may seek instructions from the court having jurisdiction over the estate. (*B. & P.C. 6185(b).*)

(3) *Compensation.* The practice administrator may be compensated from the assets of the law practice for reasonable and necessary services and costs, but only on order of the appointing court. If assets are insufficient, the services are charged against the estate as a cost of administration. (*Prob.C. 2468(g), 9764(g).*)

(4) *Accounting.* On conclusion of services, the practice administrator must render to the appointing court an accounting and petition for approval. (*Prob.C. 2468(h), 9764(h).*)

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dd. Incapacitated Attorneys.

1 Witkin Cal. Proc. Attys § 88

[§ 88] Incapacitated Attorneys.

(1) *Grounds.* *B. & P.C. 6190* et seq. empower superior courts to assume jurisdiction over the practice of an attorney who is incapacitated. The statute applies where alcohol or drug abuse, physical or mental illness, or other reason has rendered an attorney unable to provide adequate legal services and there is an unfinished client matter for which no other attorney has taken responsibility. (*B. & P.C. 6190.*)

(2) *Application.* An application to assume jurisdiction over the attorney's law practice may be made to the superior court in the county where the attorney maintains or last maintained a practice, or where the attorney resides. (*B. & P.C. 6190.1(a).*) Where the attorney consents to assumption by the court of jurisdiction, the State Bar, a client, or an interested person or entity may make the application. The State Bar must be permitted to intervene and to assume primary responsibility for conducting the action. (*B. & P.C. 6190.1(b).*) If the attorney does not consent, only the State Bar may apply. (*B. & P.C. 6190.1(c).*)

The application must be verified and must state facts showing (a) probable cause to believe that the facts set forth in *B. & P.C. 6190* have occurred, (b) the applicant's interest, and (c) probable cause to believe that the interests of the client or of an interested person or entity will be prejudiced if the proceeding is not maintained. (*B. & P.C. 6190.2.*)

(3) *Hearing.* The application must be set for hearing, and copies of the application and the notice of hearing must be served on the attorney, on the attorney's guardian or conservator, if any, and on the State Bar's Office of the Chief Trial Counsel if the State Bar is not an applicant. The court may also require service on other persons and entities not specifically provided for. (*B. & P.C. 6190.3.*)

The proceeding is generally governed by *B. & P.C. 6180* et seq. (*B. & P.C. 6190.4*), may be maintained concurrently with a disciplinary investigation or proceeding (*B. & P.C. 6190.5*), and may be terminated on motion of any interested party (*B. & P.C. 6190.6*).

(4) *Orders*. The court may make orders as provided by *B. & P.C. 6180* et seq. (supra, §§85, 86) if it finds that the facts set forth in *B. & P.C. 6190* have occurred and that the interests of the client, or of an interested person or entity, will be prejudiced if the proceeding is not maintained. The court must provide a copy of any order to the State Bar's Office of the Chief Trial Counsel. (*B. & P.C. 6190.34*.)

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ee. Relief Available to Clients.

1 *Witkin Cal. Proc. Attys* § 89

[§ 89] Relief Available to Clients.

(1) *Extension of Limitations Period.* When an attorney's practice is taken over by the court under *B. & P.C. 6180* or *6190*, the time within which persons represented by the attorney may institute actions is extended by a period of 6 months from the date of entry of the order assuming jurisdiction, provided that the application for the court to assume jurisdiction was filed prior to expiration of the applicable limitations period. (*C.C.P. 353.1.*)

(2) *Relief From Adverse Action.* When a court has assumed jurisdiction of an attorney's practice under *B. & P.C. 6180* or *6190*, a party represented by the attorney may be granted relief, on terms as may be just, from a judgment, order, or other proceeding, including dismissal, taken against the party after the application to assume jurisdiction was filed. Application for relief must be made within a reasonable time, not to exceed 6 months, after the court takes jurisdiction over the practice. No affidavit or declaration of merits is required. (*C.C.P. 473.1.*)

In an action determining the ownership or right to possession of real or personal property, written notice may be personally served in California on the party and on the attorney appointed under *B. & P.C. 6180.5* (*supra*, §86), notifying the party and the appointed attorney that an order, judgment, or other proceeding was taken against the party and that any right to apply for relief will expire 90 days after service of the notice. An application for relief must then be made within 90 days after service on the party or the appointed attorney, whichever is later. (*C.C.P. 473.1.*)

(3) *Effect of Representation by Incapacitated Attorney.* In *People v. Hinkley* (1987) 193 C.A.3d 383, 238 C.R. 272, defendant, without his knowledge, was represented at his criminal trial by an attorney whose practice had been taken over by the superior court under *B. & P.C. 6190* et seq., and who had been enrolled as an inactive member under *B. & P.C. 6007(b)(2)* (*infra*, §350). *Held*, judgment of conviction reversed. The court, noting that *B. & P.C. 6190* and *6007* both relate to incompetency, held that defendant's counsel became incompetent as a matter of law when the court assumed jurisdiction over his practice, and that defendant was therefore denied his Sixth Amendment right to competent counsel. (193 C.A.3d 388, 389.) *C.C.P. 473.1*, allowing relief from any judgment without a showing on the merits where the court has assumed jurisdiction under *B. & P.C. 6190* et seq., further shows that defendant need not present

evidence of his counsel's incompetence in order to obtain relief. (*193 C.A.3d 390.*)

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III. FIDUCIARY OBLIGATIONS

A. In General.

1 Witkin Cal. Proc. Attys § 90

[§ 90] In General.

"The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity--*uberrima fides*." (*Cox v. Delmas* (1893) 99 C. 104, 123, 33 P. 836; see *Rader v. Thrasher* (1962) 57 C.2d 244, 250, 18 C.R. 736, 368 P.2d 360, *infra*, §94; *Ames v. State Bar* (1973) 8 C.3d 910, 916, 106 C.R. 489, 506 P.2d 625, *infra*, §514; *Rieck v. Chapman* (1927) 83 C.A. 735, 737, 257 P. 168 [client action for accounting; attorney kept no records of money received and exercised undue influence over naive client]; *Kornbau v. Evans* (1944) 66 C.A.2d 677, 685, 152 P.2d 651 [attorney, in taking client's money for investment, assumed duties of trustee]; *Rest.3d, The Law Governing Lawyers* §16(3); Rutter Group, Professional Responsibility, §3:1; Chap. 4; C.E.B., 1 Civil Proc. Before Trial 4th, §2.2 et seq.; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §141 et seq.)

Among the important incidents of the fiduciary relationship are the following:

(1) *Client's Confidence*. An attorney must respect a client's confidence. (See *B. & P.C. 6068(e)(1)* [attorney's duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"]; *Anderson v. Eaton* (1930) 211 C. 113, 116, 293 P. 788; *Solin v. O'Melveny & Myers, LLP* (2001) 89 C.A.4th 451, 457, 107 C.R.2d 456 [unless statute removes protection of attorney-client privilege for confidential communications, attorney as party plaintiff may not prosecute lawsuit if, in doing so, client confidences would be disclosed]; *Fox Searchlight Pictures v. Paladino* (2001) 89 C.A.4th 294, 314, 106 C.R.2d 906 [former in-house counsel may disclose employer-client confidences to his or her attorney in wrongful termination action against former employer without violating *B. & P.C. 6068(e)* when disclosures are relevant to preparation and prosecution of case and are necessary in determining whether those communications are admissible evidence under exception to attorney-client privilege]; *Rules of Professional Conduct, Rule 3-100(A)*, *infra*, §431; A.B.A. Model Rules of Professional Conduct, Rule 1.6; 2 *Cal. Evidence* (4th), *Witnesses*, §98 et seq. [privileged communications between attorney and client].)

An attorney may, but is not required to, reveal confidential client information when the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that is likely to result in death or substantial bodily harm to an individual. (*B. & P.C. 6068(e)(2)*.) (See *Rules of Professional Conduct, Rule 3-100(B)*, *infra*, §431.)

(2) *Interest in Property in Litigation*. An attorney must not purchase an interest in property in litigation adverse to a client; if the attorney does, the client may claim the benefit of the purchase. (*McArthur v. Goodwin* (1916) 173 C. 499,

503, 160 P. 679 [foreclosure action against client's property; attorney secretly purchased note and mortgage]; cf. *Tomblin v. Hill* (1929) 206 C. 689, 694, 275 P. 941 [rule stated, but client was barred by acquiescence and laches]; see *Rules of Professional Conduct*, Rule 3-300, *infra*, §§436, 437; A.B.A. Model Rules of Professional Conduct, Rule 1.8; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §196 et seq.; on requirement of disclosure in business dealings with client, and rule against representing adverse interests, see *infra*, §§91 et seq., 103 et seq.)

(3) *Duty of Loyalty*. An attorney, like a trustee, has a duty of loyalty to a client and the client's cause. (See *Flatt v. Superior Court* (1994) 9 C.4th 275, 278, 36 C.R.2d 537, 885 P.2d 950, *infra*, §113 [duty of loyalty to existing client negated any advisory duties when severing relationship with new client on learning that new client sought to sue existing client]; *Stanley v. Richmond* (1995) 35 C.A.4th 1070, 1089, 41 C.R.2d 768 [conflict was generated and duty of loyalty was compromised when attorneys for wife and husband in hotly contested divorce proceeding agreed to merge practices before final disposition of case]; *Mosier v. Southern Calif. Physicians Ins. Exchange* (1998) 63 C.A.4th 1022, 1044, 74 C.R.2d 550 [proceeding with joint defense without full and complete disclosure to clients and without their informed consent was breach of fiduciary duty]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §188 et seq.) This duty is most commonly emphasized in civil cases involving adverse representation (see *infra*, §103 et seq.) and in criminal cases involving representation of codefendants (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §190 et seq.).

(4) *Improper Personal Relationship*. An attorney should not become involved in an improper personal relationship with a client. (See *infra*, §101.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Client's Confidence*. In *Dietz v. Meisenheimer & Herron* (2009) 177 C.A.4th 771, 99 C.R.3d 464, plaintiff attorney referred client V to defendant law firm to handle V's bad faith insurance matter. V and defendant entered into a contingent fee agreement under which plaintiff was to receive 25% of the fee. The matter settled, defendant paid plaintiff far less than agreed, and plaintiff sought recovery on contract claims as well as a fraud cause of action. Although V provided waivers of the attorney-client privilege regarding most communications with defendant, and in particular negotiations of fees, V continued to assert confidentiality rights over discussions with and advice from V's nonparty tax attorney about the settlement proceeds and related tax documents, as well as discussions with defendant that were inconsistent with V's tax strategies involving the settlement. Prior to trial defendant sought a protective order, which also requested that plaintiff's action be dismissed in its entirety. Defendant argued that a complete defense was not possible without obtaining V's tax information because that evidence would prove that V, under the guise of tax strategies, forced a renegotiated fee agreement and that thus, defendant was not liable to plaintiff under the original fee agreement because V had not paid defendant as originally agreed. Following an evidentiary hearing, the trial court found that the terms of the fee agreements and modifications would be admissible based on the applicable waivers and that this was the key information necessary to prosecute and defend all of the causes of action except fraud. Confidential information possessed by defendant that was adverse to the tax advice given to V was relevant only to defendant's motives during the fee dispute with V, and was therefore relevant only to plaintiff's fraud cause of action. Thus, the trial court dismissed the fraud claim, allowed the remainder of plaintiff's causes of action, and granted the protective order. *Held*, refusal of the trial court to dismiss plaintiff's action in its entirety did not deprive defendant of due process even though ethical considerations barred defendant from presenting certain evidence.

(a) Under *Solin v. O'Melveny & Myers, LLP* (2001) 89 C.A.4th 451, 107 C.R.2d 456, text, p. 126, an attorney plaintiff may not rely on privileged information in proving his or her claim, and dismissal is required if that is plaintiff's only proof. But *Solin* does not prohibit a trial court from balancing competing interests before taking the drastic action of dismissal. Indeed, in considering whether a defendant's right to present a defense premised on confidential information requires dismissing an action, the trial court must also address the plaintiff's interest in bringing a meritorious claim that is not premised on confidential information. (177 C.A.4th 792.)

(b) Defendant failed to show that any information it had regarding V's tax planning was material to its defense. Even if it were relevant, it would only bear on plaintiff's fraud claims, and thus, its scope would be extremely narrow. Moreover, although defendant was given the opportunity and means to do so, defendant made no showing of exactly

what confidential information was involved. "Thus, at best, the trial court excluded only a narrow slice of evidence that was not directly relevant to the core issues of the case." (177 C.A.4th 796.)

(c) Unlike in *Solin*, plaintiff did not share confidential information with defendant, and the trial court properly distinguished *Solin* on this ground. Plaintiff never consulted with defendant and never communicated confidential material relevant to the core dispute; nor did defendant provide legal services to plaintiff based on confidential information about V. In addition, V waived confidentiality as to all communications with defendant regarding fee negotiations and reserved confidentiality only in the limited areas regarding tax planning. Therefore, it would not be fundamentally unfair to dismiss only the fraud action and to allow plaintiff to proceed on the remaining claims. (177 C.A.4th 798.)



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B. Business Dealing With Client.

1. Violation of Fiduciary Duties.

a. General Rule: Violation Is Presumed.

1 Witkin Cal. Proc. Attys § 91

[§ 91] General Rule: Violation Is Presumed.

At one time, the Civil Code applied the rules governing trustees to the fiduciary relationship between attorney and client, and provided that transactions between a trustee and a beneficiary, by which the trustee obtained any advantage from the beneficiary, were presumed to be entered into without sufficient consideration and under undue influence. (Former C.C. 2235.) This rule is restated in *Prob.C. 16004(c)*, which declares that transactions between a trustee and a beneficiary are presumed to violate the trustee's fiduciary duty. This presumption continues to apply to the attorney-client relationship. (See *Ramirez v. Sturdevant* (1994) 21 C.A.4th 904, 26 C.R.2d 554, *infra*, §98; *Lewin v. Anselmo* (1997) 56 C.A.4th 694, 701, 65 C.R.2d 682, citing the text [undue influence and violation of fiduciary duty are presumed in transaction between attorney and client]; 13 *Summary* (10th), *Trusts*, §§22, 66.)

A client who wishes to challenge a transaction on the ground of undue influence must raise the issue in the pleading. (See *Metropolis Trust & Savings Bank v. Monnier* (1915) 169 C. 592, 596, 147 P. 265 [insufficient to plead conclusions of law]; *Estate of Mallory* (1929) 99 C.A. 96, 103, 278 P. 488 [insufficient merely to plead existence of relationship; must allege facts of undue influence or fraud]; *Plxweve Aircraft Co. v. Greenwood* (1943) 61 C.A.2d 21, 24, 141 P.2d 933 [complaint was sufficient]; *Swanson v. Hempstead* (1944) 64 C.A.2d 681, 690, 149 P.2d 404 [total failure to attack validity of agreement]; 4 *Cal. Proc.* (5th), *Pleading*, §548; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §141 et seq.)

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1. Violation of Fiduciary Duties.

b. Scope of Rule.

1 Witkin Cal. Proc. Attys § 92

[§ 92] Scope of Rule.

In *Felton v. Le Breton* (1891) 92 C. 457, 28 P. 490, the court said: "While an attorney is not prohibited from having business transactions with his client, yet, inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of or intimately connected with the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect; and in any attempt by the attorney to enforce an agreement on the part of the client growing out of such transaction, the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised. ... In the words of Lord Eldon, he must make it manifest that he gave to his client 'all that reasonable advice against himself that he would have given him against a third person.' " (92 C. 469.)

In *Rebmann v. Major* (1970) 5 C.A.3d 684, 85 C.R. 399, attorney M, knowing that plaintiff's wife was seriously ill, advised the wife that she could sever the joint tenancies in her property by deeding the properties to M's children. As a result of this advice M obtained, without consideration, gift deeds purporting to convey the properties to M's children. The deeds were acknowledged, but M did not record them or disclose their existence until the donor was moribund, 4 years later. Plaintiff brought an action against M's children to recover the property. *Held*, judgment quieting title in plaintiff on the ground of undue influence affirmed. M argued that former C.C. 2235, which referred to "any advantage from his beneficiary," did not apply because the conveyance here went to M's minor children. However, it is an "advantage" to a parent for his or her children to receive valuable property that may be applied to the parent's responsibilities to maintain and educate those children. (5 C.A.3d 688.)

To enforce a contract with a client, the attorney must affirmatively show that it was fair, and that there was sufficient disclosure of relevant facts to permit the client to deal with full knowledge and understanding of the transaction. If the attorney fails to sustain this burden, the presumption is not overcome, and the contract is voidable at the election of the client. (*Clark v. Millsap* (1926) 197 C. 765, 783, 242 P. 918; *Estate of Witt* (1926) 198 C. 407, 419, 245 P. 197; *Carlson v. Lantz* (1929) 208 C. 134, 139, 280 P. 531; *Stieglitz v. Settle* (1920) 50 C.A. 581, 585, 195 P. 705; *Thornley v. Jones* (1929) 96 C.A. 219, 227, 274 P. 93; *Blattman v. Gadd* (1931) 112 C.A. 76, 92, 296 P. 681;

Shahabian v. Najarian (1936) 14 C.A.2d 435, 443, 58 P.2d 396; *Estate of De Barry* (1941) 43 C.A.2d 715, 728, 111 P.2d 728; *Denton v. Smith* (1951) 101 C.A.2d 841, 844, 226 P.2d 723; *McDonald v. Hewlett* (1951) 102 C.A.2d 680, 686, 228 P.2d 83; *Priester v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1955) 131 C.A.2d 314, 317, 280 P.2d 835; *Gold v. Velkov* (1955) 133 C.A.2d 622, 628, 284 P.2d 890; *Ferrara v. La Sala* (1960) 186 C.A.2d 263, 271, 275, 9 C.R. 179, quoting the text; *Gold v. Greenwald* (1966) 247 C.A.2d 296, 306, 55 C.R. 660; see *Mayhew v. Benninghoff* (1997) 53 C.A.4th 1365, 1369, 62 C.R.2d 27 [attorney failed to overcome presumption of voidability of engagement letter that attorney argued covered client's legal and business matters]; 1 *Summary* (10th), *Contracts*, §318; A.B.A. Model Rules of Professional Conduct, Rule 1.8(a); 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §141 et seq.)

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c. Unfair Advantage Is Not Required.

1 Witkin Cal. Proc. Attys § 93

[§ 93] Unfair Advantage Is Not Required.

A far-reaching decision was rendered in *Bradner v. Vasquez* (1954) 43 C.2d 147, 272 P.2d 11. Plaintiff, while attorney for defendants, made a written agreement, terminable on his death, to handle certain business and legal affairs for a compensation of 10% of the amount to be received from oil wells. After some performance and payments, he was discharged without cause, and this action was brought for money due. The trial court denied recovery on the ground of insufficient consideration and undue influence. *Held*, affirmed; despite plaintiff's evidence of complete satisfaction on the part of defendant clients, the presumption of former C.C. 2235 (now *Prob.C. 16004(c)*) was evidence (under the law prior to the Evidence Code) and supported the judgment. The court expressly disapproved of the theory of some prior cases that the presumption arises only when an *unfair* advantage is shown (e.g., *Estate of Witt* (1926) 198 C. 407, 245 P. 197; *Carlson v. Lantz* (1929) 208 C. 134, 280 P. 531; *Estate of Mallory* (1929) 99 C.A. 96, 278 P. 488), and laid down this extraordinarily broad rule: "When a fiduciary enters into a transaction with a beneficiary whereby the fiduciary's position is improved, or he obtains a favorable opportunity, or where he otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained. To declare that the advantage obtained must be shown to be unfair, unjust, or inequitable before the presumptions arise would result in the imposition of a condition which is not required by section 2235." (43 C.2d 152.) The advantages shown here were increased compensation and no right to discharge except for legal cause. (43 C.2d 152.) (See *Rader v. Thrasher* (1962) 57 C.2d 244, 18 C.R. 736, 368 P.2d 360, *infra*, §94 [affirming *Bradner*].)

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d. Client's Confidence in Attorney.

1 Witkin Cal. Proc. Attys § 94

[§ 94] Client's Confidence in Attorney.

In *Rader v. Thrasher* (1962) 57 C.2d 244, 18 C.R. 736, 368 P.2d 360, plaintiff, the attorney for a corporation of which defendant was the president, was engaged to sue for specific performance of an option agreement on timberland. Shortly before trial defendant inquired about the fee, and plaintiff set a contingent fee of \$ 25,000; but, on defendant's strong protest, it was ultimately agreed that the contingent fee would be 30% of the net profit on resale of the property. The case was won, the agreement was reduced to writing, and plaintiff continued to act as defendant's attorney for some months until, after defendant's failure to obtain a modification to a flat sum, plaintiff was discharged. In this action for declaratory relief, defendant testified that he had been outraged at plaintiff's \$ 25,000 proposal, had no further trust or confidence in him, never intended to abide by the oral or written agreement, and concealed his feelings in order to renegotiate and get plaintiff "out of the deal." The trial judge accordingly found no trust or confidence, and declared the agreement binding. *Held*, reversed.

(a) Two presumptions arose under former C.C. 2235: undue influence and insufficient consideration. The trial judge found only that defendant did not repose trust and confidence and was under no undue influence; although requested to do so, he failed to find on adequacy of the consideration. (57 C.2d 250.) In addition, although inadequacy of consideration was not pleaded, evidence was introduced, so that it became an issue at trial. Hence, it was reversible error to fail to make a finding on it. (57 C.2d 253.)

(b) Plaintiff's contention that the fiduciary obligations arise only where a relationship of confidence exists in fact or a right of control of property exists is too narrow a view. "The fact that the client had lost trust and confidence in his attorney could not lessen the attorney's duties to his client which arise from the assumption of the relationship by the attorney; although the lack of trust and confidence is one factor to be weighed by the trial court in determining whether in fact the client was acting under the undue influence of the attorney, since one who lacks confidence in and distrusts his attorney is obviously much less likely to allow himself to be imposed upon by him." (57 C.2d 250.)

Under *Prob.C. 16004(c)*, the presumption is that the transaction is "a violation of the trustee's fiduciary duties," and neither undue influence nor insufficient consideration is mentioned.

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e. Showing To Overcome Presumption.

1 Witkin Cal. Proc. Attys § 95

[§ 95] Showing To Overcome Presumption.

The converse of the general rule (*supra*, §91) is that an attorney may make a valid contract with a client by fulfilling the fiduciary obligation of full disclosure of all relevant facts, provided also that the contract is fair to the client. (*U.S. Oil & Land Co. v. Bell* (1908) 153 C. 781, 786, 96 P. 901; see *Magee v. State Bar* (1962) 58 C.2d 423, 429, 430, 24 C.R. 839, 374 P.2d 807, *infra*, §96; *Ames v. State Bar* (1973) 8 C.3d 910, 916, 106 C.R. 489, 506 P.2d 625, *infra*, §514; *Estate of Mallory* (1929) 99 C.A. 96, 103, 278 P. 488 [where client failed to plead any facts of fraud or undue influence, presumption did not arise]; *McNeal v. Foreman* (1931) 117 C.A. 155, 158, 3 P.2d 583; [extensive examination by trial court into exact relationship of parties, disclosures, and services rendered was sufficient to uphold contract]; *Hawkins v. Faries* (1942) 49 C.A.2d 186, 193, 121 P.2d 20 [upholding findings of trial court even though based on uncorroborated and contradicted testimony of attorney]; *Roberts v. Wachter* (1951) 104 C.A.2d 271, 278, 231 P.2d 534 [sufficient evidence of disclosure and fairness through testimony and written memorandum]; *Rules of Professional Conduct, Rule 3-300*, *infra*, §§436, 437.)

Under the Evidence Code, a presumption is not regarded as independent evidence, but merely as shifting the burden of producing evidence or the burden of proof. (See *Ev.C. 600(a)*; *1 Cal. Evidence (4th), Burden of Proof and Presumptions*, §52.) The presumption of undue influence under former C.C. 2235 was clearly one shifting the burden of proof (see *Ev.C. 605*; *1 Cal. Evidence (4th), Burden of Proof and Presumptions*, §56), and *Prob.C. 16004(c)* specifically provides that the presumption is one affecting the burden of proof.

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1. Violation of Fiduciary Duties.

f. Drafting Will in Attorney's Favor.

1 *Witkin Cal. Proc. Attys* § 96

[§ 96] Drafting Will in Attorney's Favor.

(1) *Practice Discouraged*. The hazards faced by an attorney who drafts a client's will in favor of the attorney were pointed out in *Magee v. State Bar* (1962) 58 C.2d 423, 24 C.R. 839, 374 P.2d 807. An attorney, friendly with an 81-year-old testator who had no relatives, drafted her will leaving the residue of her estate (\$ 21,000) to himself. A relative of her deceased husband successfully contested the will for undue influence. In this disciplinary proceeding, the court, rejecting a recommendation of suspension, dismissed the proceeding, holding that (a) the determination in the probate proceeding was not binding; and (b) the showing made by the attorney in the disciplinary proceeding (calling in another lawyer to question the testator) rebutted the presumption of undue influence, and there was no satisfactory evidence of the testator's incompetency. However, citing the former Canons of Ethics and several authorities, the court offered the following suggestions and cautions:

"There is no rule that attorneys should never draw wills in which they receive gifts. There is nothing improper in an attorney's drawing wills for his family or for relatives, provided the gift to him is reasonable under the circumstances. Similarly, there is nothing improper in drawing wills for close friends or for clients if the gift to the attorney is a modest one. ... As the instant case suggests, however, attorneys take a grave risk in drawing wills in which they receive more than a modest gift that is in keeping with the nature of the relationship they have with the client. Petitioner took this risk, unwisely, and one consequence was that he lost the substantial gift. ... Even though an attorney may be acting only to carry out the wishes of his client in drawing a will containing a gift to himself, he should send the client to another lawyer when the circumstances would support an inference of wrongdoing." (58 C.2d 433.) (See 14 *Summary* (10th), *Wills and Probate*, §135.)

(2) *Statutory Prohibition*. The Probate Code prohibits donative transfers to (a) the person who drafted the donative instrument, or persons with specified relationships to the drafter, (b) partners, shareholders, or employees of the drafter's law firm or law corporation, (c) a person with a fiduciary relationship with the transferor, or persons with specified relationships to the fiduciary, or (d) care custodians of a dependent adult who is the transferor, or persons with specified relationships to the custodian. (*Prob.C.* 21350(a); see *Prob.C.* 21351 [conditions under which prohibitions of *Prob.C.* 21350 do not apply]; 14 *Summary* (10th), *Wills and Probate*, §§303, 304.) Violation of *Prob.C.* 21350 et seq. is grounds for discipline if the attorney knew, or should have known, of the facts leading to the violation. (*B. & P.C.* 6103.6.) (See

A.B.A. Model Rules of Professional Conduct, Rule 1.8(c) [attorney should not prepare instrument giving substantial gift from client to attorney or attorney's relative, except where client is related to donee]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §144; 57 *A.L.R.3d* 703 [disciplinary proceedings based on drafting attorney naming self or associate as executor or attorney for executor]; 80 *A.L.R.5th* 597 [disciplinary cases involving drafting attorneys].) (On inducing client to make testamentary gift to attorney as violation of Rules of Professional Conduct, see *infra*, §457.)

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2. Exceptions.

a. Contract Relating to Compensation.

1 Witkin Cal. Proc. Attys § 97

[§ 97] Contract Relating to Compensation.

(1) *Original Contract of Employment.* The cases dealing with the presumption of undue influence recognized an important exception: The presumption does not apply to the original contract employing the attorney and fixing the compensation. At this initial stage there is no fiduciary relationship, and the parties may deal at arm's length. (*Cooley v. Miller & Lux* (1909) 156 C. 510, 524, 105 P. 981; *Lee v. Gump* (1936) 14 C.A.2d 729, 733, 58 P.2d 941; *McMurray v. Sivertsen* (1938) 28 C.A.2d 541, 548, 83 P.2d 48; *Ramirez v. Sturdevant* (1994) 21 C.A.4th 904, 913, 914, 26 C.R.2d 554, *infra*, §98.)

Setzer v. Robinson (1962) 57 C.2d 213, 18 C.R. 524, 368 P.2d 124, reaffirmed and explained the exception as follows: "No attorney could safely or reasonably negotiate any fee agreement with a prospective client without some preliminary investigation of the facts of the case and a disclosure to the prospective client of the legal steps which in his judgment must be taken. If by the very fact of such investigation and disclosure the relationship of attorney and client would thereby be created, the attorney would be placed in the impossible position of becoming the prospective client's attorney while he was attempting to reach an agreement with him as to whether he should become his attorney or not." (57 C.2d 217.)

The exception is codified in *Prob.C. 16004(c)*, which states that its provisions do not apply to "an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee."

(2) *Subsequent Agreements.* The exception is not restricted to the original contract employing the attorney; it applies whenever negotiations for further compensation or hiring take place between the attorney and the client during the existence of the relationship. (*Walton v. Broglio* (1975) 52 C.A.3d 400, 404, 125 C.R. 123; *Ramirez v. Sturdevant*, *supra*, 21 C.A.4th 917; see 13 A.L.R.3d 701 [validity and effect of contract for attorney's compensation made after inception of attorney-client relationship].)

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2. Exceptions.

b. Where Fee Agreement Creates Conflict of Interest.

1 Witkin Cal. Proc. Attys § 98

[§ 98] Where Fee Agreement Creates Conflict of Interest.

In *Ramirez v. Sturdevant* (1994) 21 C.A.4th 904, 26 C.R.2d 554, the court addressed "an issue which appears to be of first impression in California: the conflict of interest, or potential conflict of interest, occurring between a client and an attorney negotiating attorney fees as part of a settlement of the client's case." (21 C.A.4th 910.) Attorney S represented R in a wrongful termination action. They entered into a contingent fee contract under which S was entitled to a percentage of the gross recovery plus any fees payable apart from damages. After entry of summary judgment against R, S agreed to represent R on appeal only if she agreed to pay costs as incurred and to accept any settlement offer of at least \$ 150,000. The summary judgment was reversed on appeal, and S then negotiated a settlement under which the defendant agreed to pay R \$ 150,000, costs of \$ 35,000, and attorneys' fees of \$ 215,000. In R's subsequent action against S, the trial court rejected her claims of breach of fiduciary duty. *Held*, reversed and remanded for an evidentiary hearing on whether R's interests were forcefully represented in the settlement negotiations.

(a) The initial retainer agreement was valid. R attacks the agreement because any contingency fee was to be calculated on the basis of gross recovery, rather than net recovery after costs, and because S was entitled to any fees payable apart from damages. However, negotiation of a fee agreement is an arm's-length transaction. S was entitled to negotiate the terms on which he would accept employment, and neither of the challenged provisions "shocks the conscience" or provides grounds for claiming unconscionability. (21 C.A.4th 913, 914.)

(b) R claims that S was obligated to prosecute her appeal unless he had cause for withdrawal, and that the supplemental retainer agreement therefore was not supported by valid consideration. However, the claim that an attorney may not withdraw from a case except for cause is mistaken. A lawyer may not abandon a client, but under *Rule 3-700 of the Rules of Professional Conduct* (infra, §450 et seq.) and *C.C.P. 284* (supra, §§69, 80), an attorney, either with the client's consent or the court's approval, may withdraw from a case when withdrawal can be accomplished without undue prejudice to the client's interests. (21 C.A.4th 915.) Here, S was prepared to protect R's rights on appeal. Having done so, he was entitled to withdraw and hence to negotiate the terms under which he would continue to represent R. His agreement to continue representing her was consideration for her consent to the terms of the supplemental agreement. (21 C.A.4th 915, 916.)

(c) In giving S the discretion to negotiate either a lump-sum or a bifurcated settlement, one part of which would be his attorneys' fee, the supplemental agreement created a potential conflict of interest, because an attorney might maximize fees at the expense of the client. The danger inherent in this conflict of interest increases dramatically where, as here, the client has agreed to accept a particular settlement. R asserts that under *Prob.C. 16004(c)* (supra, §91), it must be presumed that S breached his fiduciary duty. (21 C.A.4th 916, 917.)

(d) Former C.C. 2235, the predecessor of *Prob.C. 16004(c)*, applied to the attorney-client relationship, and there is no reason that *Prob.C. 16004(c)* also should not apply to that relationship. However, *Prob.C. 16004(c)* does no more than affect the burden of proof. In addition, the statute specifically exempts from the presumption any agreement relating to the "hiring or compensation" of the trustee/attorney, and this exemption applies to a preexisting attorney-client relationship. (21 C.A.4th 917.)

(e) In any event, substantial evidence supports the conclusion that S did not take unfair advantage of R in negotiating the supplemental agreement. R had changed attorneys twice and knew that she could do so again. S was entitled to withdraw from the case and thus was entitled to negotiate the terms under which he would continue. There was nothing inherently wrong or unfair in conditioning his continued representation on her agreement to a minimum settlement figure of \$ 150,000, because that represented a reasonable assessment of the claim's value, and because S promised to attempt to obtain a greater amount. (21 C.A.4th 918.)

(f) During settlement negotiations, the relationship between S and R began to deteriorate, and S bifurcated negotiations over the objection of R. The total amount of the ultimate settlement (\$ 400,000) was greater than a demand (\$ 350,000) that R had instructed S to make. However, R recovered less, and S obtained greater attorneys' fees in the settlement than would have been the case under R's request. In addition, S's entitlement to a separate award of attorneys' fees was questionable. (21 C.A.4th 921, 922.) These facts do not show a breach of duty by S, but they do demonstrate the conflict of interest created by the dual nature of the settlement negotiations. (21 C.A.4th 923.)

(g) No California case has considered this conflict, but the federal courts have, with conflicting results. (21 C.A.4th 923, 924.) The better approach is to consider each case on its own merits, rather than to find that the inherent conflict necessarily invalidates any settlement. (21 C.A.4th 924.) "The parties may, if they wish, negotiate a separate settlement of damages and attorney fees. That settlement, however, should be approved by an impartial tribunal charged with the duty of determining whether or not a fair and reasonable balancing of the interests of the plaintiff and plaintiff's attorney was reflected in the negotiations. The settlement may be reviewed by the court at a settlement conference, or by the court in which the action is filed on motion of a party. As with other situations involving a conflict of interest, in the absence of any evidence to the contrary it will be presumed that the conflict prejudiced the client. ... The order approving or disapproving the settlements may be reviewed for an abuse of discretion. ... [T]he trial court in cases such as this is *not* charged with the duty of insuring that the settlement reflects the actual value of the case or ultimately is fair to the parties. Its duty simply is to ensure that the settlement was not tainted by conflict of interest between attorney and client." (21 C.A.4th 925.) Here, neither the settlement court nor the trial court conducted such a review, so the matter is remanded. (21 C.A.4th 925, 926.)

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2. Exceptions.

c. Dealings After Termination of Relationship.

1 Witkin Cal. Proc. Attys § 99

[§ 99] Dealings After Termination of Relationship.

The presumption of undue influence arises from the relationship of attorney and client. However, the burden of proving the *existence of the relationship* is on the party asserting it, and, if the evidence shows that the relationship terminated prior to the transaction under attack, no presumption of invalidity will arise. (See *Moore v. Hoar* (1938) 27 C.A.2d 269, 288, 81 P.2d 226 [attorney's own contradicted testimony that relationship did not exist at time of assignment was sufficient to support court's finding to that effect]; *Ferrara v. La Sala* (1960) 186 C.A.2d 263, 9 C.R. 179 [burden of proving existence of relationship sustained].)

This theory doubtless underlies the rule, startling at first glance, that the presumption does not arise where the attorney *openly assumes a hostile attitude toward the client*. (See *Boardman v. Crittenden* (1921) 52 C.A. 438, 450, 198 P. 1020.) Of course, an attorney cannot escape from the burden of fiduciary obligations merely by violating them. But if the attorney makes it clear to the client that he or she is acting in the attorney's own interest and against the interest of the client, the attorney ceases to be the client's trusted legal adviser, and the client must deal with the attorney as with a stranger. Thus, in *Boardman*, plaintiff client, seeking to rescind a settlement agreement made with defendant attorney, was denied relief on the following facts: The attorney told him he was "through with him" because of the client's alleged misrepresentations to the attorney; the client was an experienced businessman accustomed to handling his affairs; the client did not request legal advice from the attorney and did have independent advice from his own associate. (52 C.A. 448, 451.)

On the other hand, under *Prob.C. 16004(c)*, the presumption applies not only during the existence of the trust but also "while the trustee's influence with the beneficiary remains."

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2. Exceptions.

d. Sale of Financial Products to Client.

1 Witkin Cal. Proc. Attys § 100

[§ 100] Sale of Financial Products to Client.

(1) *In General.* B. & P.C. 6175 et seq. authorize an attorney acting as a fiduciary for a client who is an elder or dependent adult, and with whom the attorney has had an attorney-client relationship within the preceding 3 years, to sell financial products to that client if (a) the transaction and its terms are fair and reasonable to the client, and (b) the attorney provides the client with a complete disclosure. (B. & P.C. 6175.3.) For this purpose, "sell" means to act as a broker for a commission. (B. & P.C. 6175(e).) "Financial products" means long-term care insurance, life insurance, and annuities governed by the Insurance Code. (B. & P.C. 6175(d).)

(2) *Nature of Disclosure.* The required disclosure must satisfy all of the following conditions:

(a) It must be written, clear and conspicuous, and in an appropriately entitled, separate document of specified format. (B. & P.C. 6175.3(a).)

(b) It must be reasonably understandable by the client, and signed by the client or the client's conservator, guardian, or agent. (B. & P.C. 6175.3(b).)

(c) It must state that the attorney will receive a commission, the amount, and any actual percentage rate. If the commission amount is not ascertainable at the outset of the transaction, the disclosure must include the actual percentage rate of the commission or the alternate basis on which the commission will be computed and an example of the calculation. (B. & P.C. 6175.3(c).)

(d) It must identify the source of the commission and the relationship between the source and the person receiving the commission. (B. & P.C. 6175.3(d).)

(e) It must be presented to the client at or before the time the financial product is recommended. (B. & P.C. 6175.3(e).)

(f) It must advise the client that the client may obtain independent advice about the purchase and will be given a reasonable opportunity to seek that advice. (B. & P.C. 6175.3(f).)

(g) It must state that the product may be returned within 30 days for a refund. (*B. & P.C. 6175.3(g).*)

(h) It must state that, if the purchase is for Medi-Cal planning purposes, the client has been advised of other appropriate alternatives, and of the possibility of obtaining a fair hearing or court order. (*B. & P.C. 6175.3(h).*)

(3) *Remedies for Violation.* An attorney violating *B. & P.C. 6175* et seq. is subject to disciplinary proceedings. (*B. & P.C. 6175.5.*) Moreover, a client damaged by the violation may recover actual and punitive damages, restitution, injunctive relief, and up to \$ 10,000 additional award if it is determined that (a) the client has suffered substantial physical, emotional, or economic damage, (b) one or more of the factors in C.C. 3345(b) (deceptive practices against senior or disabled persons) occurred, and (c) the additional award is appropriate. (*B. & P.C. 6175.4.*)

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C. Personal Relationship With Client.

1 Witkin Cal. Proc. Attys § 101

[§ 101] Personal Relationship With Client.

(1) *In General.* In *Barbara A. v. John G.* (1983) 145 C.A.3d 369, 193 C.R. 422, plaintiff attorney had represented defendant client in a postdissolution proceeding for modification of spousal and child support, and sued to recover his fees. Defendant cross-complained for damages on theories of battery and fraud, alleging that they had engaged in sexual intercourse on plaintiff's false representation that he was sterile; that the attorney-client relationship produced a sense of trust justifying defendant's reliance on that representation; and that defendant had a tubal pregnancy that required surgery, which made her sterile. *Held*, cause of action was stated for both battery and fraud.

(a) "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (145 C.A.3d 383.) The relationship of attorney and client is "a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity." (145 C.A.3d 383, citing the text.) The Supreme Court has also declared that an attorney "should not under any circumstances attempt to deceive another person," and many cases have applied these basic principles where an attorney, in breaching the fiduciary obligation, has gained financial advantage. "We can find no valid reason to restrict these principles to actions involving financial claims of a client and not to apply them to actions in which the client alleges physical damage resulting from a violation of the attorney's fiduciary obligation." (145 C.A.3d 383.)

(b) Where, as here, there is a legally recognized fiduciary relationship, it is presumed that the one in whom trust and confidence is reposed has exerted undue influence, and the burden of proof shifts to the fiduciary on that issue. (145 C.A.3d 383.) Undue influence is relevant here on the issues of consent (cause of action for battery) and justifiable reliance (cause of action for fraud). "Nevertheless, the unique facts in the case before us compel a more cautious approach in imposing on respondent, as a matter of law, the highest fiduciary standard in all his relations with appellant, social as well as legal." The existence of a confidential relationship between these parties is more properly a question of fact for the jury or trial court, "who can better assess whether the legal relationship was dominant or whether the parties functioned on a more equal basis in their personal relations." (145 C.A.3d 384.) "To hold otherwise would have a chilling and far-reaching effect on any personal relations between an attorney and his or her clients. The possibility of a factual determination of a confidential relationship should be a sufficient warning to monitor the profession in personal or social relations with clients." (145 C.A.3d 384.)

(c) Another question of first impression is whether it is a breach of ethics for an attorney in a family law case to induce a client to have sexual relations during the course of the representation. In the medical profession, doctors have been disciplined for sexual misconduct with patients; and an Oregon State Bar Legal Ethics opinion takes the position that it is unethical for an attorney to be sexually involved with a client in a divorce action. That opinion asserts that the nature of the relationship is to make the client intellectually and emotionally dependent on the attorney; and if the client becomes involved in a love affair with the attorney, the dependency is increased, and it would be impossible for the attorney to maintain an independent judgment about whether the affair might harm the client's interests. But the question is more properly addressed to the *California State Bar*. (145 C.A.3d 384, footnote 11.)

(2) *Statutes and Rule. Rules of Professional Conduct, Rule 3-120*, prohibits an attorney from requiring, demanding, or coercing clients into having sexual relations with the attorney. (See *infra*, §433.) Intentional violation of the rule is cause for suspension or disbarment. (*B. & P.C. 6106.8(d)*.) Moreover, *B. & P.C. 6106.9* makes it grounds for discipline for an attorney to coerce or intimidate a client into having sexual relations or to condition the performance of legal services on sexual relations. (See *infra*, §494.)

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D. Duty To Keep Client Informed.

1 Witkin Cal. Proc. Attys § 102

[§ 102] Duty To Keep Client Informed.

Several statutes impose obligations on attorneys to keep their clients informed.

(1) It is the general duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters for which the attorney has agreed to provide legal services. (*B. & P.C. 6068(m)*); see *Rules of Professional Conduct, Rule 3-500*, *infra*, §445 [similar]; *In the Matter of Lais* (1998) 3 Cal. State Bar Ct. Rptr. 907, 922 [client's efforts to communicate with attorney regarding refund constituted status inquiries within meaning of *B. & P.C. 6068(m)* because they implicated nature and conditions of representation]; on duty to inform client of settlement offer, see *infra*, §§238, 445; on information required to be contained in fee agreements and bills to clients, see *B. & P.C. 6148*, *infra*, §156.)

(2) An attorney is required, within 10 calendar days after receiving a client's written request, to furnish the client with a complete statement of funds received and disbursed and any charges to the client's trust account. A request may be made only once each 30 days, unless the State Bar on the client's complaint determines that more frequent statements are warranted. (*B. & P.C. 6091*.)

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1. In General.

1 Witkin Cal. Proc. Attys § 103

[§ 103] In General.

The fiduciary relationship makes it improper for an attorney to act contrary to, or assume a position inconsistent with, the interests of a present or former client. Not only is that conduct a basis for disciplinary action against the attorney, but the court, at the insistence of the client, may prevent it, or deprive the attorney of the benefits of dual representation. "By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent." (*Anderson v. Eaton* (1930) 211 C. 113, 116, 293 P. 788.) (See *Rules of Professional Conduct*, Rule 3-310, *infra*, 438 et seq.; A.B.A. Model Rules of Professional Conduct, Rules 1.7, 1.8; *Rest.3d, The Law Governing Lawyers* §121 et seq.; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §188 et seq.; on representation of conflicting interests as grounds for disciplinary action, see *infra*, §§513, 514; on conflicting interests in criminal cases, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §190 et seq.)

The following cases support this view:

Hammett v. McIntyre (1952) 114 C.A.2d 148, 155, 249 P.2d 885 [potential conflict involving insurer's counsel representing driver of insured's vehicle, but not insured party, where insured had not given permission for operation of vehicle].

Detamanti v. Lompoc Union School Dist. of Santa Barbara (1956) 143 C.A.2d 715, 723, 300 P.2d 78 ["Where there is a duty of loyalty to different clients it is impossible for an attorney to advise either one as to a disputed claim against the other"].

Potter v. Moran (1966) 239 C.A.2d 873, 876, 49 C.R. 229 [court was not informed of dual representation of guardian and trustee].

Earl Scheib v. Superior Court (1967) 253 C.A.2d 703, 706, 709, 61 C.R. 386 [client or former client can raise

conflict of interest issue "in any one of several ways at any time while the action is pending"].

Spindle v. Chubb/Pac. Indem. Group (1979) 89 C.A.3d 706, 713, 152 C.R. 776 [joint representation by insurer of two doctors with differing coverage and potential liability in malpractice action was not sufficient to establish bad faith representation of conflicting interests].

Vivitar Corp. v. Broidy (1983) 143 C.A.3d 878, 885, 886, 192 C.R. 281 [attorney's representation of some general creditors of bankrupt in state action against another general creditor does not conflict with representation of trustee in bankruptcy proceedings].

Higdon v. Superior Court (1991) 227 C.A.3d 1667, 278 C.R. 588 [conflict of interest of former court commissioner].

In re Complex Asbestos Litigation (1991) 232 C.A.3d 572, 283 C.R. 732 [conflict of interest of nonlawyer employee].

Ramirez v. Sturdevant (1994) 21 C.A.4th 904, 26 C.R.2d 554, supra, §98 [potential conflict is inherent in separate negotiation of attorneys' fees as part of settlement of client's action].

Shadow Traffic Network v. Superior Court (1994) 24 C.A.4th 1067, 29 C.R.2d 693 [conflict of interest arising out of retention of expert].

Cal Pak Delivery v. United Parcel Service (1997) 52 C.A.4th 1, 10, 13, 60 C.R.2d 207 [plaintiff's attorney offered to dismiss class action in exchange for payment to attorney personally of \$ 8 million to \$ 10 million, with class receiving nothing; affirming order of disqualification].

Commentators have dealt extensively with this subject. (See 18 *Santa Clara L. Rev.* 997 [overview of A.B.A. and State Bar rules]; 32 *U.C.L.A. L. Rev.* 986 [The Attorney as Mediator--Inherent Conflict of Interest?]; 31 *A.L.R.3d* 715 [disqualifying situations]; 68 *A.L.R.3d* 967 [participation as attorney in real estate transaction for parties having conflicting interests]; 1 *A.L.R.4th* 1124 [propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder].)

An extensive and useful Harvard Law Review Note (94 *Harv. L. Rev.* 1244) classifies the situations giving rise to conflict of interest problems as follows:

- (1) Those involving conflicts with the attorney's personal, financial, or other interests.
- (2) Those involving simultaneous representation of clients.
- (3) Those involving successive representation of clients with adverse interests.
- (4) Those involving corporate attorneys.
- (5) Those involving representation by present or former affiliates.
- (6) Those involving criminal lawyers.
- (7) Those involving representation of the poor.
- (8) Those involving government attorneys.
- (9) Those involving actions premised on the public interest.

SUPPLEMENT: [This section is current through the latest supplement]

In *Baker Manock & Jensen v. Superior Court* (2009) 175 C.A.4th 1414, 96 C.R.3d 785, the trial court disqualified the law firm that drafted decedent's will from representing G as both executor of the will and as a beneficiary. G opposed a petition filed by M, the personal representative of decedent's husband, to determine the construction of decedent's will. In opposing the petition, G asserted that decedent had intended her share of community property to pass to her residual trust. In disqualifying the firm, the trial court reasoned that: because the firm drafted the will it had a duty of care to all beneficiaries; because it represented the executor, it was not permitted to represent a beneficiary in a controversy with other beneficiaries; the representation of G in his individual capacity placed the firm in "an active and acute conflict of interest." *Held*, there was no conflict, and the trial court erred in disqualifying the law firm.

(a) There was no attorney-client relationship between the law firm and M. Although in limited circumstances an attorney may incur liability to an intended beneficiary through negligent drafting or other error, there is no allegation of that here. Thus, the mere potential for negligence does not implicate the duties of confidentiality and loyalty in an attorney-client relationship, and does not create an attorney-client relationship with those who are merely third-party beneficiaries of a contract to draft a will. (175 C.A.4th 1421; distinguishing *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, text, §297.)

(b) An attorney who drafts a will is not bound to a beneficiary of the will by the duties of an attorney to his or her client. The "beneficiary is not the attorney's client and does not become a successor client just because the will becomes irrevocable at the testator's death." (175 C.A.4th 1422.)

(c) The trial court incorrectly found that an attorney who represents an executor may not represent a beneficiary in a controversy with other beneficiaries. The correct rule is that an attorney for the estate is not permitted to represent a beneficiary in an action against the estate or against an interest of the estate. This was not the case here. (175 C.A.4th 1422.)

(d) The interests of G as executor and as a beneficiary are the same, and are not adverse to decedent's will. As executor, G has asserted his disagreement with M's interpretation of the will. G's assertion that decedent intended her share of community property to pass to her residual trust is the same assertion made by G as a beneficiary of that trust. There would be a conflict only if the law firm agreed with M's position. "Accordingly, there is no conflict of interest in representing both the executor and the beneficiary." (175 C.A.4th 1424.)



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2. Remedies and Sanctions.

1 *Witkin Cal. Proc. Attys* § 104

[§ 104] Remedies and Sanctions.

A number of methods are available by which the issue of conflicting interest (*supra*, §103) may be raised. (See C.E.B., 1 Civil Proc. Before Trial 4th, §2.59 et seq.; 94 *Harv. L. Rev.* 1470 et seq. [sanctions]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §§195, 198 et seq.) The methods include the following:

- (1) Motion to disqualify the attorney or law firm from the representation. (See *infra*, §105.)
- (2) Action to enjoin the adverse representation. (*Wutchumna Water Co. v. Bailey* (1932) 216 C. 564, 574, 15 P.2d 505 [permanent injunction sought against adverse appearance in new litigation and against disclosing information gained in former employment].)
- (3) Defense in the attorney's action to recover fees or the reasonable value of services; violation of the fiduciary obligation will defeat recovery. (See *Anderson v. Eaton* (1930) 211 C. 113, 116, 293 P. 788, *infra*, §118; *Goldstein v. Lees* (1975) 46 C.A.3d 614, 120 C.R. 253, *infra*, §137; *Jeffrey v. Pounds* (1977) 67 C.A.3d 6, 136 C.R. 373, *infra*, §110; *Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 27, 267 C.R. 896, *infra*, §128; *Mardirossian & Associates v. Ersoff* (2007) 153 C.A.4th 257, 278, 62 C.R.3d 665 [simultaneous representation did not preclude quantum meruit recovery where there was proper written consent informing client of potential conflict and client acknowledged opportunity to consult outside counsel].)
- (4) Appeal from an unfavorable judgment on the ground that the adverse interest denied the appellant a fair trial. (*Hammett v. McIntyre* (1952) 114 C.A.2d 148, 157, 249 P.2d 885.)
- (5) Civil action by the client for the loss sustained as a result of the conflicting representation. (See *Lysick v. Walcom* (1968) 258 C.A.2d 136, 144, 65 C.R. 406 [action by assignee of client].)
- (6) Motion under C.C.P. 473(b) (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §151 et seq.) to set aside the judgment on grounds of mistake, inadvertence, or excusable neglect. (See *Gregory v. Gregory* (1949) 92 C.A.2d 343, 345, 348, 206 P.2d 1122.)
- (7) Disqualification of the attorney on the trial court's own motion. (C.C.P. 128; see *People v. Superior Court*

(*Greer*) (1977) 19 C.3d 255, 261, footnote 4, 137 C.R. 476, 561 P.2d 1164, 4 Cal. Crim. Law (3d), *Introduction to Criminal Procedure*, §24 [recusal of district attorney]; *Klemm v. Superior Court* (1977) 75 C.A.3d 893, 901, footnote 4, 142 C.R. 509 [joint representation in marital dissolution]; *People v. Peoples* (1997) 51 C.A.4th 1592, 1594, 1598, 60 C.R.2d 173 [attorney for criminal defendant was sister of defendant, former wife of alleged victim, and mother of children who were percipient witnesses; trial court did not err in recusing attorney on its own motion]; *Cal Pak Delivery v. United Parcel Service* (1997) 52 C.A.4th 1, 9, 60 C.R.2d 207 [power to disqualify attorney stems both from court's inherent power and its power under C.C.P. 128(a)(5); granting demurrer and dismissing of case did not deprive court of jurisdiction to disqualify plaintiff's attorney on showing of misconduct warranting disqualification].)

(8) Disciplinary action. (See *infra*, §§513, 514; 94 Harv. L. Rev. 1496 [disciplinary proceedings].)

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3. Motion To Disqualify.

a. Motion in Trial Court.

1 Witkin Cal. Proc. Attys § 105

[§ 105] Motion in Trial Court.

(1) *Nature of Motion.* The present client or a former client may make a motion in the trial court, seeking to disqualify the attorney or former attorney from acting for the adverse party or interest. (See *Weidekind v. Tuolumne County Water Co.* (1887) 74 C. 386, 388, 19 P. 173 [trial court may forbid attorney to change sides]; *Elberta Oil Co. v. Superior Court* (1930) 108 C.A. 344, 347, 291 P. 668, *infra*, §115 [granting motion to remove attorney from one of two conflicting representations]; *Grove v. Grove Valve & Regulator Co.* (1963) 213 C.A.2d 646, 652, 29 C.R. 150, citing the text; *Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 C.A.2d 919, 927, 75 C.R. 580; C.E.B., 1 Civil Proc. Before Trial 4th, §4.52 et seq.; C.E.B., 1 Civil Proc. During Trial 3d, §6.109; 94 Harv. L. Rev. 1479 [standing].)

In *Hetos Inv. Ltd. v. Kurtin* (2003) 110 C.A.4th 36, 1 C.R.3d 472, defendant loaned money to plaintiff and, at plaintiff's request, an attorney with law firm G memorialized a promissory note negotiated between plaintiff and defendant. The loan terms required repayment of the principal plus 50 cents for each dollar loaned. Neither G nor the individual attorney was involved in the negotiations or had contact with defendant. Plaintiff later sued defendant on 13 counts, one of which was an action on the promissory note for usury. G represented plaintiff. Defendant sought disqualification as a matter of law, arguing that (a) G violated *Rules of Professional Conduct, Rule 3-210* (advising violation of law; *infra*, §435) and A.B.A. Model Rules of Professional Conduct, Rule 1.16 (declining representation to avoid violation of law or rules of professional conduct), and (b) G created an appearance of impropriety by advocating on behalf of plaintiff that the terms defendant and plaintiff had negotiated were usurious. The trial court denied the motion. *Held*, affirmed.

(a) Defendant offered no authority for the proposition that G violated *Rules of Professional Conduct, Rule 3-210* by failing to advise plaintiff against paying an excessive interest rate, assuming that it was excessive. Nor is A.B.A. Model Rules of Professional Conduct, Rule 1.16 applicable. Until it is decided whether the promissory note violated the usury laws, it is unknown if the preparation of the note was a violation of law. (110 C.A.4th 45.)

(b) The appearance of impropriety alone will not support disqualification; there must be a tangible dereliction, and here there was none. There was no determination that the promissory note violated the usury laws, and defendant himself maintained that it did not. Even if the note were usurious, this may have been due to G's error in judgment or a

mistake in overlooking a legal issue. Moreover, because disqualification is primarily prophylactic, the significant question is how G's status or misconduct would affect the outcome of the proceedings before the trial court. Nothing in G's actions suggests that G's continuing advocacy on behalf of plaintiff would negatively impact those proceedings with respect to the usury claim. (110 C.A.4th 47.)

(c) G acted merely as a scribe and neither participated in the negotiated terms of the note nor rendered advice to either plaintiff or defendant regarding those terms. To hold that a law firm that prepared a document containing a provision arguably violating California law "must be barred, as a matter of law, from representing the client for whom it prepared the document would be to enunciate an overbroad rule with potentially undesirable consequences. It would mean that any time a firm negotiated a transaction and later discovered a mistake in one of the documents . . . it would be unable to clean up the matter on its client's behalf." (110 C.A.4th 52.)

In *Machado v. Superior Court* (2007) 148 C.A.4th 875, 55 C.R.3d 902, attorney F represented A in an action against B. The action settled, and F became partners with A in a real estate holding to satisfy A's fee. M, represented by F, brought an action against W, a joint venture controlled by A, in which the complaint alleged a bribe from A to C. A successfully disqualified F based on F's prior representation of A. M, represented by F, then sued C, and the pleadings alleged the same bribe from A to C. As required by former C.R.C., Rule 804 (now C.R.C., Rule 3.300), the complaint also alleged that the action was "partially related" to the W action. Although A was not a defendant, he successfully moved to disqualify F, alleging that the C action was merely an attempt to avoid the disqualification order in the W action. *Held*, A had standing to make the disqualification motion. Although generally a nonparty should file a collateral injunctive action to end the conflicted representation, here the trial court properly permitted A to disqualify F. "Given the alter ego and conspiracy allegations, it would uphold the sheerest fiction to conclude" that A lacks standing, or is a stranger to the C action. (148 C.A.4th 881.)

(2) *Hearing and Determination*. Although the trial judge may permit testimony, it has been held proper to decide the motion solely on the basis of affidavits. (*Grove v. Grove Valve & Regulator Co.*, *supra*, 213 C.A.2d 654; *Big Bear Mun. Water Dist. v. Superior Court*, *supra*, 269 C.A.2d 927.) The issue is whether the client or former client has been prejudiced, and prejudice is presumed on proof of the conflicting representation. (*Earl Scheib v. Superior Court*, *supra*, 253 C.A.2d 709.) The trial court's order, if supported by substantial evidence, will withstand appeal. (*Grove v. Grove Valve & Regulator Co.*, *supra*, 213 C.A.2d 653, 654; *Big Bear Mun. Water Dist. v. Superior Court*, *supra*, 269 C.A.2d 927; *Toyota Motor Sales, U.S.A. v. Superior Court* (1996) 46 C.A.4th 778, 782, 54 C.R.2d 22.)

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3. Motion To Disqualify.

b. Effect of Delay.

1 *Witkin Cal. Proc. Attys* § 106

[§ 106] Effect of Delay.

(1) *Diligence Is Not Essential.* In *Earl Scheib v. Superior Court* (1967) 253 C.A.2d 703, 61 C.R. 386, plaintiff corporation sued defendant corporation for unfair competition and use of trade secrets. Defendant was represented by attorney J, who was formerly a member of the firm that represented plaintiff and had access to confidential information relating to plaintiff's business. Plaintiff moved for an order to compel J's withdrawal. The trial judge denied the motion on the ground that it was filed too late: J first appeared for defendant on November 18, 1966, and the motion was not made until March 24, 1967. *Held*, mandamus granted to compel the lower court to determine the motion on its merits. Prior cases have considered the challenge at trial (*Weidekind v. Tuolumne County Water Co.* (1887) 74 C. 386, 388, 19 P. 173) and after judgment (*Anderson v. Eaton* (1930) 211 C. 113, 293 P. 788, *infra*, §118; *Hammett v. McIntyre* (1952) 114 C.A.2d 148, 249 P.2d 885, *infra*, §119). (253 C.A.2d 707, citing the text.) Hence, the issue may be raised "at any time while the action is pending." (253 C.A.2d 709.) (See 94 Harv. L. Rev. 1481 [laches].)

(2) *Waiver Where Delay Is Unreasonable and Prejudice Results.* In *River West v. Nickel* (1987) 188 C.A.3d 1297, 234 C.R. 33, plaintiffs' counsel, attorney G, had represented defendant over 30 years earlier in a matter that the trial judge found to be substantially related to the present controversy (determination of water rights). On this basis the trial judge granted defendant's motion to disqualify G, even though it was made 47 months after the answer was filed. *Held*, order reversed.

(a) The court disagreed with the purported rule declared in *Earl Scheib v. Superior Court*, *supra*, that delay is irrelevant. The delay in *Scheib* was only 4 months, and the *Scheib* opinion took note of federal cases holding that reasonable diligence is required; "[t]herefore, we can assume the court's reference to these cases indicated delay and prejudice might be relevant under other circumstances." (188 C.A.3d 1305.) The opinion quoted with approval the following statement in *Maruman Integrated Circuits v. Consortium Co.* (1985) 166 C.A.3d 443, 450, 212 C.R. 497: "[I]n exercising this discretion, the judge may properly consider the possibility that the party brought the disqualification motion as a tactical device to delay litigation." (188 C.A.3d 1307.)

(b) Ordinarily, once a substantial relationship is established, the rights of the former client prevail, and the attorney must be disqualified. (188 C.A.3d 1308.) However, an exception exists where the current client presents *prima facie*

evidence that the delay was unreasonable and caused prejudice to the current client. (188 C.A.3d 1309.) The former client then has the burden of justifying the delay: "That party should address: (1) how long it has known of the potential conflict; (2) whether it has been represented by counsel since it has known of the potential conflict; (3) whether anyone prevented the moving party from making the motion earlier and, if so, under what circumstances; and (4) whether an earlier motion to disqualify would have been inappropriate or futile and why." (188 C.A.3d 1309.)

(c) Defendant knew of the potential conflict over 3 years before he filed the motion to disqualify, because at that time he had made an unsuccessful attempt to have G disciplined for his representation of plaintiffs in this case. (188 C.A.3d 1311.) Furthermore, during this time defendant was represented by counsel, and there was no evidence that anyone prevented him from seeking G's disqualification. (188 C.A.3d 1311.)

(d) Defendant argued that change of venue, judicial disqualifications, and difficulty in locating an "acceptable" judge to hear the case made it futile for him to have filed the motion earlier. But the motions involving change of venue and disqualification of judges were settled in 17 months, leaving defendant approximately 30 months in which to file the motion to disqualify G. More importantly, even though there was no judge to *hear* the motion while these other matters were being decided, there was nothing to prevent defendant from *filing* the motion during this period. (188 C.A.3d 1312.) "[T]he importance of placing adverse counsel and the parties on notice of a serious question concerning further participation in the litigation demands early notice and filing of the appropriate objection." (188 C.A.3d 1313.)

(e) The seriousness of the delay is manifest. G and his law firm spent over 3,000 hours on the case at a cost to plaintiffs of \$ 387,000. In addition, as a byproduct of the delay, there would be serious and complex issues concerning the right to possession of the attorney work product were counsel disqualified prior to its use. (188 C.A.3d 1313.)

(f) Under these conditions, the delay in making the motion was so unreasonable and the resulting prejudice so great that the law must assume an implied waiver of the right to disqualify G. (188 C.A.3d 1313.) Because the firm's disqualification depended on G's being disqualified, the implied waiver extended to the firm. (188 C.A.3d 1313.) (See *Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 27, 28, 267 C.R. 896, *infra*, §128 [rejecting claim of conflict of interest because plaintiff had not raised issue in trial court].)

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3. Motion To Disqualify.

c. Abuse of Motion.

1 *Witkin Cal. Proc. Attys* § 107

[§ 107] Abuse of Motion.

(1) *Policy Considerations.* In *Gregori v. Bank of America* (1989) 207 C.A.3d 291, 301, 254 C.R. 853, the court called attention to abuses in the use of the motion and the need for caution in exercise of the discretion to grant.

(a) "Motions to disqualify counsel present competing policy considerations. On the one hand, a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court. ... On the other hand, it must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his choice suffers a particularly heavy penalty where, as appears to be the case here, his attorney is highly skilled in the relevant area of the law." (207 C.A.3d 300.)

(b) "Additionally, as courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. ... Such motions can be misused to harass opposing counsel ... , to delay the litigation ... , or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable. ... In short, it is widely understood by judges that 'attorneys now commonly use disqualification motions for purely strategic purposes.' " (207 C.A.3d 300, 301.)

(2) *No Actual Conflict.* Where no actual conflict exists between an attorney's clients in a lawsuit, opposing counsel may not create a conflict through a meritless cross-complaint. Any other rule would give a party the power to reject its opponent's choice of counsel. (*Federal Home Loan Mortg. Corp. v. La Conchita Ranch Co.* (1998) 68 C.A.4th 856, 862, 80 C.R.2d 634 [denial of motion to disqualify law firm representing plaintiff mortgagors and mortgagee in action for impairment of security following defendant's cross-complaint against mortgagors].)

(3) *Appearance of Impropriety Is Insufficient.* In *DCH Health Services Corp. v. Waite* (2002) 95 C.A.4th 829, 115 C.R.2d 847, a motion to disqualify defendant's attorney, K, was based solely on confidential information allegedly imparted by K's spouse, L, a superior court judge, who had served on the board of directors of plaintiff community hospital. Although the trial court concluded that L had received confidential information pertaining to the underlying

action, it had no evidence and made no factual determinations that this was so or that there was a disclosure to K. Nevertheless, the court ordered disqualification, stating that it did so to avoid the appearance of impropriety arising from the "unique nature of the marital relationship." (95 C.A.4th 831.) *Held*, order reversed. Unlike judicial recusals, the appearance of impropriety itself does not support an attorney's disqualification. Moreover, although marriages between attorneys "create a variety of novel issues" regarding the duty of confidentiality, "[t]hese issues should not be decided mechanically on the basis of the precise relationship between the lawyers. Rather, the court should start with the presumption that, unless proven otherwise, lawyers will behave in an ethical manner." (95 C.A.4th 834.) (See *Addam v. Superior Court* (2004) 116 C.A.4th 368, 371, 10 C.R.3d 39 [sibling relationship between attorney and opposing party's physician that implied appearance of impropriety was insufficient to support disqualification; following *DCH Health Services Corp.*]; *Dino v. Pelayo* (2006) 145 C.A.4th 347, 357, 51 C.R.3d 620 [party may not disqualify attorney who jointly represents opposing parties based solely on all parties' agreement to participate in mediation; "the degree of confidentiality established among opposing parties and their attorneys in mediation is insufficient to establish such a right"].)

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3. Motion To Disqualify.

d. Review of Order.

1 Witkin Cal. Proc. Attys § 108

[§ 108] Review of Order.

The trial court's determination of the motion to disqualify is, of course, subject to review by either party. (See *Weidekind v. Tuolumne County Water Co.* (1887) 74 C. 386, 388, 19 P. 173 [refusal of trial court to prohibit plaintiff's former attorney from acting for defendant was prejudicial error; judgment for defendant reversed]; *Wutchumna Water Co. v. Bailey* (1932) 216 C. 564, 574, 15 P.2d 505 [refusal of trial court to restrain former attorney from appearing adversely; judgment denying injunction reversed]; *Elberta Oil Co. v. Superior Court* (1930) 108 C.A. 344, 347, 291 P. 668 [attorney removed by trial court petitioned for certiorari; order reviewed without discussion of propriety of remedy]; *Croce v. Superior Court* (1937) 21 C.A.2d 18, 68 P.2d 369 [mandamus by client to compel trial court to enter order of disqualification; writ denied on merits without discussion of propriety of remedy]; *Earl Scheib v. Superior Court* (1967) 253 C.A.2d 703, 710, 61 C.R. 386 [mandamus by client to compel hearing on merits; writ granted]; *Reich v. Club Universe* (1981) 125 C.A.3d 965, 969, 178 C.R. 473 [order disqualifying attorney from representing party is directly appealable]; *Toyota Motor Sales, U.S.A. v. Superior Court* (1996) 46 C.A.4th 778, 782, 783, 54 C.R.2d 22 [where parties submitted conflicting declarations, trial court's order denying motion to disqualify was supported by substantial evidence and was not abuse of discretion]; 5 A.L.R.4th 1251 [appealability of order granting or denying motion to disqualify attorney]; 94 Harv. L. Rev. 1482 [appealability of disqualification order].)

Prejudice must be shown where the issue of attorney disqualification is raised on appeal from a final judgment; i.e., it must be established "that the erroneous granting or denying of a motion to disqualify affected the outcome of the proceeding to the prejudice of the complaining party." (*In re Sophia B.* (1988) 203 C.A.3d 1436, 1439, 250 C.R. 802.) (See *Pour Le Bebe v. Guess?* (2003) 112 C.A.4th 810, 837, 5 C.R.3d 442, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §570 [arbitrators denied disqualification motion; aggrieved party failed to establish that conflict had substantial impact on award; following *In re Sophia B.*].)

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4. Representation Adverse to Current Client.

a. Nature and Scope of Conflict.

1. In General.

1 Witkin Cal. Proc. Attys § 109

[§ 109] In General.

An attorney's simultaneous representation of clients with differing interests poses the classic conflict situation. A client is entitled to the attorney's unimpaired loyalty, and the danger is that an attorney representing conflicting or potentially conflicting interests will be tempted to favor one client over the other. (See *94 Harv. L. Rev. 1292 et seq.*; *supra*, §103.)

The prohibition against simultaneous representation is strongest in the litigation context. The cases have uniformly condemned dual representation at a trial or hearing if an *actual conflict* exists, but joint representation may be permissible if there is only a *potential conflict*. (See *Klemm v. Superior Court* (1977) 75 C.A.3d 893, 898, 142 C.R. 509, *infra*, §130; *94 Harv. L. Rev. 1307.*)

Joint representation is most likely to be permitted in the *nonlitigation context*. (See *Buehler v. Sbardellati* (1995) 34 C.A.4th 1527, 1540, 41 C.R.2d 104 [no conflict of interest where attorney merely drafted partnership agreement that two partners had already agreed on].) However, the courts generally will insist on informed consent by the clients. (See *Klemm v. Superior Court*, *supra*, 75 C.A.3d 898 [dissolution of marriage]; *Jeffrey v. Pounds* (1977) 67 C.A.3d 6, 136 C.R. 373, *infra*, §110 [representation on unrelated matter]; *Rules of Professional Conduct, Rule 3-310*, *infra*, §438 *et seq.*; *78 So. Cal. L. Rev. 323* [replacing joint representation with lawyer mediation in "friendly" marital dissolution cases].)

In *McClure v. Donovan* (1947) 82 C.A.2d 664, 186 P.2d 718, judgment was obtained annulling the marriage of C, an incompetent, and a guardian was appointed for C. The attorneys who represented C's wife in the annulment action appealed, and the appeal was held properly taken. But they also filed an appeal from the order appointing the guardian, claiming authorization from C. This latter appeal was dismissed on the ground that the wife would benefit by reversal of the order appointing the guardian (thereby indicating that C was competent to marry) and the attorneys were therefore representing conflicting interests. "An attorney has a constant and perpetual rendezvous with ethics. He stands as a trustee for his client's interests--a most sacred and confidential relationship. It is elementary that a conflict of interest between a trustee and his beneficiary is never permissible. As a trustee cannot maintain an attitude adverse to his

beneficiary, so an attorney may not represent claims inconsistent with those of his client or conflicting claims of two clients. He cannot serve two masters." (82 C.A.2d 666.)

In *Dettamanti v. Lompoc Union School Dist. of Santa Barbara* (1956) 143 C.A.2d 715, 723, 300 P.2d 78, plaintiff, a minor girl, was injured by X's automobile when a school bus driver negligently allowed her to leave the bus unescorted. G, a deputy district attorney whose duties included representation of the school district, investigated and filed a criminal complaint against X. He also agreed with plaintiff's father to represent plaintiff, and obtained a small settlement for her. He did not inform her of her cause of action against the district and of the necessity of filing a claim. *Held*, late filing of the claim was excused by estoppel (see 3 Cal. Proc. (5th), *Actions*, §309), for G's dual representation was a breach of his duty of loyalty. The court rejected the "tenuous" excuse that G was not actually representing the school district because no suit had yet been filed against it.

In *American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 C.A.4th 1017, 117 C.R.2d 685, plaintiff A retained attorney L regarding possible legal remedies against an aircraft manufacturer. Subsequently L, over A's objection, accepted employment as an expert deponent for ADO, a corporate plaintiff in a federal suit against the same manufacturer, while simultaneously advising A regarding ADO's documents request in the federal action. The jury found that L had breached his fiduciary duty to A by violating *Rules of Professional Conduct, Rule 3-310(C)* (representation of potentially adverse clients; *infra*, §440), and *Rules of Professional Conduct, Rule 3-310(E)* (successive representation of adverse clients where attorney has obtained confidential information from former client; *infra*, §441). *Held*, affirmed.

(a) *Rule 3-310(C)*. It is not necessary that the offending attorney have a lawyer-client relationship with both adverse parties in order to violate Rule 3-310(C). Although L was not engaged to render legal advice to ADO, he was acting as ADO's agent, and in that capacity owed fiduciary duties to ADO as he simultaneously owed fiduciary duties to A. Thus, regardless of whether he was giving legal advice to ADO, the situation presented a conflict between the fiduciary duties owed to each party that could conceivably compel L to choose which of the two conflicting loyalties he would honor. (96 C.A.4th 1034.)

(b) *Rule 3-310(E)*. L violated Rule 3-310(E) by placing himself in a position where he might be compelled to reveal confidences obtained through representation of A. In this regard, it was irrelevant that A was not a party to the ADO lawsuit. Nor was it necessary for A to prove that L actually revealed confidential information. L placed A in a precarious position without A's consent, the very situation the rule seeks to prevent. (96 C.A.4th 1039, 1043.) (See *Fremont Indem. Co. v. Fremont General Corp.* (2006) 143 C.A.4th 50, 66, 49 C.R.3d 82 [M law firm's concurrent representation of related insurance companies I and G in separate matters in which interests were neither adverse nor related, but at time when interests of I and G were adverse in third matter not involving M, was not proper basis for disqualifying M from representing G as defendant in later action by I].)

Koo v. Rubio's Restaurants (2003) 109 C.A.4th 719, 135 C.R.2d 415, involved a class action concerning overtime wages for managers at defendant restaurants. Plaintiff's attorney, R, sought discovery of the names, addresses, and telephone numbers of defendant's managers. In response to the motion to compel, defendant's attorney, C, declared that his firm represented both defendant and its managers, and that *Rules of Professional Conduct, Rule 2-100* (*infra*, §§422, 423), which prohibits ex parte communications with a represented party, barred R from directly contacting defendant's managers. Based on that declaration, R sought disqualification of C. C responded that the declaration was intended only to assert the application of Rule 2-100 with respect to managing agents and to put R on notice that R was required to comply, and that the declaration was not intended to create an attorney-client relationship with current managing agents of the corporation. Nevertheless, the trial court indicated that C appeared to have an irremediable conflict and granted the motion to disqualify. *Held*, reversed.

(a) While it is true that disqualification in simultaneous representation cases is generally a *per se* rule, it only applies where there is an attorney-client relationship that would give rise to a conflict. The burden to establish the relationship is on the party seeking disqualification, and here R failed to do so. An attorney's unilateral declaration

cannot create an attorney-client relationship if no express or implied contract exists. Here, there was no contract, and R's reliance on C's declaration was not enough. (*109 C.A.4th* 729.)

(b) There was no evidence that C, by invoking the rule against ex parte contact, wrongfully acquired an unfair advantage that would undermine "the integrity of the judicial process or have a continuing effect on the proceedings." Thus, disqualification would have wrongly penalized defendant by requiring new counsel. (*109 C.A.4th* 734.)

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2. Representation on Unrelated Matter.

1 Witkin Cal. Proc. Attys § 110

[§ 110] Representation on Unrelated Matter.

A law firm breaches the rule against concurrent representation of conflicting interests when, without the knowledge and consent of a current client, the firm represents a third person in suing the client on an unrelated matter. In *Jeffrey v. Pounds* (1977) 67 C.A.3d 6, 10, 136 C.R. 373, defendant P engaged G's law firm to institute a personal injury action, and G turned the case over to his partner B, who handled it up to the time of trial. Meanwhile P had consulted attorney R to represent him in a marital dissolution proceeding, and P's spouse engaged G to represent her. When G wrote R claiming the spouse's interest in P's retirement fund, P instructed R to take his personal injury case away from G's firm. R did so and settled the case for \$ 4,000, receiving a \$ 1,000 fee. The trial judge then allowed G's firm \$ 500 out of R's fee as the reasonable value of their legal services in the case. The judge reasoned that, because P was already drawing a pension, the continued handling of his personal injury claim by G involved no confidential information that might aid P's spouse in the dissolution. *Held*, reversed.

(a) The strictures against dual representation of antagonistic interests (Rules of Professional Conduct, former Rule 5-102, now Rule 3-310, *infra*, §438 et seq.) are broader than the provisions designed to protect the confidential relationship (*B. & P.C. 6068(e)*, *supra*, §90, and former Rule 4-101, now Rule 3-310(E), *infra*, §441); "they arise without potential breaches of confidentiality." (67 C.A.3d 10.) And the need for disclosure and consent of all parties arises not only where multiple clients' antagonisms are confined to a single controversy, but extends to situations where antagonism pervades the relationship. "A lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter. Hence the decisions condemn acceptance of employment adverse to a client even though the employment is unrelated to the existing representation. Basis of the condemnation is the client's loss of confidence, not the attorney's inner conflicts." (67 C.A.3d 11.) Here, G, who undertook to represent P's spouse without P's consent, violated former Rule 5-102(B) (now Rule 3-310(C)). (67 C.A.3d 11.)

(b) Plaintiffs are entitled to compensation for the value of services that were rendered only up to the time of this violation of the rule. (67 C.A.3d 12; see *infra*, §215.)

The rule of disqualification in simultaneous representation cases, even those involving unrelated matters, is

automatic. (See *Flatt v. Superior Court* (1994) 9 C.4th 275, 284, 287, 36 C.R.2d 537, 885 P.2d 950, *infra*, §113; *Hernandez v. Paicius* (2003) 109 C.A.4th 452, 465, 466, 134 C.R.2d 756 [defense counsel engaged in "egregious and shocking breach of her duty of loyalty" and violated *Rules of Professional Conduct, Rule 3-100(C)(3)* where counsel's firm simultaneously represented plaintiff's expert witness in unrelated matter, and counsel rigorously sought to impeach expert's reputation and credibility]; *Cal West Nurseries v. Superior Court* (2005) 129 C.A.4th 1170, 1177, 29 C.R.3d 170 [duty of undivided loyalty required disqualification of L from representing R in action against multiple parties that included C, who was represented by L in unrelated matter, even though L disassociated as cocounsel in R's cross-complaint against C but continued as cocounsel for all other parties; C and R remained adverse parties, and thus L would be representing two clients who were opponents in same action].)

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a. Nature and Scope of Conflict.

3. Representing Parent and Subsidiary Corporations.

1 Witkin Cal. Proc. Attys § 111

[§ 111] Representing Parent and Subsidiary Corporations.

When representation involves parent and subsidiary corporations, is there one entity or two for conflict purposes? One court has taken the position that parent and subsidiary corporations should be treated as the same entity *only* when one corporation is the alter ego of the other. In *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court* (1997) 60 C.A.4th 248, 70 C.R.2d 419, attorney L had represented defendants since 1991 regarding the construction of a cogeneration facility. Plaintiff PMNC had agreed to design and construct the facility and plaintiff Parsons Corporation (Parsons) guaranteed the performance. Parsons moved to disqualify L contending that L, while representing parties adverse to Parsons in this litigation, was simultaneously representing Parsons' interests on unrelated matters by representing various Parsons subsidiaries since 1994, when another attorney had joined L's firm, bringing a Parsons subsidiary with him. L represented that subsidiary in a dispute in 1997, the year of L's first appearance in the current litigation. Parsons contended that L was conducting concurrent representation of adverse interests in violation of *Rules of Professional Conduct, Rule 3-310(C)(3)* (infra, §438 et seq.). The trial judge ruled that L's representation of parties adverse to Parsons created a conflict of interest and specifically based the ruling on a finding that a sufficient "unity of interest" existed between Parsons and its subsidiary for conflict purposes. *Held*, ruling vacated and remanded.

(a) *Two-step inquiry*. Whether a conflict of interest arises when an attorney accepts representation that is adverse to the parent of an existing corporate client depends on (1) whether the parent is a client or entitled to be treated as a client for conflict purposes, and (2) if the parent is not a client, whether the attorney's duty of loyalty to the subsidiary precludes representation that is adverse to the parent. (60 C.A.4th 254.)

(b) *Parent as client*. *Rules of Professional Conduct, Rule 3-600* (infra, §446 et seq.), a related State Bar opinion, and an opinion of the American Bar Association's Committee on Professional Ethics (A.B.A. Formal Ethics Opinion No. 95-390) make it clear that a corporation's status as the parent of an attorney's existing client does not make it a client too. (60 C.A.4th 254.)

(c) *Duty of loyalty*. The duty of loyalty owed to a client is the basis for the requirement of *Rules of Professional Conduct, Rule 3-310(C)*, that an attorney cannot undertake representation directly adverse to an existing client. (60

C.A.4th 256.) However, only *direct* adverse consequences to an existing client are barred. Negative economic consequences a corporation may suffer as a result of litigation against its affiliate are *indirect*, because the immediate impact is on the affiliate. Two compelling policy justifications exist for refusing to allow these indirect adverse consequences to support a conflict of interest: First, there would be no way to construct a meaningful standard to distinguish among indirect consequences, and second, to conclude otherwise would create conflicts of interest that are undetectable because an attorney would need an exhaustive list of all the holdings of all of his or her clients, something that would impose undue constraints on the attorney-client relationship and prove almost impossible to implement. (*60 C.A.4th 256.*) Thus, the attorney's duty of loyalty to a corporate client does not bar the attorney from representing an interest adverse to the client's parent. (*60 C.A.4th 257.*)

(d) *Alter ego exception.* A narrow exception to the rule that related corporations should not be treated as the same entity for conflict purposes is the alter ego exception. The alter ego doctrine has been extensively developed in California case law. (*60 C.A.4th 257*; see 9 *Summary* (10th), *Corporations*, §9 et seq.) Thus, when one corporation is the alter ego of another, they should be treated as the same entity for conflict purposes. (*60 C.A.4th 257.*) Here, the trial judge incorrectly applied the "unity of interests" test in finding that L had a conflict of interest in undertaking a representation adverse to Parsons. This standard entails a lesser showing than that required for a finding of alter ego and is potentially so broad that an exception based on it could easily subsume the rule. (*60 C.A.4th 258, 259.*)

However, in *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 *C.A.4th* 223, 81 *C.R.2d* 425, *infra*, §133, defendant law firm had formerly represented plaintiff parent corporation and subsequently continued to receive information about the parent as counsel to the parent's underwriters. In upholding a preliminary injunction that prevented defendant from representing a third party in a dispute with the subsidiary, the court likened the case to one of successive representation and stated that the alter ego test is something less than the bright-line standard the *Brooklyn Navy Yard* court envisioned. "It was not developed to deal with conflict issues and in our view it does not work very well in conflicts cases. It involves many considerations which are irrelevant in conflicts cases, and omits others which may be highly relevant. Thus, while the test may be one standard among others for judging corporate relationships in conflicts cases, we do not think it can properly be viewed as the *sole* standard." (*69 C.A.4th 249.*) The court determined that the trial judge properly used the unity of interests standard, cited support for its use in opinion number 95-390 of the A.B.A. Committee on Professional Ethics, and found "no reason to depart from it here." (*69 C.A.4th 252.*) (See 29 *Western State L. Rev.* 283 [arguing that general rule for corporate affiliate conflicts should be whether proposed representation violates "reasonable expectations" of confidentiality or loyalty, offering five-step analysis, and discussing *Brooklyn Navy Yard Cogeneration Partners* and *Morrison Knudsen Corp.*].)

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a. Nature and Scope of Conflict.

4. Withdrawal From Representation Does Not Avoid Conflict.

1 *Witkin Cal. Proc. Attys* § 112

[§ 112] Withdrawal From Representation Does Not Avoid Conflict.

Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 C.A.4th 1050, 8 C.R.2d 228, involved an action for equitable subrogation and other relief brought by plaintiff T against defendant F. When T contacted law firm C concerning the case, C ran a computerized conflicts check and found that for several months C had been defending a credit union that was related to F in two wrongful termination actions. C informed F that C was willing to withdraw from the wrongful termination cases and to waive fees for its past services, but F refused to consent to the concurrent representation. C then engaged substitute counsel to handle the wrongful termination cases, and accepted representation of T. In the hearing on F's motion to disqualify C from acting as counsel for T, the trial judge recognized that conflict problems of large compartmentalized law firms and insurance companies differ from those of sole practitioners representing private individuals, but saw no reason why different rules should apply, and disqualified C pursuant to the per se disqualification rule in concurrent representation cases. *Held*, order of disqualification affirmed.

(a) *Rule 3-310 of the Rules of Professional Conduct* prohibits an attorney from representing two or more clients whose interests conflict, unless there is informed written consent. (6 C.A.4th 1055; see *infra*, §440.)

(b) T argued that C's withdrawal from its representation of F made F a former client, and that the less severe former representation standard (see *infra*, §137) should apply. The authorities do not support this position. In the concurrent representation context, the representation adverse to a present client must be measured not so much against the similarities in litigation, but against the duty of undivided loyalty that an attorney owes to each client. (6 C.A.4th 1056.) Moreover, the automatic disqualification rule cannot be avoided by unilaterally converting a present client into a former client prior to the hearing on the motion for disqualification. (6 C.A.4th 1057, 1058.)

(c) Although a federal case recognized an exception where there was the "mere happenstance of an unseen concurrent adverse representation," that was not the situation here. At the time C accepted representation of T, C knew that it was representing F in the wrongful termination litigation. Thus, C created the conflict, and cannot avail itself of the exception. (6 C.A.4th 1058, 1059.)

(d) T argues that the automatic disqualification rule is harsh when applied to large law firms organized into specialty practice groups representing institutional clients where conflict situations may arise inadvertently. However, there was nothing inadvertent when C agreed to represent T while representing F. Also, "to the extent this argument implies or suggests that the duty of loyalty owed a client of a large law firm is somehow less than that owed to the client of a smaller firm or sole practitioner, we summarily reject the implication." (6 C.A.4th 1060.)

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a. Nature and Scope of Conflict.

5. No Duty To Advise Potential Client Where Conflict Exists.

1 Witkin Cal. Proc. Attys § 113

[§ 113] No Duty To Advise Potential Client Where Conflict Exists.

In *Flatt v. Superior Court* (1994) 9 C.4th 275, 36 C.R.2d 537, 885 P.2d 950, plaintiff consulted F, an attorney with defendant law firm, concerning a legal malpractice claim against plaintiff's former attorney, H. A week later, F advised plaintiff by letter that defendant could not represent him against H, because defendant represented H in an unrelated matter, and returned all documents to plaintiff. Plaintiff later filed a malpractice action against H and defendant, claiming that defendant breached its duty by failing to advise plaintiff of the statute of limitations or to seek other counsel. Defendant sought summary judgment on the ground that defendant owed no duty to advise plaintiff, because any advice would run contrary to the interests of defendant's client, H. Summary judgment was denied, and the Court of Appeal affirmed. Confining the issue to whether an attorney-client relationship had been formed between plaintiff and defendant, the Court of Appeal concluded that a professional relationship *could* have been formed. *Held*, reversed. In declining to represent plaintiff, defendant had no duty to inform him of the statute of limitations applicable to the proposed suit against H or to seek alternative counsel.

(a) *Narrow holding*. The holding is narrow and confined to circumstances where "the attorney is confronted with a mandatory and unwaivable duty *not* to represent the second client in light of an irremediable conflict with the existing client and acts promptly to terminate the relationship after learning of the conflict." (9 C.4th 279.)

(b) *Attorney-client relationship*. Assuming circumstances were sufficient to make plaintiff defendant's client, the duty of loyalty owed to the firm's existing client required severance from representing plaintiff and absolved defendant of a duty to provide any advice to plaintiff adverse to defendant's preexisting client. However, client status does not give rise to the implicit assumption adopted by the Court of Appeal that the question of client status is itself material to the dispositive legal issue raised by the motion for summary judgment. (9 C.4th 281.)

(c) *Duty of loyalty*. An attorney's duty of loyalty to a client cannot be divided, at least under circumstances where the ethical obligation to withdraw from further representation of one of the parties is mandatory. The dispositive principle is derived from the ethical stricture embodied in *Rules of Professional Conduct, Rule 3-310* (infra, §440), which prohibits an attorney from accepting or continuing representation of more than one client in a matter in which the

interests of the clients actually conflict. (9 C.4th 282.)

(d) *Rule of disqualification.* Because the primary value at stake in cases of simultaneous or dual representation is the attorney's duty of loyalty, even though the simultaneous representations are in unrelated matters and there is no risk of breaching confidences, the rule of disqualification in simultaneous representation cases is automatic. (9 C.4th 284.) The reason for the rule rests with the client's expectation of confidence and trust in counsel. A client who knows counsel is also representing a litigation adversary, even in a wholly unrelated matter, will not be able to sustain those expectations. (9 C.4th 285.) Hence, the decisions condemn acceptance of employment adverse to a client even though the employment is unrelated to the existing representation. (9 C.4th 287, citing *Jeffry v. Pounds* (1977) 67 C.A.3d 6, 10, 136 C.R. 373, supra, §110.)

(e) *No duty to advise.* An attorney's duty of loyalty and mandatory disqualification from dual representation precludes assuming any relation that prevents dedicating all energies to a client's interests and prohibits any act that would interfere with that dedication. (9 C.4th 289.) Here, once F learned of the conflicting interests, any advice to plaintiff regarding his contemplated damage action would adversely affect defendant's existing client. (9 C.4th 289.) Therefore, defendant had no duty to give plaintiff any advice. (9 C.4th 290, 291.)

A dissenting opinion argued that, even though defendant might have violated a duty of loyalty to an existing client by giving advice to plaintiff, that fact did not absolve defendant of the duty to do so. Plaintiff did not create the conflict, and he was deprived of the services of the counsel of his choice through no fault of his own. (9 C.4th 295.) Further, the majority failed to address *Rules of Professional Conduct, Rule 3-700(A)(2)* (infra, §450), requiring that an attorney not withdraw from employment until taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. (9 C.4th 296, 297.) (See 23 *Pepperdine L. Rev.* 698 [Flatt]; 35 *Santa Clara L. Rev.* 1093 [same]; 35 *Santa Clara L. Rev.* 1379 [same].)

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E. Representation Adverse to Current or Former Client.

4. Representation Adverse to Current Client.

a. Nature and Scope of Conflict.

6. Vicarious Disqualification of Law Firm.

1 Witkin Cal. Proc. Attys § 114

[§ 114] Vicarious Disqualification of Law Firm.

(1) *In General.* In *William H. Raley Co. v. Superior Court* (1983) 149 C.A.3d 1042, 197 C.R. 232, plaintiff was represented by a law firm with about 100 lawyers. Z, a partner in the firm, was a director and member of the trust committee of a bank that as trustee owned all of defendant's common stock. When informed of a possible conflict, Z took steps to isolate himself from all matters involving defendant at both the firm and the bank. While the case was at the pleading stage, defendant moved to disqualify the firm. *Held*, disqualification should have been ordered.

(a) Z had fiduciary obligations to defendant by virtue of Z's positions with the bank, and at the same time had a partnership interest in the firm representing plaintiff. This constituted a clear conflict of interest. (149 C.A.3d 1047, 1048.)

(b) Vicarious disqualification of a firm is generally required when a partner has a conflict. This rule is not mechanically applied where it would be harsh and unfair to both the firm and its client, but in this case disqualification is proper. There are "great difficulties" in Z's attempted isolation of himself from the case, and the inconvenience to plaintiff of obtaining new counsel at this early stage of the litigation is minimal. (149 C.A.3d 1049, 1050.) (See *Klein v. Superior Court* (1988) 198 C.A.3d 894, 913, 914, 244 C.R. 226 [firm disqualification was required where partner had been disqualified because of prior receipt of confidential information and there was no attempt to screen him from litigation]; A.B.A. Model Rules of Professional Conduct, Rule 1.10 [imputation of conflicts of interest]; 6 A.L.R.5th 242 [disqualification of member of law firm as requiring disqualification of entire firm--state cases].)

(2) *"Of Counsel" Attorney.* An attorney who is "of counsel" to a law firm is subject to the same imputation rule for disqualification purposes as regular members of the firm. In *People v. Speedee Oil Change Systems* (1999) 20 C.4th 1135, 86 C.R.2d 816, 980 P.2d 371, the Attorney General sued an oil franchisor on behalf of the Department of Corporations. Numerous franchisees intervened, bringing an oil company into the action as a defendant in intervention. The franchisees' attorney associated law firm S to assist him. Without the knowledge of that association, members of the law firm representing the oil company met with attorney D who was of counsel to S and discussed material, confidential information concerning the litigation. On learning of the association with the franchisees' attorney, the oil company

sought disqualification of S for a conflict of interest attributable to the conversations between D and the oil company's attorneys. The trial judge denied the motion. *Held*, reversed.

(a) *Disqualification principles*. The paramount concern in disqualification motions is to preserve public trust in the administration of justice and in the integrity of the Bar. The following two related fundamental values are involved:

(1) *Confidentiality*. To protect the confidentiality of communications between attorney and client, *Rules of Professional Conduct, Rule 3-310* (infra, §438 et seq.) prohibits attorneys from accepting, without a client's informed written consent, employment adverse to the client or former client where the attorney has received confidential information material to the employment. (20 C.4th 1146.)

(2) *Loyalty*. Attorneys have a duty to maintain undivided loyalty to their clients. If an attorney, or law firm, simultaneously represents clients who have conflicting interests, disqualification follows automatically regardless of whether the representations have anything in common or present a risk that confidences obtained in one matter would be used in the other. (20 C.4th 1146.) The attorney's actual intention and motives are immaterial. (20 C.4th 1147.)

(b) *Representation*. For disqualification purposes, an attorney represents a client when the attorney knowingly obtains material, confidential information from the client and renders legal advice or services. (20 C.4th 1148.) Here, the initial discussions between D and the oil company's attorneys involved substantial amounts of material, confidential information. D discussed the substantive allegations, the procedural status, and the oil company's theories of the case. Acting on this information, D provided the oil company's attorneys with the results of his research. The involvement went beyond initial or peripheral contacts and rose to the level for which fiduciary duties of confidentiality and loyalty properly can be imposed. Thus, for disqualification purposes, D represented the oil company. Consequently, D and S represented opposing parties in the same litigation giving rise to a potential breach of the duty of confidentiality. (20 C.4th 1152.)

(c) *Imputed disqualification and "of counsel" attorneys*. The close, personal, continuous, and regular relationship between a law firm and the attorneys affiliated with it as of counsel contains many of the same elements that justify the rule of vicarious disqualification applicable to partners, associates, and members. An of counsel attorney, particularly one frequently in the firm's offices or in contact with the firm's attorneys, may be consulted on a variety of matters without being formally identified as cocounsel. "This close, fluid, and continuing relationship, with its attendant exchanges of information, advice, and opinions, properly makes the of counsel attorney subject to the conflict imputation rule, regardless of whether that attorney has any financial stake in a particular matter." Here, D's conflict must be imputed to S because of the public designation of their relationship. Thus, D's conflict of interest must lead to S's vicarious disqualification. (20 C.4th 1154.)

A similar result was reached in *Pound v. DeMera DeMera Cameron* (2005) 135 C.A.4th 70, 36 C.R.3d 922. After terminating their employment with D, plaintiffs sought declaratory relief against D regarding the effect of various employment agreements. In their amended complaint, plaintiffs added derivative causes of action against H and M, the principal shareholders. H and M then sought personal counsel and S, the attorney for D, assisted in the search. S interviewed B and discussed the case in specific terms, including issues, personalities, vulnerabilities, and other topics described as attorney work product. B was not hired. Three years later attorney J, who had represented plaintiffs from the beginning, consulted with B, who offered observations about the legality of the actions of H and M, but did not reveal facts or issues learned from S or any other source. J ultimately associated B as counsel in the case. On learning of B's association, D's counsel sought disqualification of both B and J. The trial court disqualified B but denied the motion as to J. *Held*, disqualification of J was also required.

(a) *Attorney-client relationship*. As corporate counsel for D, S also had a confidential relationship with H and M, and for over a year beginning with plaintiff's initial action, S was the primary attorney with whom H and M consulted. When S interviewed B for possible representation of H and M and revealed confidential information, S was acting as the agent of H and M, thus giving rise to a duty of loyalty and confidentiality on the part of B to H and M. In essence,

when B then associated with J, the matter became one of successive representation, and B entered into representation adverse to his former clients. Given the potential for disclosure of confidential information, J must be disqualified. (135 C.A.4th 76.)

(b) *Waiver*. S did not waive any privilege he may have had by disclosing his work product information to B. Under *Speedee Oil Change Systems*, the work product is confidential information and is not waived when discussed with a consultant. Further, even if S's work product was prepared in his capacity as corporate counsel, it necessarily included confidential information consistent with the interests of H and M. Finally, there is no evidence that S acted inconsistently with an intent to safeguard his work product. (135 C.A.4th 80.)

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b. Adverse Interests of Corporate Attorneys.

1. In General.

1 Witkin Cal. Proc. Attys § 115

[§ 115] In General.

A corporate attorney's paramount obligation is to the corporate entity, and the corporate attorney normally follows management's position. The same rule applies to an attorney representing a partnership. However, when potential or actual conflicts arise between the interests of a corporation and those of its managers, or between the interests of a partnership and those of its partners, the attorney is faced with a difficult decision as to the appropriate course of action. (See *Responsible Citizens v. Superior Court* (1993) 16 C.A.4th 1717, 20 C.R.2d 756, *infra*, §116 [partnership]; 91 Cal. L. Rev. 57 [arguing that focus of ethical analysis should be on normative structure of collaborative relationships within entity or organization]; 94 Harv. L. Rev. 1334 et seq. [representing entity; problems of corporate attorney].)

Conflicts often arise in disputes between shareholders and management, and particularly in shareholder derivative suits. (See 94 Harv. L. Rev. 1337 et seq. [conflicts between shareholders and management].) The Rules of Professional Conduct provide that, when an organization is the client, the attorney must treat the organization itself as the client. (Rule 3-600(A).) However, if there is no disqualifying conflict, the attorney may also represent corporate officers or other constituents. (Rule 3-600(E).) (See *infra*, §446 et seq.) (See A.B.A. Model Rules of Professional Conduct, Rule 1.13 [organization as client].)

In *Elberta Oil Co. v. Superior Court* (1930) 108 C.A. 344, 347, 291 P. 668, minority stockholders sued a corporation and the directors to have the latter declared trustees for the corporation of property personally acquired. One individual defendant filed a cross-complaint against the plaintiffs and the corporation, to quiet his title to part of the property. M appeared as attorney for the corporation and the cross-complainant. *Held*, the trial judge properly removed him as counsel for the corporation; under the allegations of the complaint, the interests of the corporation and cross-complainant were opposed. (108 C.A. 347.)

In *Jacuzzi v. Jacuzzi Bros.* (1966) 243 C.A.2d 1, 52 C.R. 147, plaintiffs brought a derivative action seeking various forms of relief against the corporation and five of its directors and officers. Plaintiffs' motion to disqualify the attorneys for the individual defendants from representing the corporation was denied by the trial judge. *Held*, the denial was proper; joint representation is permissible "prior to an adjudication that the corporation is entitled to relief against its

officers, or directors." (243 C.A.2d 36.)

In *Woods v. Superior Court* (1983) 149 C.A.3d 931, 197 C.R. 185, the wife in a marital dissolution proceeding moved to disqualify attorney K from representing the husband, on the ground that K was the attorney for a family corporation that was the primary focus of dispute in the dissolution proceeding. *Held*, the motion should have been granted. As the attorney for the family corporation, K represented both the husband's and the wife's interests. The mere possibility that K's representation of the husband might be adverse to the wife's interests is sufficient to require K's disqualification; proof of an actual breach of confidence or adverse impact is not required. (149 C.A.3d 936.) "[A]bsent consent or waiver, the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a dissolution action." (149 C.A.3d 937.)

In *Metro-Goldwyn-Mayer v. Tracinda Corp.* (1995) 36 C.A.4th 1832, 43 C.R.2d 327, a merged corporation and a bank that financed the merger each brought separate actions against board members and major shareholders of one of the parties to the merger. Defendants in the bank action were represented by a law firm that had also been primary outside counsel in both litigation and transactional matters for one of the parties to the merger. When the actions were consolidated, plaintiffs moved to disqualify the law firm on the basis of that representation, but the motion was denied. *Held*, reversed. Under *Rules of Professional Conduct, Rule 3-600(E)*, corporate counsel may represent corporate officers, subject to the prohibition of Rule 3-310 (*infra*, §438 et seq.) against representation of adverse interests. (36 C.A.4th 1841.) Here, the law firm's employment as chief corporate counsel for one of the parties to the merger, and its specific representation of that company in the transaction giving rise to the present actions, made its appearance "adverse to the client or former client," contrary to Rule 3-310, and the firm should have been disqualified per se from representing defendants. (36 C.A.4th 1845.)

In *Forrest v. Baeza* (1997) 58 C.A.4th 65, 67 C.R.2d 857, attorney M simultaneously represented two closely held family-run corporations and two of the three shareholders (and directors) of those corporations in a shareholder derivative action. The two shareholders were accused of embezzling from the corporations and subjecting the corporations to penalties for tax fraud. The trial court granted the third shareholder's motion to disqualify M from representing the corporation, but allowed M to continue representing the other two shareholders. *Held*, affirmed. "Current case law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit, at least where, as here, the directors are alleged to have committed fraud." (58 C.A.4th 74.) Although *Jacuzzi* held that dual representation was permissible prior to an adjudication that the corporation is entitled to relief against its officers or directors, *Jacuzzi* "has been criticized as illogical and against the weight of authority." (58 C.A.4th 75.) Here, it is clear that the interests were adverse. M could not represent both the accused shareholders and the corporations and the corporations were properly ordered to secure independent counsel. "This order is consistent with federal authority in the precise circumstance of attorney disqualification in shareholder derivative litigation, which holds that while dual representation of a corporation and its directors is impermissible (at least if the directors are charged with fraud), the attorney who formerly represented both clients may continue to represent the individual ones." (58 C.A.4th 80.)

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b. Adverse Interests of Corporate Attorneys.

2. No Automatic Representation of Officers or Partners.

1 Witkin Cal. Proc. Attys § 116

[§ 116] No Automatic Representation of Officers or Partners.

Under the Rules of Professional Conduct, the attorney for an organization may, but does not necessarily, represent corporate officers or other constituents. (Rule 3-600; *infra*, §446 et seq.)

In *Responsible Citizens v. Superior Court* (1993) 16 C.A.4th 1717, 20 C.R.2d 756, H & G law firm represented an association in its opposition to a mining project operated by two persons, one of whom was a partner in a general partnership. The firm also represented the partnership in an unrelated real estate matter. The trial court in the mining matter disqualified H & G on the ground that an attorney-client relationship existed between the firm and the individual partner, and the firm sought mandamus. *Held*, mandamus issued.

(a) No case clearly addresses the issue "whether, within the conflict of interest context, an attorney representing a partnership necessarily has an attorney-client relationship with the individual partners extending beyond the partnership affairs." (16 C.A.4th 1726.)

(b) The attorney for a corporation represents it, its stockholders, and its officers in their representative capacity, but does not represent the officers personally. (16 C.A.4th 1726, 1727.) An attorney for a partnership represents all partners with respect to matters of partnership business, but this does not resolve the question whether the attorney represents individual partners for other purposes. (16 C.A.4th 1727, 1728.)

(c) *Rules of Professional Conduct*, Rule 3-600, applies where an organization is a client. Under Rule 3-600(A), the attorney for an organization must treat the organization itself as the client. (16 C.A.4th 1729.) Although the rules do not define the term "organization," Rule 3-600(A) and the comment to the rule indicate an intent to include partnerships and to apply the entity theory of partnership law, i.e., the client is the organization itself. (16 C.A.4th 1730, 1731.)

(d) Hence, under Rule 3-600(A), representation of a partnership does not, by itself, create an attorney-client relationship with individual partners. However, under Rule 3-600(E), the attorney for a partnership may represent individual partners. "The rule eschews a bright line pronouncement that a partnership attorney *always* represents the

partners, or that he or she *never* does." (16 C.A.4th 1731.)

(e) Unless there is a court appointment or an express agreement to represent an individual partner, the attorney-client relationship can exist only if implied from the circumstances. (16 C.A.4th 1732.) Various factors might support or undercut implication of an attorney-client relationship with an individual partner in a particular case: the type and size of the partnership; the nature and scope of the attorney's engagement by the partnership; the kind and extent of contacts, if any, between the attorney and the individual partner; and the attorney's access to information (e.g., partnership financial information) relating to the individual partner's interests. In determining whether the relationship exists, "primary attention should be given to whether the totality of the circumstances, including the parties' conduct, implies an agreement by the partnership attorney not to accept other representations adverse to the individual partner's personal interests." (16 C.A.4th 1733.)

(f) The trial court's disqualification order was based solely on its erroneous legal conclusion that representation of a partnership includes representation of the individual partners. It is therefore appropriate to remand the case for reconsideration under the proper legal principles. (16 C.A.4th 1734, 1735.)

In *Johnson v. Superior Court* (1995) 38 C.A.4th 463, 45 C.R.2d 312, the court reviewed and applied the *Responsible Citizens* factors. The court concluded that an attorney has a duty to individual partners if the representation of a partnership involves an obligation to protect the partners' rights to benefits from the partnership. Hence, the attorney must terminate the representation if conflicts exist among the partners. (38 C.A.4th 479.)

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c. Adverse Interests in Insurance Matters.

1. Representing Insured and Insurer.

1 Witkin Cal. Proc. Attys § 117

[§ 117] Representing Insured and Insurer.

For purposes of disqualification in simultaneous representation cases, an attorney representing an insured also represents the insurer. In *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 C.A.4th 1422, 86 C.R.2d 20, law firm M had represented plaintiff in a coverage issue involving defendant. Four months after completing that representation, defendant retained M to represent its insured. A year later, M represented plaintiff in this action against defendant seeking declaratory relief and subrogation relating to the coverage matter previously handled by M. A month after the complaint was filed, defendant objected to M's continued representation of plaintiff, based on *Rules of Professional Conduct, Rule 3-310*. M did not respond to the objection, the case involving defendant's insured eventually settled, and plaintiff commenced discovery in this case. Defendant moved to disqualify M. The trial court concluded that defendant's status at the time of the disqualification motion was that of a former client and thus disqualification was not required under the substantial relationship test. *Held*, reversed.

(a) *Client status*. In cases involving disqualification based on *Rules of Professional Conduct, Rule 3-310*, the complaining party must be a client. Although no case squarely addresses the disqualification issue presented here, whether an attorney-client relationship exists between an insurer and counsel it hires to defend an insured, has arisen in several contexts (e.g., asserting attorney-client privilege and independent right to sue for malpractice). Courts analyzing these situations have characterized the relationship as a "loose partnership, coalition or alliance directed toward a common goal. ... Conceptually, each member of the trio ... has corresponding rights and obligations founded largely on contract, and as to the attorney, by the Rules of Professional Conduct." (72 C.A.4th 1429.) As a practical matter, the attorney may have closer ties with the insurer than with the insured. The insurer engages and pays the attorney, and it is customary for the insurer to control the defense it provides. Moreover, California courts have upheld malpractice actions brought by the insurer against the counsel it hired to defend its insured, expressly recognizing the attorney-client relationship. Thus, under established principles, defendant was M's client for purposes of this disqualification motion. (72 C.A.4th 1429.)

(b) *Automatic disqualification*. It is a violation of the duty of loyalty for an attorney to assume a position adverse or antagonistic to a client without the client's free and intelligent consent given after full knowledge of the facts and

circumstances. Thus, to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship, the rule of disqualification in simultaneous representation, even if involving unrelated matters, is an automatic one. Here, M was representing defendant when M filed the underlying complaint against defendant on behalf of plaintiff. Although the case subsequently settled, there was a period when M was simultaneously representing clients with adverse interests. Hence, the trial court erred in analyzing the relationship as if it were a successive representation and incorrectly applied the substantial relationship test. (72 C.A.4th 1430.)

(c) *No implied consent.* In successive representation cases, delay in bringing a motion to disqualify that results in prejudice to the present client may establish an exception to the rule of disqualification. However, here the issue is whether defendant's conduct in referring cases to M while there was a possibility that one of M's existing clients would sue defendant on a subrogation claim constitutes implied consent by conduct. The need to protect clients justifies applying different standards to conflicts involving concurrent representation. M had the burden to avoid creating a conflict, and should not have accepted the cases referred by defendant when M knew it might be filing a lawsuit against defendant. Thus, there is no basis for finding implied consent to the adverse representation. (72 C.A.4th 1433.) (On amendment to *Rules of Professional Conduct, Rule 3-310(C)(3)* in response to *State Farm Mut. Auto. Ins. Co.*, see *infra*, §440.)

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2. Workers' Compensation Cases.

1 Witkin Cal. Proc. Attys § 118

[§ 118] Workers' Compensation Cases.

Where an employee subject to the Workers' Compensation Act sustains a compensable injury or death at the hands of a third-party tortfeasor, two causes of action arise: one for compensation, against the employer; the other for damages, in an ordinary tort action, against the third party. (See 2 *Summary* (10th), *Workers' Compensation*, §69.)

In *Anderson v. Eaton* (1930) 211 C. 113, 293 P. 788, defendant client had a compensation claim and cause of action for wrongful death as a result of the negligent killing of her son by the third party. Plaintiff attorney represented the employer's insurer on a regular retainer. He advised defendant not to engage counsel to appear before the Industrial Accident Commission because the employer would not contest the compensation claim, and induced her to employ him to prosecute the wrongful death action on a one-third contingent fee. Then, (a) acting as the attorney for the employer and the insurer, he contested the amount of her death benefit, and succeeded in cutting it from his previous estimate of \$ 1,500 to \$ 309; (b) acting as her attorney in the damage action, which he had estimated as worth \$ 40,000 or \$ 50,000, he settled it for \$ 3,100, and brought this action to recover his contingent fee. *Held*, recovery denied; the contract was against public policy and void. (211 C. 116.) As defendant's attorney, plaintiff probably obtained confidential information concerning the degree of her dependency, which he could have used in contesting her compensation claim. As the attorney for the insurer, his primary interest was in obtaining a sure recovery, however small, which would at least equal the subrogation claim of the insurer in the amount of the compensation award. Also, his contest of defendant's dependency claim before the Commission might conceivably have had an adverse effect on the damage action. (211 C. 117, 118.) It is not necessary to show that the attorney actually uses confidential information or does in fact allow the adverse interest to work to the disadvantage of his client; the dual employment, with its temptations, is improper and invalidates the contract. (211 C. 116, 117.)

Anderson was distinguished on its facts in *Burum v. State Comp. Ins. Fund* (1947) 30 C.2d 575, 184 P.2d 505, where the court declared that the earlier decision was grounded on an *actual* conflict of interests; that a *mere possibility* of conflicting interests does not necessarily invalidate an attorney's contract of employment; and that dual representation of the dependent of a deceased employee and of the employer's insurer in this situation is not necessarily against public policy. (30 C.2d 582, 584.) The distinction and holding were attacked in a strong dissenting opinion based on the

principles laid down in *Anderson*. (30 C.2d 586, 587.)

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3. Automobile Accident Cases.

aa. Representation at Trial.

1 Witkin Cal. Proc. Attys § 119

[§ 119] Representation at Trial.

Conflicts frequently arise between the interests of the insurer and its insured; in these situations the insured is entitled to independent counsel of choice at the insurer's expense. (*Executive Aviation v. National Ins. Underwriters* (1971) 16 C.A.3d 799, 810, 94 C.R. 347.) Often these conflicts, and the need for independent counsel, become apparent during settlement negotiations. (See *infra*, §120.)

In *O'Morrow v. Borad* (1946) 27 C.2d 794, 167 P.2d 483, after a collision between two drivers, one sued, the other cross-complained, and it appeared that the same insurer represented both. *Held*, the cross-complainant was entitled to independent counsel, although his policy called for representation by the insurer's attorneys. (27 C.2d 798.) (See 2 *Summary* (10th), *Insurance*, §287 et seq.)

The same principle was involved in *Hammett v. McIntyre* (1952) 114 C.A.2d 148, 249 P.2d 885, where the insurer's attorneys represented the driver and the owner of the car. The attorneys advised the driver to waive a jury and admit negligence. Then they successfully defended the owner on the ground of no permissive use, and judgment was rendered against the driver alone. *Held*, the driver was denied a fair trial, and this was reversible error despite the strong showing that the driver did not, in fact, have any defense. (114 C.A.2d 157, 158.)

The right to insist on independent counsel belongs to the insured, not his adversary, and the insured may waive the right even though the opponent objects. (*McGee v. Superior Court* (1985) 176 C.A.3d 221, 227, 228, 221 C.R. 421.)

Other situations may arise where two insurers are involved. (See *Ivy v. Pacific Auto. Ins. Co.* (1958) 156 C.A.2d 652, 320 P.2d 140, 2 *Summary* (10th), *Insurance*, §295 [improper joint representation of insured and one insurer by insurer's attorney; attorney stipulated away insured's rights to shift liability to second insurer].)

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bb. Representation in Settlement Negotiations.

1 *Witkin Cal. Proc. Attys* § 120

[§ 120] Representation in Settlement Negotiations.

The conflict of interest may arise long before trial, when the insurer's attorney is first brought into the case by the insurer. The attorney's dilemma, and the alternative courses of action, were exhaustively considered in *Lysick v. Walcom* (1968) 258 C.A.2d 136, 65 C.R. 406. Plaintiffs sued R's administrator for wrongful death. A, R's insurer, offered to settle for \$ 9,500, and later authorized defendant, an attorney engaged by A to defend the case, to offer the policy limit of \$ 10,000, subject to conditions. The administrator's attorney, pointing to the \$ 450,000 demand in plaintiffs' action, and their willingness to settle for \$ 12,500, offered the estate's contribution of the \$ 2,500 over policy limits. Despite extended negotiations, defendant did not bring the insurer's offer up to \$ 10,000, the action went to trial, and plaintiffs received judgment of \$ 225,000. Then plaintiffs, having obtained an assignment from R's estate, sued A and defendant attorney for bad faith in refusing to settle. A paid \$ 89,000 in compromise and was dismissed. The action proceeded against defendant attorney, and a verdict for defendant was returned. *Held*, judgment reversed.

(a) *Client's advance consent to dual representation.* The policy provision that the insurer's attorney may defend claims against the insured is a consent in advance by the insured to be represented by that attorney. The attorney represents both clients and owes professional obligations to both. (258 C.A.2d 146.)

(b) *Attorney's election where conflict of interest appears.* If a conflict of interest arises, the attorney may elect either of the following: (1) to withdraw from the case or terminate the relationship with the client whose interests prevent the attorney from devoting his entire energies in that client's behalf; or (2) to continue to represent the dual interests with full disclosure to and full consent of the client. (258 C.A.2d 147.) (See *infra*, §129.)

(c) *Election to remain and duty of disclosure.* If choosing the second option, the attorney must disclose all facts and circumstances that, in the judgment of an attorney of ordinary skill and capacity, are necessary to enable the client to make free and intelligent decisions; and the attorney is liable in damages to the client for losses suffered by lack of disclosure. (258 C.A.2d 147.)

(d) *Insurer's duty to settle distinguished from attorney's duty.* The insurer's duty to accept a reasonable offer of settlement is based on the implied covenant of fair dealing in the policy (see 2 *Summary* (10th), *Insurance*, §257); i.e., it arises from a contractual relationship between the insurer and insured. The attorney's duty is created by the employment, and it may extend only to defense of the suit in court, and not necessarily embrace settlement of the claim. (258 C.A.2d 148, 149.) "Accordingly, where the attorney properly represents only the insurance company in the matter of settlement, it is his duty to protect the interests of the insurance company in that respect including protection against liability for failure to discharge its duties to the insured. In such a situation, if the attorney fails to give proper consideration to the interests of the insured in his recommendations with respect to the settlement of the case and the insurance company acts upon that recommendation causing loss to the insured, there is no cause of action against the attorney because he owes no duty in that respect to the insured. In that case the insured's cause of action is only against the insurance company." (258 C.A.2d 150.)

(e) *Attorney's breach of duty to disclose.* When A turned over the entire file to defendant attorney, and authorized settlement of the case as one of good liability, the attorney became aware of a conflict of interest concerning the settlement offer made by plaintiffs. Instead of terminating, he chose the option of continuing to act for both. This called for full disclosure, but he failed to advise the insured that he was acting solely for the insurer in determining advisability of settlement. This was a violation of the standard of professional care as a matter of law and it was error to submit the issue to the jury. (258 C.A.2d 151, 157.) (See *infra*, §290 et seq.)

In *Merritt v. Reserve Ins. Co.* (1973) 34 C.A.3d 858, 870, 110 C.R. 511, 2 *Summary* (10th), *Insurance*, §263, the court noted that an immediate conflict of interest requiring separate representation arises once an offer is made to settle an excess claim within policy limits. The remedy of separate representation is inadequate to resolve the conflict between the insured and the carrier, because control of the defense remains with the carrier, which cannot be forced to accept a settlement offer. (34 C.A.3d 870, 871.) Therefore, even when the insured obtains separate legal counsel, the insurer still has a duty to consider not only its own interests but those of the insured. (34 C.A.3d 871, 873.) (See *Betts v. Allstate Ins. Co.* (1984) 154 C.A.3d 688, 717, 201 C.R. 528 [malpractice recovery upheld where attorney representing insurer and insured failed to make full disclosure to insured prior to trial and acted against insured's best interests after return of excess verdict]; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 C.A.4th 1372, 1393, 1396, 25 C.R.2d 242 [right of insured landlords to independent counsel in negotiations to settle action by tenants for amount in excess of policy limits].)

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4. Malpractice Cases.

1 Witkin Cal. Proc. Attys § 121

[§ 121] Malpractice Cases.

In *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 C.A.3d 579, 113 C.R. 561, an attorney was retained by an insurer to defend a physician in malpractice actions. He withdrew from the defense after the insured sued the insurer for various alleged wrongs in connection with the matter. A malpractice plaintiff then sought discovery of the attorney's files to establish that the insured's testimony had been influenced by alleged improper pressures from the insurer. The trial court rejected the insurer's claim of the attorney-client privilege on the ground that the attorney had represented only the insured, who had expressly waived the privilege. *Held*, the claim of privilege should be recognized, for the attorney had represented both the insurer and the insured.

(a) The attorney's relationships to the two clients involved both common and independent elements. "The two obligations, one to insured and one to insurer, were both parts of a common, joint plan. Each of these lawyer-client relationships is endowed with confidentiality. Moreover, there is a sense in which each is independent of the other. For it may well be that in the full discharge of his obligation to his client-insurer, the attorney may communicate to the insurer objective evaluations of his client-insured, which are for the consideration only of the client-insurer in permitting it to discharge its duties to the insured under the insurance contract. Similarly there may be confidences indulged by the insured to the attorney which in turn are not intended for the insurer." (38 C.A.3d 592.)

(b) Because the insured sued the insurer alleging collusion between the insurer and the attorney, the attorney had no choice but to withdraw from further representation of the insured in all pending matters. (38 C.A.3d 593.)

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5. Insurer's Reservation of Rights.

aa. Insured's Right to Independent Counsel.

1 Witkin Cal. Proc. Attys § 122

[§ 122] Insured's Right to Independent Counsel.

(1) *Cumis Case*. In *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc.* (1984) 162 C.A.3d 358, 208 C.R. 494, a complaint against the insureds alleged multiple theories of recovery and sought general and punitive damages. The insurer retained counsel to represent the interests of the insureds, but reserved the right to deny coverage later. The reservation of rights was based on the conclusion that the insurance policy did not cover wilful conduct or punitive damages, and possibly did not cover breach of contract. The insureds retained independent counsel and, when the insurer refused to pay independent counsel's fees, brought an action to compel payment. The trial court ordered the insurer to pay the costs of independent counsel. *Held*, judgment affirmed.

(a) In the usual case, the insurer and the insured share a single, common interest of minimizing or avoiding liability, and dual representation by counsel is beneficial to both. The situation is different when some of the allegations in the complaint are not covered under the policy, because the insurer will wish to prove that any liability rests on excluded conduct while the insured will desire to prove that any liability rests on covered conduct. (162 C.A.3d 364.)

(b) While issues of coverage are not actually litigated in the third-party action, the opposing interests of insurer and insured necessarily affect decisions of counsel not only during trial, but also during pretrial settlement conferences and even during discovery. (162 C.A.3d 364, 365, 366.)

(c) *Gray v. Zurich Ins. Co.* (1966) 65 C.2d 263, 54 C.R. 104, 419 P.2d 168, 2 Summary (10th), *Insurance*, §51, while finding a duty to defend against noncovered conduct, did not consider whether this duty includes payment for independent counsel where a conflict of interest exists. (162 C.A.3d 368.) *Tomerlin v. Canadian Indem. Co.* (1964) 61 C.2d 638, 39 C.R. 731, 394 P.2d 571, 2 Summary (10th), *Insurance*, §324, recognized that where a complaint alleges multiple theories of recovery, some of which involve noncovered conduct, a conflict of interest exists, and implicitly recognized that in that situation the insurer must pay for independent counsel. (162 C.A.3d 369.) The reasoning of *Tomerlin* has been further developed in cases following it. (162 C.A.3d 369.)

(d) "[T]he Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent to continued representation, counsel must cease to represent both. Moreover, in the absence of such consent, where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible noncoverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured. ... Disregarding the common interests of both insured and insurer in finding total nonliability in the third party action, the remaining interests of the two diverge to such an extent as to create an actual, ethical conflict of interest warranting payment for the insureds' independent counsel." (162 C.A.3d 375.)

(2) *Statutory Right*. The *Cumis* requirement has been codified. An insurer with a duty to defend must provide independent counsel for the insured in the event of a conflict of interest, unless the insured signs a written waiver. (C.C. 2860.) (See *United States Fidelity & Guaranty Co. v. Superior Court* (1988) 204 C.A.3d 1513, 1524, 252 C.R. 320 [enactment of C.C. 2860 is sufficient reason for concluding that *Cumis*, although limited by later cases, is still binding precedent]; *Center Foundation v. Chicago Ins. Co.* (1991) 227 C.A.3d 547, 557, 278 C.R. 13 [C.C. 2860 is not retroactive]; 50 A.L.R.4th 932 [duty of insurer to pay for independent counsel when conflict of interest exists between insured and insurer]; 2 *Summary* (10th), *Insurance*, §287 et seq.)

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bb. Scope of Right.

1 Witkin Cal. Proc. Attys § 123

[§ 123] Scope of Right.

An insured who has a right to independent counsel also has the discretion to choose that counsel, and the insurer has an obligation to accept the insured's choice unless there is a reasonable basis for refusing to do so. However, the insured's discretion is not unlimited. "[T]he duty of good faith imposed upon an insured includes the obligation to act reasonably in selecting as independent counsel an experienced attorney qualified to present a meaningful defense and willing to engage in ethical billing practices susceptible to review at a standard stricter than that of the marketplace." (*Center Foundation v. Chicago Ins. Co. (1991) 227 C.A.3d 547, 560, 278 C.R. 13*; see C.C. 2860(c) [insurer may require that independent counsel have minimum qualifications]; *Assurance Co. of America v. Haven (1995) 32 C.A.4th 78, 92, 38 C.R. 2d 25* [insurer may sue independent *Cumis* counsel for negligent breach of statutory duty under C.C. 2860(d) and (f)].)

The *Cumis* rule and C.C. 2860 apply broadly to conflicts arising from all types of insurance contracts. (See *Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 C.A.4th 1372, 1393, 1396, 25 C.R.2d 242, 1 Summary (10th), Contracts, §195* [under *Cumis* and C.C. 2860, conflict of interest existed entitling insured landlords to independent counsel, where insurer sought, without insureds' consent, to settle action by tenants for amount in excess of policy limits, thus leaving insureds exposed to subsequent claims by other tenants].)

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5. Insurer's Reservation of Rights.

cc. Limitations on Right.

1 *Witkin Cal. Proc. Attys* § 124

[§ 124] Limitations on Right.

The *Cumis* requirement of independent counsel (*supra*, §122) applies only when the insurer's reservation of rights creates a conflict of the type involved in *Cumis*, e.g., where the reservation is based on the possibility that noncovered conduct is involved. A reservation of rights based on a resident relative exclusion in the policy presents an issue extrinsic to the question of the insured's liability, and dual representation with the insured's consent is permissible in that situation. (*McGee v. Superior Court* (1985) 176 C.A.3d 221, 227, 228, 221 C.R. 421 [automobile insurance case].)

In *Foremost Ins. Co. v. Wilks* (1988) 206 C.A.3d 251, 253 C.R. 596, the underlying defamation action against defendant insured included a claim for punitive damages which, by statute, are not covered by liability insurance. When defendant's attorney refused to associate with plaintiff insurer's attorney, plaintiff brought this declaratory relief action to determine its obligations under *Cumis*. *Held*, defendant was not entitled to retain independent counsel at plaintiff's expense.

(a) Because the dispute here is unrelated to any issue in the underlying action, there is no conflict of interest. Plaintiff is obligated to indemnify up to the policy limits except for punitive damages. It is in plaintiff's interest to vigorously defend to avoid liability for indemnification for compensatory damages, and plaintiff gains no benefit from pursuing a theory that defendant acted maliciously or with reckless disregard for the truth. (206 C.A.3d 261.)

(b) *Cumis* does not compel a contrary finding. (206 C.A.3d 261.) There, the insurer's reservation of rights on the ground of noncoverage was based on the nature of the insured's conduct. Here, there is no such claim. "[T]o the extent that *Cumis* can or may be interpreted as holding a conflict requiring independent counsel exists solely from the fact that punitive damages are alleged and sought, we depart from the *Cumis* court and reject that holding." (206 C.A.3d 262.) (See *Blanchard v. State Farm Fire & Cas. Co.* (1991) 2 C.A.4th 345, 350, 2 C.R.2d 884 [not every reservation of rights creates conflict of interest requiring appointment of independent counsel; conflict depends instead on nature of coverage issues in underlying case; citing *McGee* and *Foremost*].)

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5. Insurer's Reservation of Rights.

dd. No Right to Independent Insurance Adjuster.

1 *Witkin Cal. Proc. Attys* § 125

[§ 125] No Right to Independent Insurance Adjuster.

An attempt to extend the *Cumis* rule (supra, §122) was rejected in *State Farm Fire & Cas. Co. v. Superior Court* (1989) 216 C.A.3d 1222, 265 C.R. 372. D, insured under a homeowners liability policy, was sued by the purchasers of their home for damages caused by foundation defects. The insurer accepted the defense under a reservation of rights, and brought an action for declaratory relief against D, denying policy coverage. The insurer then, in conformity with *Cumis*, agreed to pay the fees of independent counsel W representing D, and retained H to pursue its declaratory relief action. The present case deals with the action for insurance bad faith (denial of coverage and failure to defend adequately) brought by D against the insurer.

The insurer assigned its adjuster K to the case as its agent, and K communicated with both W and H. K served in a dual capacity, assisting W in the liability case and assisting H in the declaratory relief case, and maintained only one file. D obtained a discovery order for production of all of the documents in K's file, on the theory that K was the agent of the insured and the insured's *Cumis* counsel, and that communications to K by H constituted a waiver of attorney-client privilege otherwise available to the insurer. *Held*, discovery order vacated; the communications between H and K were privileged and not discoverable.

(a) The insurance adjuster is the agent of the insurer, and where no issue of coverage arises, the adjuster can also become the agent of the insured. "Where coverage is in issue, however, it is obvious that the adjuster's loyalties are divided and the insured and his counsel cannot reasonably expect that he represents only the interest of the insured. Indeed, it is to remedy this problem that the concept of the *Cumis* counsel has been created." (216 C.A.3d 1227.)

(b) This is not a case in which the adjuster has taken advantage of misplaced or mistaken confidences; his adverse position in terms of D's claims was understood by W, and it was W's obligation to guard against improvident revelations to the insurer. (216 C.A.3d 1227.) Nor was this a case of damage to D resulting from use of confidential information obtained by K from W. "The thrust of the discovery motion ... was not to prevent [K] from passing information to his company ... or to sanction him for breach of confidences; it was to obtain information in [K]'s files which he had

obtained from the company's coverage counsel." (216 C.A.3d 1228.)

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d. Adverse Interests in Dissolution of Marriage.

1 Witkin Cal. Proc. Attys § 126

[§ 126] Adverse Interests in Dissolution of Marriage.

In *Ishmael v. Millington* (1966) 241 C.A.2d 520, 50 C.R. 592, *infra*, §324, the court made some pointed observations on the hazards of representing both spouses in a dissolution of marriage action: "Divorces are frequently uncontested; the parties may make their financial arrangements peaceably and honestly; vestigial chivalry may impel them to display the wife as the injured plaintiff; the husband may then seek out and pay an attorney to escort the wife through the formalities of adjudication. We describe these facts of life without necessarily approving them. Even in that situation the attorney's professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband. A husband and wife at the brink of division of their marital assets have an obvious divergence of interests. Representing the wife in an arm's length divorce, an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice. Representing both spouses in an uncontested divorce situation (whatever the ethical implications), the attorney's professional obligations demand no less. He may not set a shallow limit on the depth to which he will represent the wife." (241 C.A.2d 527.)

Thus, the attorney should make every effort to see that the adverse party spouse has independent counsel. (On distinction between actual and potential conflict, and requirement of informed consent, see *Klemm v. Superior Court* (1977) 75 C.A.3d 893, 142 C.R. 509, *infra*, §130; on problems of dual representation and advisability of independent counsel, see Rutter Group, Family Law, §1:80 et seq.; on proceeding for dissolution of marriage, see 11 *Summary* (10th), *Husband and Wife*, §67 et seq.)

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e. Adverse Interests in Class Actions.

1 *Witkin Cal. Proc. Attys* § 127

[§ 127] Adverse Interests in Class Actions.

A plaintiff's attorney in a class action faces potential conflict of interest problems in that the attorney has two and often three distinct interests to represent: (1) the named plaintiffs; (2) the absent class members; and (3) the public interest. (See 94 *Harv. L. Rev.* 1447 et seq.; 37 *A.L.R.4th* 751 [propriety of attorney acting as both counsel and class member or representative]; 4 *Cal. Proc.* (5th), *Pleading*, §298.)

In *Cal Pak Delivery v. United Parcel Service* (1997) 52 *C.A.4th* 1, 60 *C.R.2d* 207, K, the attorney for plaintiff and the class it sought to represent contacted defendant and offered to dismiss the action in exchange for payment to the attorney personally of approximately \$ 8 million to \$ 10 million; the class would receive nothing. On defendant's motion, plaintiff's attorney was disqualified. *Held*, affirmed.

(a) "Surreptitiously contacting the opposing party and offering to dismiss a client's action or forego filing a valid cause of action in return for payment of fees directly to the attorney creates a conflict of interest ... and constitutes an obvious breach of the attorney's fiduciary obligation to the client. Although [K] contends it is in the best interests of the potential class to permit his representation to continue, *it is highly unlikely* many of the 150,000 alleged class members would agree." (52 *C.A.4th* 11.)

(b) The fact that a class action is involved makes disqualification even more compelling. An individual plaintiff might waive the conflict of interest, but unidentified class members cannot do so. Because of the responsibility to absent class members, counsel's qualifications in a class action are subject to a heightened standard, which the attorney here cannot meet. (52 *C.A.4th* 11, 12.)

(c) An additional consideration supports disqualification. "This case truly is *sui generis*. Unlike ... most other disqualification cases, here the trial court faced a direct, acknowledged, undisputed and indefensible betrayal by counsel of the interests of his client and the putative class. In such circumstances, the failure of the trial court to take immediate remedial action to disqualify counsel would constitute an abdication of judicial responsibility, violating the public trust and exposing judicial institutions to public obloquy." (52 *C.A.4th* 13.) (For discussion of attorney's right to recover fees, see *infra*, §211.)

In *Apple Computer v. Superior Court* (2005) 126 C.A.4th 1253, 24 C.R.3d 818, the named plaintiff in a class action was an attorney who was represented by his law firm and by a second firm that served as cocounsel with plaintiff's firm on other class action matters. In the prayer for relief, plaintiff sought attorneys' fees under C.C.P. 1021.5 (private attorney general doctrine; 7 Cal. Proc. (5th), *Judgment*, §259 et seq.). Defendant sought disqualification of both firms based on the following conflict of interest: As the class representative, plaintiff must seek the maximum recovery for the putative class, but plaintiff and the firms may have an interest in maximizing their recovery of fees, to the detriment of the class. The trial court denied the disqualification motion. *Held*, writ of mandamus issued to vacate the order and to enter a new order granting the motion to disqualify.

(a) Although one federal case supports plaintiff's argument that the prohibition against serving as class counsel and class representative is limited to common fund cases (see 7 Cal. Proc. (5th), *Judgment*, §249 et seq.), the prohibition is not so limited. (126 C.A.4th 1267.) Moreover, settlement discussions provide further opportunity for conflicts between the attorney and the class. The oversight provided by the court at the time of settlement cannot substitute for the participation and supervision an independent class representative provides throughout the case. Thus, the interests of the putative class in settlement matters can best be ensured if the class attorney is not the named representative. (126 C.A.4th 1272.)

(b) This case does not involve a speculative conflict and mere appearance of impropriety. Plaintiff and his firm are clearly in a position of divided loyalties involving their own financial interests in recovering attorneys' fees and their obligation to maximize recovery for the putative class. Cocounsel must also be disqualified given the close business connection between that firm and plaintiff's firm. Thus, the trial court abused its discretion because "an insurmountable conflict of interest exists between the *attorneys* for the *putative class* (including plaintiff) and the *putative class* itself." (126 C.A.4th 1278.)

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f. Adverse Interests Involving Multiple Parties.

1 Witkin Cal. Proc. Attys § 128

[§ 128] Adverse Interests Involving Multiple Parties.

In *Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 267 C.R. 896, defendant law firm was appointed to act as designated defense counsel in scheduling discovery-related activities in numerous asbestos-related cases. The firm successfully moved in the superior court for an award of fees from plaintiff ACF, a group of manufacturers who were defendants in the asbestos actions. On appeal, plaintiff claimed that defendant, which also was counsel to non-ACF defendants, could not recover fees because it represented conflicting interests. The court rejected the claim because plaintiff had not raised the issue in the trial court, but cautioned that serious conflict of interest problems exist when designated defense counsel is also allowed to represent individual parties whose interests might be adverse to other defendants. (219 C.A.3d 27, 28.)

In *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 C.A.4th 1240, 84 C.R.2d 204, a wrongful termination and discrimination action, the trial judge disqualified plaintiff's attorney B because of a conflict of interest created by B's simultaneous representation of plaintiff and four other clients against the same employer in a different case. The other clients had signed a settlement agreement, negotiated by B, containing a confidentiality clause. However, B attempted to advance plaintiff's interests by calling one or more of the others as witnesses in plaintiff's case. The trial judge found that B risked harming his other clients' interests through violation of the terms of the settlement agreement. *Held*, affirmed.

(a) *Conflict*. The confidentiality clause imposed significant limits on what, if anything, the four signatories could safely say about the facts underlying the settlement agreement. Because any transgression of the clause, intentional or not, would subject the signatories to severe sanctions under the agreement's penalty clause, the trial judge properly feared that B would be unable to prevent the testimony from entering prohibited territory. Moreover, because of his simultaneous representation of plaintiff and the other parties, B could not adequately counsel the other parties regarding the severe detriment to them if they gave prohibited testimony. (71 C.A.4th 1251.) Even if B could prevent prohibited testimony, a conflict would still exist. Plaintiff was not a party to the settlement agreement and might have advanced on her own evidence that the employer had recently settled employee claims similar to hers. To the extent B curtailed presentation of this favorable evidence in an attempt to reconcile the divergent interests of his multiple clients and obligations of confidentiality, he necessarily violated his duty of loyalty to plaintiff. Thus, the conflict was

irreconcilable. (71 C.A.4th 1254.)

(b) *Disqualification was proper.* The trial judge's decision to disqualify B was proper. *Rules of Professional Conduct, Rule 3-310(C)* (infra, §440) requires informed written consent of each client before an attorney may accept or continue representation of multiple clients if there is actual or potential conflict. Neither plaintiff nor any of the other parties gave informed written consent to the actual conflict existing here. By failing to acknowledge even a potential conflict, neither plaintiff nor the other parties gave the consent necessary for B's continued simultaneous representation. Thus, the absence of the consent arguably makes B's continued representation a violation of the Rules of Professional Conduct. Accordingly, plaintiff's right to counsel of her choice must yield to the court's obligation to protect the integrity of the judicial process from a violation of the ethical standards. (71 C.A.4th 1256.)

McPhearson v. Michaels Co. (2002) 96 C.A.4th 843, 117 C.R.2d 489, criticized and distinguished *Gilbert*. Before representing plaintiff employee M in a discrimination and harassment action against defendant employer, R had represented former employee H in a similar action against the same defendant. The settlement agreement in H's suit contained a confidentiality clause similar to the one in *Gilbert*. Both H and M signed written waivers of the potential conflict of interest. However, the trial court granted defendant's motion to disqualify R, finding *Gilbert* applicable and dispositive. *Held*, reversed.

(a) *Gilbert* exaggerated what it perceived as a "very real danger to the settling employees" if they testified in the subsequent action. Nothing in the confidentiality clause precluded the settling employees from testifying as percipient witnesses. (96 C.A.4th 847.) "Indeed, it would be contrary to public policy to permit a party to litigation to dissuade or otherwise influence the testimony of a percipient witness through a private agreement." (96 C.A.4th 848.) Thus, the alleged conflict of interest was more apparent than real. (96 C.A.4th 848.) Here, H personally witnessed circumstances that gave rise to M's claim and could testify without violating the settlement agreement. Accordingly, R's efforts on M's behalf to secure H's testimony do not conflict with R's duties as H's attorney. (96 C.A.4th 848.)

(b) Several factors weigh against disqualification. Disqualification would impose a substantial hardship on plaintiff, who would bear the costs of finding a replacement. In addition, the persons who are personally concerned with the alleged conflict, M and H, each filed written declarations waiving the conflict, and disqualification is sought by a litigation adversary who is not personally interested in the alleged conflict. (96 C.A.4th 850.)

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g. Exceptions.

1. Joint Representation in Nonlitigation Matters.

1 Witkin Cal. Proc. Attys § 129

[§ 129] Joint Representation in Nonlitigation Matters.

In the absence of litigation or contemplated litigation, an attorney may represent both parties to a transaction where they have knowledge of the circumstances. (See *Lysick v. Walcom* (1968) 258 C.A.2d 136, 147, 65 C.R. 406, supra, §120 [necessity of full disclosure]; *Cloer v. Superior Court* (1969) 271 C.A.2d 143, 146, 76 C.R. 217, supra, §77; *Klemm v. Superior Court* (1977) 75 C.A.3d 893, 142 C.R. 509, infra, §130; *Buehler v. Sbardellati* (1995) 34 C.A.4th 1527, 1540, 41 C.R.2d 104 [representation of partners pursuing common end result did not constitute conflict of interest]; *Rest.3d, The Law Governing Lawyers* §130; *Rules of Professional Conduct, Rule 3-310*, infra, §438 et seq.; A.B.A. Model Rules of Professional Conduct, Rule 1.7; C.E.B., 1 Civil Proc. Before Trial 4th, §2.29; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §190.)

"Were this not the rule, the common practice of attorneys in acting for both partners in drawing articles of copartnership or drawing agreements for the dissolution of copartnership, in acting for both the grantor and the grantee in the sale of real property, in acting for both the seller and purchaser in the sale of personal property, in acting for both the lessor and the lessee in the leasing of property, and in acting for both the lender and the borrower in handling a loan transaction would be prohibited even though done in the utmost good faith and with the full consent of all parties concerned. In each of these instances there is the possibility of conflict, if not an actual conflict, in the interests of the persons represented, but it cannot be said as a matter of law that an attorney is prohibited from acting for both parties in such cases with the knowledge and consent of both." (*Lessing v. Gibbons* (1935) 6 C.A.2d 598, 606, 45 P.2d 258.)

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E. Representation Adverse to Current or Former Client.

4. Representation Adverse to Current Client.

g. Exceptions.

2. Knowing and Informed Waiver.

1 *Witkin Cal. Proc. Attys § 130*

[§ 130] Knowing and Informed Waiver.

In *Klemm v. Superior Court* (1977) 75 C.A.3d 893, 142 C.R. 509, D and G separated after 6 years of marriage with two minor children. G filed a petition for dissolution in pro. per. There was no community property, neither party owned substantial personal property, D was a carpenter with part-time employment, and both parties waived spousal support. At the hearing B, an attorney friend of both parties, appeared for G without compensation. B had developed an oral agreement that provided for joint custody and a waiver of child support. The trial judge granted an interlocutory decree and awarded custody as agreed; but, because G was receiving aid for dependent children from the county, the judge referred the matter to the county for investigation. The agency recommended that D be ordered to pay \$ 25 monthly support for each child, paid to the county as reimbursement for aid given. B filed a written objection to this recommendation, and at the hearing announced that she was appearing on behalf of D; but, on questioning by the judge, it was not clear that G had consented to this representation. At a continued hearing other counsel filed written consents of D and G to the joint representation and made a motion that B be allowed to appear for both. The judge denied the motion on the ground that there was an actual conflict of interest. *Held*, mandamus granted directing the judge to reconsider the motion to determine if the consent was knowing and informed.

(a) *Written consent to dual representation in pretrial agreements.* Under former Rule 5-102 (now *Rules of Professional Conduct*, Rule 3-310(C); *infra*, §440), representation of parties with conflicting interests is prohibited without the written consent of all parties concerned. Thus, the rule permits representation in connection with agreements and negotiations prior to a trial or hearing, where there is a full disclosure and informed consent. (75 C.A.3d 898; see *supra*, §129.)

(b) *Exception: dual representation at trial or hearing where actual conflict exists.* No case sanctions dual representation at a trial or hearing where there is an actual, present, existing conflict. "As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other." (75 C.A.3d 898.)

(c) *Distinction: where conflict is merely potential.* If there is no existing dispute or contest between the parties, full disclosure and informed consent will make dual representation proper. (75 C.A.3d 899; see supra, §§118, 120.) This is the case here. The parties had settled their differences by agreement and neither wanted a child support provision; the actual conflict on this issue was between the county on one hand and *D and G on the other*. (75 C.A.3d 899.)

(d) *Necessity of inquiry as to knowing and informed consent.* At the hearing the judge did not inquire whether the written consents were knowing, informed, and given after full disclosure, and this was a failure to exercise his discretion. (75 C.A.3d 900.) "Initially, the trial court is entitled to accept properly executed written consents to joint representation at their face value. The judge is entitled to presume the attorney is familiar with the law and code of professional ethics and has complied with the proper standards. However, if the judge has any question regarding whether the proper standards have been observed, it is his duty to either require counsel to inquire further or inquire himself regarding the circumstances of the execution of the written consents and the state of mind of the clients for the purpose of making the necessary factual determination in this regard." (75 C.A.3d 901.) (See 94 Harv. L. Rev. 1311 [adequacy of consent to joint representation]; on potential civil liability for attorney who fails to disclose potential conflict and necessity for independent counsel, see supra, §120; on disciplinary charges for unprofessional conduct, see infra, §§513, 514.)

In re Marriage of Egedi (2001) 88 C.A.4th 17, 105 C.R.2d 518, involved a marital dissolution in which the parties had agreed to the terms of a settlement agreement but had asked an attorney acquaintance to type it up for them. Although the attorney initially declined and advised them to obtain independent counsel, he ultimately agreed to serve as scrivener, telling the parties that he would not render legal advice but would merely set out the agreed terms and add standard provisions normally found in a marital settlement agreement. The parties signed a conflicts waiver confirming that the attorney had advised them of the potential conflict, that he was merely acting as scrivener, that he was not acting in an advisory capacity and had not been involved in negotiation of the agreement, and that each party had been advised to seek independent legal counsel with respect to the waiver and the marital settlement agreement. The husband later breached and, when the wife sought enforcement, contended that the agreement should be set aside on various grounds, including improper conduct by the attorney. The trial judge found that the agreement was entered into freely and voluntarily but that it could not be enforced because the conflict disclosures made by the attorney were inadequate to permit dual representation. The judge concluded that, despite acting only as scrivener, the attorney was effectively rendering legal advice to both parties because he added standard provisions to the agreement, and that these provisions could only be added after full disclosure and an informed decision. *Held*, reversed and remanded for enforcement of the agreement.

(a) Under *Klemm*, the same counsel may represent both parties in an uncontested dissolution proceeding if the conflict of interest is potential, not actual, and the parties give informed, intelligent consent in writing after full disclosure. *Klemm* does not suggest that a marital settlement agreement may be invalidated solely for lack of informed consent to dual representation where the parties have freely and voluntarily entered into an agreement to which the attorney adds standard marital settlement agreement provisions. Here, the parties agreed to the standard provisions that were added, and these provisions were never in dispute. (88 C.A.4th 23.)

(b) Even if there was dual representation, there was informed consent within the meaning of *Rules of Professional Conduct*, Rule 3-310. There was no further advisement the attorney could have given beyond what he told the parties. "A single attorney acting as a scrivener should not advise the parties of the pros and cons of their agreement so that they might 'unagree.' This would defeat the very purpose for which they sought assistance." (88 C.A.4th 24.)

In re Marriage of Friedman (2002) 100 C.A.4th 65, 122 C.R.2d 412, involved a *postnuptial* agreement entered into by the parties when the husband was beginning treatment for leukemia and intended to protect the wife from creditors. The parties agreed that their individual income, business property, and debts would be separate property. Husband's attorney, B, prepared a draft agreement and advised the parties orally and by engagement letter that he was representing only the husband because of the potential conflict, and that wife would have to retain separate counsel or represent herself (she was an attorney). Wife's changes to the agreement were incorporated into the final draft, which she signed.

When wife later filed for marital dissolution, she claimed that the agreement was invalid because B prepared the agreement without obtaining a written conflict of interest waiver. The trial court found the agreement valid. *Held*, affirmed. There was neither dual representation nor a conflict of interest on the part of B. Wife was advised orally and in writing of the potential conflict; she voluntarily entered into the agreement and, acting as her own attorney, made changes to the agreement and signed it. Because there was no actual conflict of interest, B's disclosure was sufficient. (100 C.A.4th 71; following *Egedi*.) Moreover, even assuming that *Rules of Professional Conduct, Rule 3-310* required a written waiver for every conceivable potential conflict, wife's signature on the agreement served this purpose. (100 C.A.4th 71.)

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3. Single Agency With Separate Divisions.

1 Witkin Cal. Proc. Attys § 131

[§ 131] Single Agency With Separate Divisions.

Castro v. Los Angeles County Bd. of Supervisors (1991) 232 C.A.3d 1432, 284 C.R. 154, involved a challenge to a county plan under which a nonprofit corporation (DCLS) was established to represent indigent parties in juvenile dependency proceedings. DCLS had three separate divisions, each operated as a separate law firm with its own group of attorneys, and under the plan separate groups within DCLS could represent all three parties to a dependency proceeding. The court rejected the argument that the plan would allow DCLS to represent conflicting interests.

(a) DCLS is not a private firm and it does not represent itself to the public as a single law firm; it is a nonprofit corporation that has no incentive to favor one client over another (because it receives payment not from its indigent clients but from a third party) and that has structured itself so that its attorneys and separate groups have no contact with one another. (232 C.A.3d 1441, 1442.)

(b) "It is not to be assumed hypothetically, in the absence of facts, that DCLS attorneys will act to violate their client's confidence or to compromise their legal interests. The structures of the organization reinforce this ethical duty, which is well known to all attorneys." (232 C.A.3d 1442.)

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5. Representation Adverse to Former Client.

a. In General.

1 Witkin Cal. Proc. Attys § 132

[§ 132] In General.

The fiduciary relationship of an attorney to a client does not wholly end with the termination of the relationship. Two important incidents remain: (1) The client's secrets and confidences must still be maintained, and information acquired by virtue of the former employment cannot be used against the client at any time in the future. (2) Independently of secrets or information, the attorney cannot accept employment or otherwise act adversely to the former client in a matter or controversy in which the attorney formerly represented the client. It makes no difference how the relationship terminated; e.g., neither an unwarranted discharge of the attorney, nor the failure to pay the fee, excuses the attorney's acceptance of adverse representation. (*Wutchumna Water Co. v. Bailey* (1932) 216 C. 564, 571, 15 P.2d 505.) (See *B. & P.C. 6068(e)* [duty to maintain confidences and secrets]; *Rest.3d, The Law Governing Lawyers, §132*; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §§191, 192; Rutter Group, Professional Responsibility, §4:160 et seq.; on representation adverse to former client as basis of disciplinary action, see *infra*, §513.)

Actual disclosure of confidences by a former attorney during litigation is not required to support an action for the attorney's breach of loyalty to the former client. "The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client" and accepts new representation in which the former client's confidences may benefit the new client because of the relationship between the new and previous matter. (*Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 C.A.4th 1179, 1189, 20 C.R.3d 621 [law firm represented G in arbitration involving firm's former client B].)

The following cases are illustrative:

In re Cowdery (1886) 69 C. 32, 10 P. 47 [former city attorney accepted fee from adverse party, agreeing not to assist city in pending appeals in cases handled by him for city; suspended from practice; opinion elaborately reviews English and early American authorities].

Weidekind v. Tuolumne County Water Co. (1887) 74 C. 386, 19 P. 173 [attorney, asserting wrongful discharge and failure to pay fee, changed sides in subsequent trial of same case; trial court's refusal to prevent him from acting was reversible error].

Grove v. Grove Valve & Regulator Co. (1963) 213 C.A.2d 646, 651, 29 C.R. 150 [patent attorney who formerly represented manufacturing company was properly enjoined from representing former employee in action against company and from disclosing confidential and privileged information].

Earl Scheib v. Superior Court (1967) 253 C.A.2d 703, 706, 61 C.R. 386 [defendant's attorney had previously worked for law firm that represented plaintiff in current action].

Big Bear Mun. Water Dist. v. Superior Court (1969) 269 C.A.2d 919, 927, 75 C.R. 580 [in eminent domain action, trial court properly disqualified attorney from representing intervening party where attorney had previously represented plaintiff].

SUPPLEMENT: [This section is current through the latest supplement]

In *Styles v. Mumbert* (2008) 164 C.A.4th 1163, 79 C.R.3d 880, S sued M in the underlying action in which M was represented by attorney P. In that action, the trial court imposed terminating sanctions against M, and after P admitted that he did not have time to devote to the case, the trial court permitted M to retain new counsel. New counsel was unable to have the terminating sanctions vacated, and the trial court entered a default judgment against M, from which M appealed. At the same time, M sued P for malpractice. While the appeal was pending, S assigned her rights to the underlying judgment to P for an undisclosed consideration. P then sought to substitute into M's appeal as respondent, represented by another attorney from his own law firm, the same firm that represented M in the underlying action. *Held*, P's attempt to substitute into the appeal violated his fiduciary duty to M; P's motion was denied and monetary sanctions were awarded to M.

(a) Although P no longer represented M, P continued to owe M a duty to protect their prior confidential relationship. Problems of compromising that confidentiality typically arise when an attorney represents multiple adverse parties in successive representations. Here, P not only attempted to represent the opposing side, *he sought to be the opposing side* in the same litigation in which he had represented M. This situation establishes as a certainty that P possessed confidential information about M, and M properly objected to P "stepping into the shoes of his adversary in order to safeguard his confidences." (164 C.A.4th 1168.)

(b) There is no legal support for P's position that he is entitled to reveal confidences to defend himself. This was not a malpractice claim or a fee dispute, but an appeal from the actual action where P represented M. P wished to "step into the position" of M's adversary and be represented by an attorney from his own firm, the firm that previously represented M. There is no authority that permits this. (164 C.A.4th 1168.)

(c) If P were permitted to substitute in as respondent, on appeal P would have to argue that the default judgment, for which he may be professionally responsible, should not be reversed. If the appeal fails, P would collect on the default judgment, a result directly contrary to M's interests, and P would benefit in the malpractice action, reducing any potential damages owed to M. Thus, P would receive a significant windfall at the expense of his former client. Clearly, P's "disregard for his ongoing fiduciary duties to his former client in favor of his own personal gain is without precedent." (164 C.A.4th 1169.)

(d) "The misconduct in this case is serious, and is of the kind which undermines public confidence in the legal system. ... By buying an interest in the judgment against his former client from his former client's opponent, and by seeking to oppose his client's efforts to reverse the judgment, [P] has violated a myriad of ethical duties. ... [P]'s actions make a mockery of the Rules of Professional Conduct." (164 C.A.4th 1169.)



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b. Substantial Relationship Test.

1 Witkin Cal. Proc. Attys § 133

[§ 133] Substantial Relationship Test.

In *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 C.A.4th 223, 81 C.R.2d 425, plaintiff corporation and its wholly owned subsidiary sought to enjoin defendant law firm from representing a water district in the district's dispute with the subsidiary concerning a road construction project. Defendant had never represented the subsidiary, but had been retained on an ongoing basis by the parent corporation's insurance underwriters to monitor the defense attorneys the corporation retained on errors and omissions claims. The trial judge granted a preliminary injunction and disqualified the law firm from representing the district. *Held*, affirmed.

(a) *Rules for disqualification.* Two rules of disqualification are potentially implicated here. The first is the per se rule of disqualification that generally prevents an attorney from undertaking a representation that is adverse to a current client. The attorney's duty of undivided loyalty prevents the simultaneous representation, even on matters that are wholly unrelated, without the informed written consent of both clients. The second rule governs successive representation of clients with adverse interests and stems from the attorney's duty to maintain client confidences. An attorney may not undertake a representation that is adverse to a former client if there is a "substantial relationship" between the current and former matters. (69 C.A.4th 230.)

(b) *Substantial relationship.* The situation here is analogous to one of successive representation. In applying the substantial relationship test, factors showing that the information from the prior representation is "material" to the current employment include the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy. The record here sufficiently sustains the trial judge's finding of a substantial relationship between the underlying dispute and matters defendant handled on behalf of plaintiff and its underwriters. Defendant (1) had previously represented the parent on cases involving negligent engineering and negligent construction claims, (2) had substantial involvement in the parent's other cases, even in defendant's capacity as monitoring counsel for the underwriters, and (3) as monitoring counsel, had considerable exposure to the parent's litigation policies and strategies. (69 C.A.4th 234.)

In *City Nat. Bank v. Adams* (2002) 96 C.A.4th 315, 117 C.R.2d 125, plaintiff bank sued defendant borrower who had defaulted on a loan secured by shares of stock, and defendant cross-complained that plaintiff wrongfully failed to

sell the stock before it became worthless. When previously urged by defendant to sell the stock, plaintiff had retained D to provide a legal opinion whether a restrictive legend could be removed and the stock sold. D provided the opinion and was subsequently retained by defendant in the current matter. On plaintiff's motion, the trial court disqualified D, finding that D had been retained by plaintiff in connection with the same matter and that representing defendant would constitute a conflict of interest and breach of confidentiality. *Held*, affirmed. There was more than a substantial relationship between the former and current representation; D had essentially switched sides in the same litigation. Defendant's affirmative defenses and cross-complaint were based on contentions that plaintiff should have sold the stock in order to satisfy defendant's liability on the note and D was retained by plaintiff to provide an opinion letter directed to the same issue. Thus, the conditions under which the stock could be sold to satisfy the debt were at the heart of the current litigation. The two representations were "both factually and legally intertwined." (96 C.A.4th 329, 330.)

In *Jessen v. Hartford Cas. Ins. Co.* (2003) 111 C.A.4th 698, 3 C.R.3d 877, plaintiff insured was represented by W in an action against defendant insurer. Defendant moved to disqualify W and W's firm on the ground that W had represented defendant in numerous matters when W was an associate with another law firm. In opposition, W provided the trial court with two orders from the federal district court in California issued in separate actions against defendant by other plaintiffs represented by W. Defendant had made unsuccessful attempts in those actions to disqualify W. Relying on the orders, the trial court denied defendant's motion on the basis that defendant was collaterally estopped from relitigating the disqualification issue. *Held*, reversed. The trial court should have applied the substantial relationship test. After a lengthy review of the evolution of the test, the court offered these guidelines for ruling on disqualification motions in successive representation cases: "[T]he trial court must first identify where the attorney's former representation placed the attorney with respect to the prior client. If the court determines that the placement was direct and personal, ... [this aspect is] settled as a matter of law in favor of disqualification and the only remaining question is whether there is a connection between the two successive representations, a study that may not include an 'inquiry into the actual state of the lawyer's knowledge' acquired during the lawyers' representation of the former client. ... However, if the court determines the former attorney was not placed in a direct, personal relationship with the former client, the court must assess whether the attorney was positioned during the first representation so as to make it likely the attorney acquired confidential information relevant to the current representation, given the similarities or lack of similarities between the two." (111 C.A.4th 710.) "Direct and personal" placement is where an attorney was "personally involved in providing legal advice and services to the former client," thus giving rise to a conclusive presumption that confidential information passed to counsel. (111 C.A.4th 709.) (On application of substantial relationship test regarding disqualification of former corporate attorney, see *infra*, §137.)

The following decisions further illustrate the substantial relationship test:

Santa Teresa Citizen Action Group v. San Jose (2003) 114 C.A.4th 689, 709, 712, 7 C.R.3d 868 [trial court properly denied plaintiff's motion to disqualify defendant's two attorneys where one of them had briefly represented plaintiff in prior matter that involved entirely separate legal issues; thus, even if confidential information had been obtained in prior representation, it was immaterial to present action].

Farris v. Fireman's Fund Ins. Co. (2004) 119 C.A.4th 671, 682, 14 C.R.3d 618 [in bad faith and breach of contract action involving complex insurance coverage issues, trial court erred in failing to disqualify plaintiff's attorney, whose former extensive representation of defendant insurer as coverage counsel created substantial relationship between former and current representation].

Brand v. 20th Century Ins. Co./21st Century Ins. Co. (2004) 124 C.A.4th 594, 21 C.R.3d 380 [trial court abused discretion by denying motion to disqualify attorney who had prior 3-year relationship with defendant insurer and was involved in matters substantially related to current case where attorney was retained as expert].

Fremont Indem. Co. v. Fremont General Corp. (2006) 143 C.A.4th 50, 66, 49 C.R.3d 82 [law firm representation of defendant insurance company G in action by related insurance company I did not require disqualification where firm previously represented I in entirely unrelated matter and there was no showing that firm had obtained confidential

information from I material to present action].

Faughn v. Perez (2006) 145 C.A.4th 592, 604, 610, 51 C.R.3d 692 [trial court improperly disqualified attorney for plaintiff where defendant hospital failed to show that attorney's prior representation of parent corporation was substantially related to plaintiff's action; defendant's motion "relied too heavily on inferences about facts that were within its control and that could have been disclosed without compromising confidential information"].

Knight v. Ferguson (2007) 149 C.A.4th 1207, 1212, 57 C.R.3d 823 [substantial relationship test was met and trial court properly disqualified defendants' attorney, who had previously been retained by plaintiff for consultation regarding formation of business entity that was at heart of current contract action].

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c. Acquisition of Adverse Pecuniary Interest.

1 Witkin Cal. Proc. Attys § 134

[§ 134] Acquisition of Adverse Pecuniary Interest.

In *David Welch Co. v. Erskine & Tulley* (1988) 203 C.A.3d 884, 250 C.R. 339, plaintiff Welch operated a collection agency that specialized in collecting delinquent employer contributions owed to employee benefit trust funds. Defendants E&T acted as Welch's attorney. After the attorney-client relationship terminated, numerous clients of plaintiff requested a proposal from E&T, to whom they subsequently transferred their accounts. *Held*, E&T's conduct was a breach of fiduciary duty to a former client.

"We agree with defendants that the various trust funds were free to send their business to any entity they chose, as absent a contract to that effect, they were under no continuing duty to continue business with Welch. Similarly, any law firm, *other than E&T*, was free to make proposals at the request of those trust funds in an effort to obtain their business, as E&T did in this case. But, due to the preexisting attorney-client relationship during which defendants were in a position to and did obtain confidential information about Welch's business, *these defendants* had a higher duty, which was to refrain from acquiring any pecuniary interest involving collection work for these trust funds, unless they first notified and obtained the informed consent of Welch to submit their business proposals. As they did not do so, the trial court properly found that they had breached their fiduciary duty towards Welch." (203 C.A.3d 892.)

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d. Vicarious Disqualification of Law Firm.

1 Witkin Cal. Proc. Attys § 135

[§ 135] Vicarious Disqualification of Law Firm.

In *Dill v. Superior Court* (1984) 158 C.A.3d 301, 205 C.R. 671, attorney H, after representing plaintiff, became associated with B law firm, which represented the defendant in the same action. *Held*, the superior court abused its discretion in denying plaintiff's motion to disqualify B. (158 C.A.3d 306.)

In *Henriksen v. Great Amer. Savings & Loan* (1992) 11 C.A.4th 109, 14 C.R.2d 184, the Court reviewed the case law on this subject and followed *Dill*.

(a) Under former Rules of Professional Conduct, Rule 3-310(D) (now *Rules of Professional Conduct, Rule 3-310(E)*; *infra*, §441), a former client may seek to disqualify a former attorney from representing an adverse party by showing that the former attorney possesses confidential information adverse to the former client. (11 C.A.4th 113.) The former client need not establish that the attorney actually possesses confidential information; it is enough to show that there was a "substantial relationship" between the former and current representation. If this is established the court will conclusively presume that the attorney possesses confidential information adverse to the former client. (11 C.A.4th 114.)

(b) The Rules of Professional Conduct do not specifically address the question of vicarious disqualification of the entire law firm; the rules have been shaped by judicial decisions. (11 C.A.4th 114, citing *Dill* and *William H. Raley Co. v. Superior Court* (1983) 149 C.A.3d 1042, 197 C.R. 232, *supra*, §114.) This is especially true where the attorney's disqualification is due to prior representation of the opposing side during the same action, as in *Dill*. (11 C.A.4th 115.)

(c) Plaintiffs contended that they had screened the attorney from participating in the case, and that vicarious disqualification of the entire firm was unnecessary. This "ethical wall" concept has been recognized in cases dealing with former government attorneys now in private practice. (11 C.A.4th 115, citing *Chambers v. Superior Court* (1981) 121 C.A.3d 893, 175 C.R. 575, *infra*, §148.) However, the concept has not found judicial acceptance in cases where a nongovernmental attorney armed with confidential information switches sides during the pendency of litigation. (11 C.A.4th 115.) There is no gray area; the entire firm must be vicariously disqualified even if the attorney has been ethically screened from the beginning. (11 C.A.4th 116.) "[W]e believe the rule to be quite clear cut in California: where

an attorney is disqualified because he formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law." (11 C.A.4th 117.)

In *Frazier v. Superior Court* (2002) 97 C.A.4th 23, 118 C.R.2d 129, a civil action by multiple plaintiffs against F, the trial court granted plaintiffs' motion to disqualify F's independent counsel, firm H, appointed by F's insurer. Early in the litigation, L, counsel for F's insurer, had covered several depositions for H on F's behalf, and learned that some plaintiffs had contacted G, a partner in a regional office of L's firm, about possible representation, which never transpired. L and H both declared that no confidential information passed between them, and plaintiffs offered no evidence that confidential information they provided to G would normally have been imparted to L or H. *Held*, the trial court erred in disqualifying H. Plaintiffs essentially sought disqualification by "double imputation," i.e., by imputing G's knowledge first to L and then from L to H, a different law firm entirely, merely because L, who had every right to do so, attended the depositions on behalf of F. There was no evidence that either L or H had actual information concerning the communications between plaintiffs and G. Employing this double imputation would lead to extreme results that have no bearing on maintaining public confidence in the *Bar*. (97 C.A.4th 31, 36.)

In *Derivi Const. & Architecture v. Wong* (2004) 118 C.A.4th 1268, 14 C.R.3d 329, plaintiff successfully disqualified firm H from representing defendant, where B, an attorney with firm H, had formerly represented plaintiff's predecessor company in two actions. Defendant substituted firm M and its attorney W, who was married to D, an attorney with firm H. D had no part in the prior representation. Plaintiff moved to disqualify W and firm M, arguing that W's marriage to D made the substitution of W for H illusory. The trial court denied the motion. *Held*, affirmed.

(a) Other than W's marriage to D, plaintiff indulged in mere speculative contention of a conflict of interest in suggesting that W might receive confidential information from firm H that related to plaintiff. Moreover, W's failure to disclose the marriage would be significant only if the marriage required disqualification, which it did not. (118 C.A.4th 1273.)

(b) Plaintiff's theory of disqualification exceeded the usual application of the substantial relationship test. Here, W never represented plaintiff, was not associated with a law firm that had represented plaintiff, and had no direct relationship to anyone who had represented plaintiff. Thus, plaintiff's theory required two stages of imputation of possession of confidential information and an imputation based solely on a marital relationship. Plaintiff would first impute B's presumed confidential knowledge to the entire firm of H, including D. Then, D's vicarious disqualification would extend to W based on their marriage. Neither theory is supported by authority. (118 C.A.4th 1275; following *Frazier*.)

In *Goldberg v. Warner/Chappell Music* (2005) 125 C.A.4th 752, 23 C.R.3d 116, plaintiff G was employed by defendant as in-house counsel from 1993 to 2002. In 1997 G asked S, formerly an attorney with law firm M, to review an employment contract given to her by defendant. She intended to represent herself in negotiations with defendant but wanted S's input on what to expect. Their meeting was an informal discussion about the employment contract. No file was opened, no notes, documents, or records were prepared. S never discussed the meeting with anyone in the firm. One month prior to this meeting, M began legal work for defendant. S left the firm in 2000. In 2003, G filed a wrongful termination action against defendant and moved to disqualify M from representing defendant based on G's 1997 discussions with S. The trial judge denied the motion, finding that, although there was an attorney-client relationship between G and S, their one-time meeting was informal and limited, that S had not spoken to others at the firm, that S had not initiated further action, and most importantly, that S had left the firm 3 years before plaintiff's action was filed, which eliminated the possibility of other members of the firm discussing the action with S. *Held*, affirmed. It serves no purpose in this case to apply a presumption of imputed knowledge to M. Were S still employed by M, vicarious disqualification of M would make sense because there would be no practical way of ensuring that S would not disclose confidential information he might not even be aware he possessed. However, with S gone, it was appropriate for the trial court to assess whether S had actually disclosed confidential information. Finding that S did not, there was no basis for disqualification. (125 C.A.4th 752, following *Adams v. Aerojet-General Corp.* (2001) 86 C.A.4th 1324, 104 C.R.2d

116, *infra*, §136.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Meza v. H. Muehlstein & Co.* (2009) 176 C.A.4th 969, 979, 98 C.R.3d 422 [law firm was properly disqualified from representing plaintiff in multidefendant action for personal injuries where attorney in firm formerly represented one of defendants and participated in common interest sharing of work product between all defendants; permitting firm to represent plaintiff could undermine policy in favor of protecting attorney work product]. (New) *Public law offices: In re Charlissee C.* (2008) 45 C.4th 145, 84 C.R.3d 597, 194 P.3d 330, involved successive representation by a publicly funded, nonprofit law office (CLC) that represents parties in a county's juvenile dependency cases. The CLC was the subject of simultaneous representation issues resolved in *Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 C.A.3d 1432, 284 C.R. 154, text, §131. Since then, the CLC has been reorganized into three units: a core unit, known as Unit 1, and two conflict units, known as Units 2 and 3. In the present case, Unit 3 represented C in a dependency petition that alleged in part that C was at risk of substantial abuse from her mother, S, who once had been represented by Unit 1, and who was represented in the present matter by a non-CLC attorney. S sought disqualification of CLC and Unit 3 from any further representation of any party, arguing that CLC's prior representation of her was substantially related to the present representation of C. In granting the disqualification motion, the juvenile court applied the higher duty of loyalty standard used in simultaneous representation cases, and found that CLC failed to meet the structural, "ethical wall" safeguards demanded by *Castro* that would permit an organization to represent multiple parties in a pending action. *Held*, the wrong standard was applied, and case is remanded to juvenile court to apply the correct standard.

(a) *Proper standard.* In simultaneous representation cases, the primary fiduciary duty at stake is loyalty, i.e., the attorney's ability to render undivided representation; in successive representation cases, it is the duty of confidentiality. In the former, disqualification generally follows automatically because the client's level of trust and confidence in the attorney is severely compromised from the beginning. In the latter, disqualification depends on whether confidential matters arising in the prior representation can remain confidential, thus protecting the client beyond the earlier representation. Thus, when as here "the potential conflict arises from an attorney's successive representation of clients with potentially adverse interests, and the primary value at stake is ... client confidentiality, the correct legal standard generally requires disqualification of the attorney" if the former client demonstrates a substantial relationship between the subjects of the former and current representation. (45 C.4th 161.)

(b) *Vicarious disqualification.* Where an attorney through successive representation is disqualified, the disqualification normally extends vicariously to the attorney's entire law firm based on the doctrine of imputed knowledge. However, California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in cases of public law offices. Instead, courts look to whether the public law office has adequately protected and will continue to protect the former client's confidences "through timely, appropriate, and effective screening measures and/or structural safeguards." (45 C.4th 162.) This is the approach the juvenile court should have taken here to determine whether CLC has adequately protected, and will continue to protect, S's confidences. Thus, disqualification may be warranted if it is likely that the Unit 3 attorney appointed to represent C has obtained or will acquire "either intentionally or inadvertently, confidential information CLC acquired through Unit 1's prior representation" of S. (45 C.4th 166.)

(c) *Evidentiary burden.* Because CLC has unique access to the relevant information, CLC has the evidentiary burden to show that there are appropriate and timely measures and safeguards in place to protect confidential information obtained in the former representation of S. (45 C.4th 166.)



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e. Vicarious Disqualification of Individual Attorney.

1 Witkin Cal. Proc. Attys § 136

[§ 136] Vicarious Disqualification of Individual Attorney.

Vicarious disqualification is based on a theory of imputed knowledge under which knowledge by one attorney in a law firm is knowledge by all attorneys in the firm. Thus, when an attorney is disqualified from representation the disqualification extends to the entire firm. But representation by an attorney's former firm of a client who is an adverse party in current litigation does not necessarily impute knowledge to the attorney that requires automatic disqualification.

In *Adams v. Aerojet-General Corp.* (2001) 86 C.A.4th 1324, 104 C.R.2d 116, attorney H represented plaintiff property owners in toxic waste disposal litigation against defendant, a corporation represented by H's former law firm in a similar action. While H was a principal at that firm, the firm advised defendant on land use issues involving hazardous waste management. However, H performed no work on these matters, had no discussions with other attorneys in the firm regarding the matters, and was not made privy to information about defendant, confidential or otherwise. When H left the firm, he took no files or written materials about defendant. The trial court invoked the imputed knowledge theory and disqualified H, finding a substantial relationship between the subject matter of the firm's prior representation and the present action, thus establishing a conclusive presumption that confidential information passed to H. *Held*, reversed and remanded.

(a) Once an attorney departs from a firm, a blanket rule to prevent future breaches of confidentiality is not necessary because the departed attorney no longer has presumptive access to the secrets possessed by the firm. A rule that disqualifies an attorney based on imputed knowledge derived solely from former membership in a firm without inquiry into the attorney's actual exposure to the former client's secrets is too broad and inconsistent with the language of *Rules of Professional Conduct, Rule 3-310(E)* (infra, §441). Thus, rather than rely on the fiction of imputed knowledge to safeguard client confidentiality, the court should assess whether and to what extent the attorney, during the tenure with the firm, was reasonably likely to have obtained confidential information material to current litigation. (86 C.A.4th 1335.)

(b) Disqualification should not be ordered where there is no reasonable probability that the attorney had access to confidential information related to subsequent litigation involving the firm's client. If there is a substantial relationship between present litigation and matters handled by the attorney's former firm, but the attorney did not personally

represent the client who now seeks disqualification, the trial court should apply a "modified version of the 'substantial relationship' test." The court must determine whether the confidential information material to current representation would normally have been imported to the attorney while at the firm. The court should focus on the relationship between the attorney and the client's representation, and consider (1) time spent by the attorney working for the client and the possible exposure to formulation of policy or strategy, (2) whether the attorney worked in the same office that handled the former litigation, and (3) whether the attorney's administrative or management duties exposed the attorney to matters relevant to the current dispute. (86 C.A.4th 1340.)

(c) Because of the paramount importance of maintaining the inviolability of client confidences, where a substantial relationship between the former firm's representation of the client and the current litigation has been shown, as in this case, the attorney whose disqualification is sought bears the burden of proving nonexposure to confidential information relevant to the current action. "That burden requires an affirmative showing and is not satisfied by a cursory denial." (86 C.A.4th 1340, 1341.) Here, the trial court abused its discretion by basing the disqualification not on a particularized analysis of H's relationship to matters concerning defendant, but on a conclusive presumption derived merely from H's former membership in the firm. (86 C.A.4th 1341.) (See *Ochoa v. Fordel* (2007) 146 C.A.4th 898, 909, 53 C.R.3d 277 [trial court properly applied "modified substantial relationship test" in determining that plaintiff's attorney, formerly employed by firm representing defendants, was not required to be disqualified where attorney proved that confidential information material to present representation was not imparted to him, nor was he significantly exposed to that information during his tenure with former firm; following *Adams*].)

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f. Former Corporate Attorney.

1 Witkin Cal. Proc. Attys § 137

[§ 137] Former Corporate Attorney.

In *Goldstein v. Lees* (1975) 46 C.A.3d 614, 120 C.R. 253, a corporation's former general counsel had represented a shareholder-director in a proxy fight for corporate control, and was denied recovery of attorneys' fees in the matter, on the ground that as general counsel he had received corporate confidences and secrets relevant to the proxy fight. Having this confidential information made his employment adverse to the corporation, regardless of how the outcome of the proxy fight would affect the corporation's interests. Revealing the confidences to the new client would violate the attorney's duty to the corporation, and withholding the information would preclude the undivided loyalty necessary to adequate representation of the new client. (46 C.A.3d 619, 620.) Even if the new client had a right to know the corporation's confidences and secrets in his capacity as a member of the board of directors, he was not entitled to receive that information from the former general counsel to the exclusion of all the other directors. (46 C.A.3d 623.)

In *Global Van Lines v. Superior Court* (1983) 144 C.A.3d 483, 192 C.R. 609, attorney F represented plaintiff in an action against defendant G for breach of an agency contract. G moved to disqualify F on the ground that F had been G's general counsel for 16 years, during which time F acquired confidential information relevant to issues in the action. *Held*, F should have been disqualified. Under former Rules of Professional Conduct, Rule 4-101 (now *Rules of Professional Conduct, Rule 3-310(E)*; *infra*, §441), disqualification is required when there is a substantial relationship between the former representation and the current representation, and confidential information material to the current dispute would normally have been imparted to the attorney or his subordinates during the former representation. (144 C.A.3d 489.) These requirements were met here by undisputed evidence that: (a) the current dispute arose during F's tenure as G's general counsel; (b) a major issue in dispute concerned G's acquisition of and relationship with a third company, in the purchase of which F was directly involved; (c) G intended to defend on the basis of the antitrust laws, which defense would involve the intent and conduct of its top management and necessarily implicate F's previous role as its general counsel. (144 C.A.3d 488, 489, 490.)

In *H.F. Ahmanson & Co. v. Salomon Bros.* (1991) 229 C.A.3d 1445, 280 C.R. 614, the court, in affirming an order denying a disqualification motion, said: "Under the *Global Van Lines* formulation of the test, the courts focus less on the meaning of the words 'substantial' and 'relationship' and look instead at the practical consequences of the attorney's representation of the former client. The courts ask whether confidential information material to the current dispute

would normally have been imparted to the attorney by virtue of the former representation." (229 C.A.3d 1454.) (See *Rosenfeld Const. Co. v. Superior Court* (1991) 235 C.A.3d 566, 574 et seq., 577, 286 C.R. 609 [in determining whether substantial relationship exists between present and former representation, court should consider factual similarity, legal similarity, and nature and extent of attorney's involvement with cases; discussing prior cases]; *Zador Corp. v. Kwan* (1995) 31 C.A.4th 1285, 1294, 37 C.R. 2d 754 ["substantial relationship" test is not determinative when prior representation involved joint clients]; on joint-client exception, see *infra*, §141 et seq.)

A former in-house counsel may sue the corporate employer for wrongful discharge, provided the confidences of the former employer are properly protected. (See *General Dynamics Corp. v. Superior Court* (1994) 7 C.4th 1164, 32 C.R.2d 1, 876 P.2d 487, *infra*, §219.)

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g. Exceptions.

1. Relationship Was Never Created.

1 Witkin Cal. Proc. Attys § 138

[§ 138] Relationship Was Never Created.

The rule against representation adverse to a former client does not apply, of course, where the attorney-client relationship was never in fact created between the attorney and the complaining party. In *Hicks v. Drew* (1897) 117 C. 305, 49 P. 189, plaintiff consulted A with reference to representation in her action for damages to real property. He offered to handle the matter on a contingent fee but she refused and engaged other counsel. *Held*, A properly appeared in the case as one of defendant's counsel; there was no retainer and no implied contract to pay for advice given. "If these facts disqualify an attorney from appearing in a case, it would be an easy matter to disqualify all those attorneys whom a party neither desired to retain, nor to allow the opposing party to retain." (117 C. 307.)

In *Meehan v. Hopps* (1956) 144 C.A.2d 284, 301 P.2d 10, the receiver of an insurance company brought an action for an accounting and other relief against H, a former director. H moved to restrain the company's counsel from appearing, contending that an attorney for a corporation is disqualified from representing it in such an action. *Held*, order denying motion affirmed. The attorney for a corporation represents the corporation, stockholders, and officers only in their representative capacity, and does not represent the officers personally. As to alleged confidential disclosures made by H, the court said: "To hold that the giving of such information in that more or less intimate relationship which necessarily must exist between an officer of the corporation and its attorneys would prevent the corporation attorneys from thereafter using it in favor of the corporation in litigation against the officer, would be unfair to the corporation and its stockholders, and would violate the above mentioned very important precept, namely, that the attorney's first duty is to his client. Were appellants' contention correct, in all litigation between a corporation and a former officer, more time of the court would be spent in determining, as each bit of evidence appeared, whether it was obtained by the corporation attorney from the officer than in determining the merits of the litigation." (144 C.A.2d 293.)

In *Ward v. Superior Court* (1977) 70 C.A.3d 23, 138 C.R. 532, a county assessor sued a supervisor and two employees of the same county under the Civil Rights Act (42 U.S.C., §1983) and obtained an order disqualifying the county counsel from representing the defendants. Explaining its ruling, the trial court expressed concern that the action would relate to assessor's office operations about which the county counsel had received confidential information from the plaintiff, so that his defense would constitute representation adverse to a former client in violation of former Rules

of Professional Conduct, Rule 4-101 (now *Rules of Professional Conduct, Rule 3-310(E)*; *infra*, §441). *Held*, mandamus to vacate order granted. Under the county charter, the county counsel's only client was the county; accordingly, he had no attorney-client relationship with the assessor within the meaning of former Rules of Professional Conduct, Rule 4-101. Moreover, disclosure to the defendants of information allegedly received from the assessor would violate no duty of confidentiality. "Communications by the assessor with respect to the operations of his office made to the county counsel are not subject to a claim of privilege as between the assessor and members of the board of supervisors, who are charged by law with the duty of supervising the conduct of the assessor's office." (70 C.A.3d 35.)

A number of other decisions are illustrative. (See *Kraus v. Davis* (1970) 6 C.A.3d 484, 491, 85 C.R. 846 [conflict of interest rule was inapplicable where attorney who was objected to had previously been employed by attorney for objectors, but his major time was spent on his own business, and he neither represented nor gained confidential information concerning objectors' business]; *Maruman Integrated Circuits v. Consortium Co.* (1985) 166 C.A.3d 443, 449, 212 C.R. 497 [C, after terminating employment with plaintiff and beginning employment with defendant, informed defendant's attorneys of previous communications between C and plaintiff's attorney; disqualification motion was properly denied, because defendant's attorneys never represented plaintiff]; *In re Charles L.* (1976) 63 C.A.3d 760, 764, 132 C.R. 840, *infra*, §139 [no attorney-client relationship where attorney had previously represented minor's codefendant but not minor]; *In re Marriage of Zimmerman* (1993) 16 C.A.4th 556, 564, 20 C.R.2d 132, *infra*, §139 [no representation of wife where attorney discussed case for 20 minutes and recommended that she seek domestic relations attorney]; *Strasbourg Pearson Tulcin Wolff v. Wiz Technology* (1999) 69 C.A.4th 1399, 1403, 82 C.R.2d 326 [disqualification order was reversed where defendant failed to show requisite attorney-client relationship between defendant and plaintiff's attorney; fact that defendant paid plaintiff's attorneys' fees pursuant to underwriting agreement in prior stock offering was not determinative]; *Oaks Management Corp. v. Superior Court* (2006) 145 C.A.4th 453, 467, 470, 51 C.R.3d 561 [law firm for plaintiff should not have been disqualified where two of its attorneys had prior lender-borrower relationship with defendant and not attorney-client relationship; there was neither duty of loyalty to defendant nor risk of breach of confidential information obtained from defendant; distinguishing *William H. Raley Co. v. Superior Court* (1983) 149 C.A.3d 1042, 197 C.R. 232, *supra*, §114].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Med-Trans Corp. v. California City* (2007) 156 C.A.4th 655, 669, 68 C.R.3d 17 [trial court erred in disqualifying plaintiff's attorney where, although attorney's prior meeting with defendant was direct and personal and concerned issues in current litigation, it was exploratory only regarding defendant's participation in then pending federal action, no confidential information was acquired by attorney, and thus no attorney-client relationship was created].



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g. Exceptions.

2. New Employment Is Not Injurious.

1 Witkin Cal. Proc. Attys § 139

[§ 139] New Employment Is Not Injurious.

Representation is proper if it is not inconsistent with the former employment. In conformity with the rule approved in *Wutchumna Water Co. v. Bailey* (1932) 216 C. 564, 15 P.2d 505, supra, §132, an attorney may accept new employment against a former client if it will not injure that client in the original matter and will not involve disclosure of the client's secrets. (*Lessing v. Gibbons* (1935) 6 C.A.2d 598, 605, 45 P.2d 258; *Stockton Theatres v. Palermo* (1953) 121 C.A.2d 616, 626, 264 P.2d 74; *Johnson v. Superior Court* (1984) 159 C.A.3d 573, 578, 205 C.R. 605; *Vangsness v. Superior Court* (1984) 159 C.A.3d 1087, 1091, 206 C.R. 45; see 7 Am.Jur.2d (2007 ed.), Attorneys at Law §191.)

In *Jacuzzi v. Jacuzzi Bros.* (1963) 218 C.A.2d 24, 29, 32 C.R. 188, G, formerly an attorney for J Corporation, represented minority shareholders in a derivative suit to restore assets allegedly taken from it wrongfully by defendant majority shareholders. Defendants moved to enjoin his representation. *Held*, defendants' motion to enjoin was properly denied; the representation in a derivative suit is for the benefit of the corporation and in no sense adverse. (218 C.A.2d 29.)

In the case of *In re Charles L.* (1976) 63 C.A.3d 760, 132 C.R. 840, a minor moved in the juvenile court to disqualify the district attorney's office from prosecuting him, on the ground that attorney H, who had represented the minor's "codefendant" at their arraignment, had since joined the district attorney's office. *Held*, the motion was properly denied. There was no showing that H had acquired confidential information from or concerning the minor. Moreover, such a showing, even if made, would not require disqualification in the absence of evidence that the confidential information would reach the deputy district attorney handling the case. The deputy denied any contact with H; the size of the district attorney's office made extremely dubious an inference of a free flow of information within the office; and it is presumed that H would respect confidences with which he might have been entrusted. (63 C.A.3d 764, 765.)

In re Marriage of Zimmerman (1993) 16 C.A.4th 556, 20 C.R.2d 132, involved a former wife's attempt to disqualify B, the attorney who had represented her former husband throughout dissolution proceedings. The judgment of dissolution was filed in 1984. In 1987, the wife filed a postdissolution complaint seeking division of a missed asset. In 1989, she telephoned attorney G and discussed the matter with him for approximately 20 minutes; he recommended that

she seek a domestic relations attorney. In 1992, on learning that B had become a partner in G's firm, she moved to disqualify him. The trial court denied the motion. *Held*, affirmed.

(a) G did not recall the conversation with the wife, took no notes, and never represented her. The record does not show a disclosure of confidential information, and the nature of the brief relationship was not such that confidential information material to the current dispute normally would be disclosed. Moreover, the issue on which G apparently was consulted had been finally decided. (16 C.A.4th 564, 565.)

(b) B had represented the husband throughout the case, even before becoming a partner in the same firm as G. "To deprive respondent of the counsel of his choice at this late stage in the proceedings, where no unfair disadvantage to appellant is indicated, would, we believe, cause undue hardship to respondent without serving the purpose of the disqualification remedy." (16 C.A.4th 565.)

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3. Client's Consent or Waiver.

1 Witkin Cal. Proc. Attys § 140

[§ 140] Client's Consent or Waiver.

If the former client expressly agrees to the attorney's new employment, or, with knowledge of it, voices no objection, and no bad faith or use of confidential information is involved, the employment is proper. (*People v. Rocco* (1930) 209 C. 68, 72, 285 P. 704; *Grauberger v. Light* (1932) 127 C.A. 576, 578, 16 P.2d 188; see *Health Maintenance Network v. Blue Cross of Southern Calif.* (1988) 202 C.A.3d 1043, 1064, 249 C.R. 220 [former client implicitly consented to any adverse representation where, with knowledge of potential conflict of interest, it provided attorney's name to new client]; *Zador Corp. v. Kwan* (1995) 31 C.A.4th 1285, 1300, 37 C.R. 2d 754 [detailed waiver and consent form and agreement not to disqualify counsel "notwithstanding any adversity that may develop" constituted consent to continued representation in subsequent litigation]; *McPhearson v. Michaels Co.* (2002) 96 C.A.4th 843, 850, 117 C.R.2d 489 [disqualification order was reversed where current and former clients in employment harassment and discrimination action against same employer filed written waivers]; *People v. Baylis* (2006) 139 C.A.4th 1054, 1064, 43 C.R.3d 559 [trial court did not abuse discretion in denying defendant's request to substitute attorney H for appointed counsel where H had previously represented defendant's brother R in similar cases involving sex offenses, defendant planned to implicate R, and R's written waiver failed to show that he was aware of risks in waiving conflict]; *Rules of Professional Conduct, Rule 3-310(E)*, infra, §441 [written consent required]; A.B.A. Model Rules of Professional Conduct, Rule 1.9 [consent required]; 94 *Harv. L. Rev.* 1333 [former client's consent to representation of adverse interests]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §193.)

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4. Joint Attorney.

aa. Use of Joint Attorney Waives Objection.

1 Witkin Cal. Proc. Attys § 141

[§ 141] Use of Joint Attorney Waives Objection.

(1) *Croce Case*. The waiver exception (supra, §140) was given a dubious application in *Croce v. Superior Court* (1937) 21 C.A.2d 18, 68 P.2d 369. In the first action, the attorney represented several defendants who denied that they were partners. In the second action the attorney represented one of those parties as plaintiff against the others as defendants, alleging that they were partners. *Held*, this was proper. (a) By employing a joint attorney the parties waived their privilege against disclosure of confidential communications (see 2 Cal. Evidence (4th), Witnesses, §165), and (b) if the attorney was thereby relieved from his disqualification as an adverse witness, he was likewise free to serve as an adverse counsel. (21 C.A.2d 19, 20.)

It is questionable, however, whether an attorney's fiduciary obligation to a former client is limited by the narrow doctrine of privileged communications. Clients who jointly engage an attorney may well expect to have the attorney testify, under oath, truthfully as to the facts of the transaction; but it does not follow that they contemplate or consent to the attorney's representation of one of them against the other, as an *advocate*, inevitably using intimate knowledge of their affairs to gain an advantage for the individual client. However, in *Petty v. Superior Court* (1953) 116 C.A.2d 20, 30, 253 P.2d 28, the court followed *Croce* and allowed an attorney who had prepared oil leases for N and G to represent N in an action against G for an accounting.

(2) *Croce Criticized and Distinguished*. In *Industrial Indem. Co. v. Great Amer. Ins. Co.* (1977) 73 C.A.3d 529, 140 C.R. 806, S was an employee working for a subcontractor on construction work performed by T for M. S died of injuries received on the job, and his heirs sued T and M for wrongful death. T's insurer, Industrial, had added endorsements covering M, and M was also insured by G. Industrial retained attorney R to represent both T and M, and R settled the case, allocating \$ 100,000 of the liability to M and only \$ 62,000 to T. Industrial then sued M and G seeking reimbursement for the \$ 100,000 payment, on the ground that M's liability to the heirs was based on active negligence, and that the policy endorsement covered only secondary or vicarious liability. M and G cross-complained, alleging that Industrial breached its duties as insurer in retaining attorney R, who had a conflict of interest, failing to file a cross-complaint for indemnity against T, and failing to consult M in allocating the \$ 100,000 liability. The

cross-complainants then moved to enjoin R from representing the plaintiff and cross-defendant and from disclosing confidential information. The trial judge denied the motion. *Held*, reversed. R's reliance on *Croce* is not persuasive.

(a) The viability of *Croce* was questioned in *Goldstein v. Lees* (1975) 46 C.A.3d 614, 623, footnote 9, 120 C.R. 253, supra, §137. Moreover, a federal case criticized *Croce* for failing to note that the rule against representing conflicting interests is broader than the basis for the evidentiary privilege (encouraging the disclosure of information); the former arises out of the fiduciary relationship itself, i.e., clients not only disclose confidential information to attorneys but repose confidence in them. (73 C.A.3d 536, footnote 5.)

(b) *Croce* is distinguishable. R represented conflicting interests, for the less vicarious that M's liability became, less was the danger that Industrial's policy would cover it, and less was the danger that T would be required to indemnify it. (73 C.A.3d 536, 537.) This conflict, while perhaps not apparent when R assumed the defense, became obvious when Industrial asserted its position on the policy endorsements. (73 C.A.3d 537.)

(c) "[E]ven if *Croce* is still good law, it does not apply to a situation where the joint representation of two or more clients with conflicting interests was undertaken or continued without disclosure and written consent." (73 C.A.3d 538.) However, "[t]his opinion deals solely with the obligations of counsel who represents insurer and insured. It has nothing to do with the duties of an insurer who is faced with a contractual obligation to defend several insureds with conflicting interests." (73 C.A.3d 538, footnote 11.)

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4. Joint Attorney.

bb. Exception Limited.

1 *Witkin Cal. Proc. Attys* § 142

[§ 142] Exception Limited.

In *Cornish v. Superior Court* (1989) 209 C.A.3d 467, 257 C.R. 383, C was the prime contractor on a project that was the subject of several lawsuits; Capital was the bonding company of a subcontractor; and V was Capital's attorney. C, through his attorney, cooperated with V and tendered defense of some of the actions to Capital. Subsequently, C filed suit against Capital and moved to disqualify V from representing Capital. *Held*, the trial court properly denied the motion. C at all times had personal counsel to advise him and knew that V's primary client was Capital, and V had specifically advised C that Capital retained the right to continue using V in the event of a dispute between C and Capital. Hence, C could not reasonably expect that V would keep information provided by C confidential from Capital. (209 C.A.3d 476, 477, citing *Croce v. Superior Court* (1937) 21 C.A.2d 18, 68 P.2d 369, and *Petty v. Superior Court* (1953) 116 C.A.2d 20, 30, 253 P.2d 28, *supra*, §141.)

Noting the criticisms of *Croce*, the court limited its holding: "While we agree an attorney should not always be free to represent one former joint client against another merely because of the joint-client exception to the attorney-client privilege and we can easily envision situations where such action would seriously undermine the integrity of the attorney-client relationship, the present case is not such a situation." Here, petitioner maintained an attorney-client relationship with his personal attorney, never sought or obtained advice from V, and knew that in any conflict between petitioner and Capital, V would continue to represent Capital. "Our conclusion would be significantly altered if petitioner had not been independently represented by counsel or if there was evidence that petitioner looked to both its personal counsel and [V] for advice and counsel." (209 C.A.3d 477, 478.)

In *Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 C.A.3d 752, 261 C.R. 100, the trial court granted defendant N's motion to disqualify the B law firm representing plaintiff W, based on a finding that B had previously represented both N and W against a third party in a dispute that was substantially related to the action here. W argued that the joint client exception applied, permitting the firm to represent it against N. *Held*, order of disqualification affirmed. N had general counsel representing it, but B was the primary counsel on the case against the third party. Unlike *Cornish*, *supra*, B had a confidential attorney-client relationship with N in which N reasonably

expected that its disclosures to B would remain confidential. (212 C.A.3d 763.) (See *Zador Corp. v. Kwan* (1995) 31 C.A.4th 1285, 1294, 37 C.R. 2d 754 [propriety of disqualification when prior representation involves joint clients turns on scope of clients' consent, not on substantial relationship test]; on substantial relationship test, see *supra*, §133.)

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6. Conflicts of Interest of Government Attorneys.

a. In General.

1 Witkin Cal. Proc. Attys § 143

[§ 143] In General.

Government attorneys face conflicts of interest that are in some respects similar to, but in other respects different from, those faced by private attorneys. These include (1) conflicts involving the attorney's functions (infra, §§144, 145), and (2) conflicts involving the attorney's personal interests (infra, §§146, 147). (See A.B.A., Model Rules of Professional Conduct, Rule 1.11 [special conflicts of interest for former and current government officers and employees]; 94 *Harv. L. Rev.* 1413 et seq.; 25 *Southwestern U. L. Rev.* 265 [confidentiality and conflict of interest issues for California public lawyers]; on disqualification of district attorney as prosecutor, see 4 *Cal. Crim. Law (3d), Introduction to Criminal Procedure*, §24 et seq.; on disqualification of city attorney as defense counsel, see 4 *Cal. Crim. Law (3d), Introduction to Criminal Procedure*, §29.)

Conflict of interest problems of former public attorneys may also result in motions to disqualify the attorneys or law firms with which they are subsequently associated. (See infra, §148.)

SUPPLEMENT: [This section is current through the latest supplement]

See 41 *Loyola L.A. L. Rev.* 701 [resolving tension between duty of confidentiality and whistleblower protection involving government attorney].



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b. Conflicting Functions.

1. General Principles.

1 Witkin Cal. Proc. Attys § 144

[§ 144] General Principles.

(1) *Nature of Problem.* Government attorneys often hold positions that involve the discharge of multiple functions, and these functions sometimes conflict; e.g., if a public employee and the employer are jointly sued for the acts of the employee, it may be necessary for the government attorney to choose between the two clients. (See *Govt.C. 995.2(a)(3)*, (c) [public entity may refuse defense of employee or former employee if conflict of interest exists]; *94 Harv. L. Rev. 1421, 1422*; *96 Harv. L. Rev. 1914* [ethical obligations of government attorney when government switches sides in action].)

(2) *Determination Whether Disqualification Is Required.* The courts have approached the issue whether conflicting functions require disqualification on the basis of the specific facts of each case, placing emphasis on the need for actual rather than speculative conflicts. (See *Civil Service Com. v. Superior Court (1984) 163 C.A.3d 70, 79, 83, 209 C.R. 159* [county counsel was disqualified from representing county in litigation against quasi-independent county civil service commission where there was substantial relationship between county counsel's current representation and prior representation of commission on same matters involved in litigation; proof that county counsel obtained confidential information during prior representation of commission was unnecessary]; *Elliott v. McFarland Unified School Dist. (1985) 165 C.A.3d 562, 567, 573, 211 C.R. 802* [attorney's continued representation of high school district was proper, where limited nature of prior joint representation of high school district and unified school district did not give rise to presumption of disclosure of confidential information, and joint powers agreement constituted written consent of unified school district to continued representation of high school district; distinguishing *Civil Service Com.*, and *Dill v. Superior Court (1984) 158 C.A.3d 301, 205 C.R. 671, supra, §135*].)

"A court confronted with an attorney disqualification motion should proceed with caution in order to avoid hardships on innocent clients where disqualifications are unnecessarily ordered. ... Disqualifications of public counsel can result in increased public expenditures for legal representation, and 'there is the potential for a substantially increased call upon an already severely strained tax base.' ... Where only speculative or minimal benefit would be obtained by disqualification of public counsel, the 'dislocation and increased expense of government' is not justified. ... An additional factor weighing against disqualification without sufficient cause is the potential deprivation to the client

of the services of an attorney highly skilled in a particular area of the law, as appears to be the case here where county counsel has a specialized unit which handles dependency matters." (*In re Lee G.* (1991) 1 C.A.4th 17, 28, 1 C.R.2d 375.)

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b. Conflicting Functions.

2. Where Conflict Affects Third Party.

1 Witkin Cal. Proc. Attys § 145

[§ 145] Where Conflict Affects Third Party.

In *Howitt v. Superior Court* (1992) 3 C.A.4th 1575, 5 C.R.2d 196, H, a deputy sheriff, was transferred by the sheriff's department from his station and summarily suspended without pay. H sought an administrative hearing before the County Employment Appeals Board, a quasi-independent administrative tribunal established by county ordinance. At the hearing, H discovered that the sheriff's department would be represented by a deputy county counsel, and that the county counsel would personally advise the board and prepare its written decision. H sought mandamus to compel the county counsel's office to disqualify itself from advising the board. *Held*, writ denied without prejudice.

(a) *Civil Service Com. v. Superior Court* (1984) 163 C.A.3d 70, 79, 83, 209 C.R. 159, *supra*, §144, left open the question whether a county counsel's office is ever permitted to act as an advocate for one party in a contested hearing while at the same time serving as the legal adviser for the decision maker. The answer is "yes," provided there is compliance with the guidelines set forth in this opinion. (3 C.A.4th 1579.)

(b) The answer is not provided by the rules of ethics and professional responsibility for attorneys. Under *Rules of Professional Conduct, Rule 3-310* (*infra*, §438 et seq.), a client may waive a conflict of interest; but this rule is obviously not designed to deal with the situation in which one of the clients is a party to a dispute and one is a decisionmaker. "The fact that the represented party and the decisionmaker are willing to waive a conflict does precious little for the remaining party who must face an adversary with unequal access to the tribunal." (3 C.A.4th 1580.)

(c) To satisfy due process concerns, the same law office may perform both roles only if the adviser for the decisionmaker is screened from inappropriate contact with the advocate. (3 C.A.4th 1585, 1586.) The burden of providing these assurances must rest with the law officer performing the dual roles. (3 C.A.4th 1586, 1587.) (For discussion in *Howitt* of due process entitlement to impartial decisionmaker, see 7 *Summary* (10th), *Constitutional Law*, §667.)

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c. Conflicts With Personal Interests.

1. Financial Interests.

1 Witkin Cal. Proc. Attys § 146

[§ 146] Financial Interests.

Conflicts with a government attorney's personal interests generally involve financial considerations. It is obviously improper for the attorney to exploit his or her public position for private gain. (See *94 Harv. L. Rev. 1422* et seq.) It is also improper to accept concurrent private employment that conflicts with the attorney's government obligations. (See *Govt.C. 1126* [local employee may not engage in employment in conflict with public duties]; *Govt.C. 1128* [attorney in nonelective position is permitted to serve on certain other government bodies]; on prohibition against public prosecutor acting as defense counsel, see *4 Cal. Crim. Law (3d), Introduction to Criminal Procedure, §29.*)

In *People v. Superior Court (Clancy)* (1985) 39 C.3d 740, 218 C.R. 24, 705 P.2d 347, a city hired C, a private attorney, under a contingent fee arrangement, to bring abatement actions based on the city's nuisance ordinance. C filed an abatement action against E and the adult bookstore she owned, and E moved to disqualify C as the attorney for the city. The motion was denied, and E sought mandamus to disqualify the attorney. *Held*, writ issued.

(a) *People v. Superior Court (Greer)* (1977) 19 C.3d 255, 137 C.R. 476, 561 P.2d 1164, observed that "a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors. ... When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." (39 C.3d 746.)

(b) A city attorney is a public official. Although the contract between the city and C provides that C is an independent contractor, he "cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job." (39 C.3d 747.)

(c) C's contingent fee arrangement gives him an interest extraneous to his official function. While the government, under appropriate circumstances, may hire a private attorney on a contingent fee to try a civil case, "just as certainly

there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement." (39 C.3d 748.)

(d) *Los Angeles v. Decker* (1977) 18 C.3d 860, 135 C.R. 647, 558 P.2d 545, 7 Cal. Proc. (5th), Trial, §224, noting the balancing of interests required in an eminent domain action, held that the government attorney must be unaffected by personal interests. Abatement of a public nuisance involves a similar balancing of the interests of the People against those of the landowner. When, as in this action, an adult bookstore is involved, First Amendment interests must also be balanced. "Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (39 C.3d 749.)

(e) A public nuisance abatement action often coincides with or triggers a criminal prosecution, and this connection further supports the need for neutrality. (39 C.3d 749.) (See *Campagna v. Sanger* (1996) 42 C.A.4th 533, 540, 542, 49 C.R.2d 676 [deputy city attorney was entitled to negotiate directly with city regarding compensation for litigation services not covered by his basic retainer, but referral fee agreement with outside firm, which he retained in his official capacity, violated Govt.C. 1090 (conflict of interest) and former Rules of Professional Conduct, Rule 2-108 (no division of fees without client's consent)]; on Govt.C. 1090, see *Summary* (10th), *Contracts*, §651; 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §105); on division of fees, see *infra*, §§161, 162.)

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c. Conflicts With Personal Interests.

2. Enforcement of Collective Bargaining Rights.

1 Witkin Cal. Proc. Attys § 147

[§ 147] Enforcement of Collective Bargaining Rights.

In *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 C.4th 525, 28 C.R.2d 617, 869 P.2d 1142, plaintiff, an association representing attorneys in the office of defendant county counsel, notified defendant county that it intended to petition for mandamus to enforce its members' bargaining rights under the Meyers-Milias-Brown Act (MMBA) (3 Summary (10th), *Agency and Employment*, §571). Defendant county counsel, however, informed the attorneys that litigation on salary issues could not be maintained unless the lawyers ceased employment or defendant county consented. Plaintiff then filed an action for declaratory and injunctive relief against defendants, seeking a declaration that the proposed writ proceeding did not violate its members' ethical obligations. The trial judge determined that plaintiff's members were entitled to proceed with their petition and enjoined defendant county counsel from terminating the members' employment if an action was filed. The Court of Appeal reversed. *Held*, Court of Appeal reversed.

(a) Defendant county argues that the action is barred by the attorney's duty of loyalty, and that, to the extent the MMBA authorizes the suit, it violates the constitutional separation of powers, because the power to govern the legal profession is vested in the judiciary. (7 C.4th 542.) However, the Legislature has enacted numerous statutes regulating the legal profession, and the court has never declared a statute of general application, which does not affect the traditional areas of attorney admission, disbarment, and discipline, unconstitutional. (7 C.4th 544.)

(b) Defendant county claims that the proposed action would violate *Rules of Professional Conduct*, Rule 3-300 (avoiding interests adverse to client; *infra*, §§436, 437) and Rule 3-310 (avoiding representation of adverse interests; *infra*, §438 et seq.). However, neither rule applies. Rule 3-300 regulates business transactions and acquisition of pecuniary interests, neither of which is involved here; Rule 3-310 applies only to conflicts involving the subject matter of the representation, not to attorney-client conflicts outside that subject matter. (7 C.4th 545, 546.)

(c) The issue remains whether an attorney's common law duty of loyalty prohibits the action. The issue is not the extent to which the duty of loyalty generally precludes an attorney's lawsuit against a current client, but "whether an attorney's lawsuit to enforce rights granted pursuant to a statutory scheme of public employer-employee bargaining is

fundamentally incompatible with the essentials of the duty of loyalty. In order to answer this question, we must decide another, more fundamental, issue: to what extent is the collective bargaining relationship between an attorney/employee and a client/employer itself compatible with the attorney's duty of loyalty?" (7 C.4th 549.)

(d) The legal profession formerly looked askance at attorneys joining unions or other employee associations. This attitude has changed, and the American Bar Association has adopted a pragmatic approach that recognizes the right of attorneys to join such associations, and even to strike, provided that an attorney does not violate his or her professional obligations to the client. (7 C.4th 549, 550, 551.)

(e) "Although we do not necessarily endorse the ABA Committee's position on the permissibility of strikes for government attorneys, we find its approach to the question of employee organization among these attorneys to be essentially correct. First, we do not find that government attorneys who organize themselves into associations pursuant to statute and who proceed to bargain collectively with their employer/clients are *per se* in violation of any duty of loyalty or any other ethical obligation. The growing phenomenon of the lawyer/employee requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee." (7 C.4th 551.)

(f) "Moreover, we follow the ABA Committee's approach to determining when an attorney, in pursuit of an employee association's goals, oversteps ethical boundaries. That occurs when the attorney violates actual disciplinary rules, most particularly rules pertaining to the attorney's duty to represent the client faithfully, competently, and confidentially. ... An attorney, in pursuing rights of self-representation, may not use delaying tactics in handling existing litigation or other matters of representation for the purpose of gaining advantage in a dispute over salary and fringe benefits." (7 C.4th 552.)

(g) "We therefore hold that attorneys employed in the public sector, who exercise their statutory right to sue to enforce rights given them by the MMBA, do not in such capacity violate their ethical obligations to their employer/client. In so holding, we emphasize that attorneys in such circumstances are held to the highest ethical obligations to continue to represent the client in the matters they have undertaken, and that a violation of their duty to represent the client competently or faithfully, or of any other rule of conduct, will subject those attorneys to the appropriate discipline, both by the employer and by the State Bar." (7 C.4th 553.)

(h) Under C.C.P. 284, a client generally may discharge an attorney at will (see *supra*, §75). However, Govt.C. 3506 expressly prohibits a public agency from intimidating or discriminating against a public employee solely or chiefly because the employee has engaged in protected activity under the MMBA. (7 C.4th 555.) Moreover, attorneys who believe they have been discriminated against for protected activity may bring an antidiscrimination action in the manner available to other employees. (7 C.4th 557.)

(i) Although the attorneys could not be punished for filing the action, defendants were entitled to reorganize the county counsel's office to respond. Hence, the attorneys had no right to be reinstated to their full employment responsibilities, from which they had been excluded once they announced their intention to sue. This strikes a proper balance between defendants' need to obtain representation in which they have full confidence and the attorneys' statutory employment rights. (7 C.4th 557.)

A dissenting opinion by one justice argued that the right of defendant county, as the client of plaintiff's member attorneys, to discharge the attorneys because they no longer enjoyed defendant county's full trust and confidence, took precedence over the right of the attorneys to enforce their employment rights against defendant county. (7 C.4th 558.) (On holding that plaintiff was entitled to sue under MMBA, see 3 Summary (10th), *Agency and Employment*, §579.)

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d. Former Public Sector Attorney.

1 Witkin Cal. Proc. Attys § 148

[§ 148] Former Public Sector Attorney.

(1) *In General.* Conflict of interest problems also may arise involving former public attorneys who have entered private practice. The "revolving door" phenomenon provides benefits to both public agencies and attorneys in public and private practice, but it also poses dangers. In addition to the need to protect client confidences, care must be taken to ensure that private parties do not gain unfair advantage by hiring former government attorneys. (See 94 *Harv. L. Rev.* 1428; A.B.A. Model Rules of Professional Conduct, Rule 1.11; *Rest.3d, The Law Governing Lawyers* §133; Rutter Group, Professional Responsibility, §4:216 et seq.)

(2) *Law Firm of Former Public Employee.* In *Chambers v. Superior Court* (1981) 121 C.A.3d 893, 175 C.R. 575, plaintiffs sued the state of California for injuries received in an automobile accident, alleging negligent maintenance of a road. The state moved to disqualify plaintiffs' law firm on the ground that W, one of its members, had been employed by the state and had obtained confidential information on the action. Plaintiffs filed a declaration by W that he did not work on the case while employed by the state, that he was not working on it in his present employment, and that he accepted the private employment on condition that he would not be involved in cases as to which he had acquired any knowledge in his state employment. The trial judge granted the motion. *Held*, mandamus granted to compel entry of an order denying the motion.

(a) Former A.B.A. Disciplinary Rule 9-101(B) (lawyer shall not accept private employment in a matter in which lawyer had substantial responsibility while a public employee) and Rule 5-105(D) (disqualification extended to partners) were the subject of a formal opinion by the A.B.A. Standing Committee on Ethics and Professional Responsibility, reading in part as follows: "The purposes of limiting the mandate to matters in which the former public employee had a substantial responsibility are to inhibit governmental recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the

partnership, or the client may have relied in the past on representation by the firm." (121 C.A.3d 899.)

(b) There are dangers in interference with the right to counsel of one's choice, restrictions on the disqualified attorney's future employment prospects, and potential harm to the ability of government to attract talented young attorneys. (121 C.A.3d 899.) Federal decisions, expressing the same concerns, have followed the same approach, i.e., favoring screening rather than mechanical vicarious disqualification. (121 C.A.3d 900, 902.)

(c) Here there was no evidence that W had any responsibility over matters related to the action or had acquired confidential information about it; the firm had undertaken sufficient protective matters to screen him from participation in it; and disqualification at this late date (nearly 31/2 years after the case was filed) would not only have an adverse effect on the innocent client but would unnecessarily delay the judicial process. Hence, it was an abuse of discretion to grant the motion. (121 C.A.3d 903.) (See 94 Harv. L. Rev. 1439 [vicarious disqualification of associates of former public employee]; 28 Hastings L. J. 1537 [same].)

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e. Former Private Sector Attorney.

1 Witkin Cal. Proc. Attys § 149

[§ 149] Former Private Sector Attorney.

When an attorney leaves private practice for a government law office, ethical screening of that attorney to protect confidences obtained from prior representation in private practice may prevent disqualification of the entire government office in litigation involving former clients. In *Santa Barbara v. Superior Court (2004) 122 C.A.4th 17, 18 C.R.3d 403*, plaintiff homeowners sued the city of Santa Barbara for damage after water and sewage from a city main flooded portions of their home. The city attorney represented the city. After working over 30 hours on the case, attorney K, associated with the firm retained by plaintiffs, left the firm and joined the city attorney's office. Plaintiffs moved to disqualify the city attorney. The assistant city attorney responsible for litigation, M, stated that she had constructed an "ethical wall" to prevent K's access to information related to plaintiff's litigation. M did not supervise K, nor did her staff work with K. Office staff had been instructed to isolate K from communications and information about the case. The city's litigation files were segregated from nonlitigation files, and because K did not work on litigation matters she had no reason to access the litigation files. M did not attend office staff meetings and reported on litigation only to the city attorney. Plaintiffs conceded that K had not disclosed confidential communications, but maintained that they should not be required to face possible future disclosure. The trial court concluded that the ethical wall was insufficient and ordered disqualification of the entire city attorney's office. *Held*, order vacated.

(a) Disqualification of individual attorneys and vicarious disqualification of a law firm is often necessary to protect the integrity of the judicial process by enforcing counsel's duties of confidentiality and loyalty. Ordinarily, switching sides in the private sector suggests that an attorney is indifferent to these duties, and regardless of the attorney's true intentions, a rule of automatic disqualification, including vicarious disqualification, is reasonable. (*122 C.A.4th 23.*)

(b) Although public sector attorneys have the same ethical duties, vicarious disqualification in the public sector raises numerous problems. For example, public law offices would have difficulty recruiting competent attorneys, and private sector law firms might hesitate to hire an attorney from a public law office fearing disqualification in future matters. Moreover, individual attorneys might avoid the public sector in order to prevent limiting their future opportunities in the private sector. Clients having adverse interest to a public entity might also be deprived of chosen counsel, or find it difficult to retain counsel. Thus, courts have more readily accepted screening procedures, such as M's ethical wall, as an alternative to vicarious disqualification involving public law offices. (*122 C.A.4th 24.*)

(c) K would be personally disqualified from representing the city here, but that does not require the vicarious disqualification of the entire office. M's ethical wall would be effective for several reasons. First, no breaches had occurred, and K and all other employees in the city attorney's office have been instructed not to communicate about the case. Second, M has no managerial or supervisory authority over K, the two attorneys do not attend staff meetings together, and K does not have access to litigation files. Finally, the case is of a sufficiently low profile not to attract media attention or erode public confidence in the administration of justice or the integrity of the *Bar*. (122 C.A.4th 27.)

However, an entire government law office is subject to disqualification when the head of the office has a conflict arising from previous representation while in private practice. In *San Francisco v. Cobra Solutions* (2006) 38 C.4th 839, 43 C.R.3d 771, 135 P.3d 20, C, a computer company, sought contracts with plaintiff city for information technology services and retained a law firm of which H was a named partner. A year later H was elected City Attorney, and he adopted a blanket policy of not participating in matters involving his former law firm or any of its clients regardless of whether he had a conflict. When H assumed office, the City Attorney's office was investigating contracts for computer services entered into by the building inspection department and kickbacks to a city official. When H learned that the investigation implicated C, he took measures to screen himself from the case with respect to C. All attorneys working on the case maintained locked files and computerized records that were inaccessible to H and were directed to report to H's chief assistant. When C was added to the complaint against the city official, C moved to disqualify H and the City Attorney's office. The trial judge, in granting the motion, found (1) that H had personally represented C and obtained confidential information that was substantially related to issues in the litigation, and (2) that H's conflict must be imputed to the entire City Attorney's office because "the personally-conflicted counsel is the head" of that office and the deputies were necessarily subject to H's oversight and influence. *Held*, affirmed.

(a) Although California has not adopted separate Rules of Professional Conduct applicable to government attorneys, judicial decisions have addressed government law office conflict issues and have upheld the ethical screening of private attorneys who have moved into government service. However, in those cases the attorney subject to the screening was "simply one of the attorneys in the government office" and not the head of the office, at whose pleasure the deputies serve. (38 C.4th 853.)

(b) Attorneys in charge of a government law office hold unique positions because they are the policy decisionmakers, and it is not possible to entirely insulate the attorneys who serve directly under them. "The power to review, hire, and fire is a potent one. Thus, a former client may legitimately question whether a government law office, now headed by the client's former counsel, has the unfair advantage of knowing the former client's confidential information when it litigates against the client in a matter substantially related to the attorney's prior representation of that client." (38 C.4th 854.)

(c) Disqualification also furthers a "compelling societal interest in preserving the integrity of the office of a city attorney." Public confidence may be seriously undermined if the public perceives that a city attorney and the deputies "might be influenced by the city attorney's previous representation of the client, at the expense of the best interests of the city." (38 C.4th 854.)

One justice dissented, arguing that disqualification should not be automatic. (38 C.4th 854.)

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7. Acts of Nonattorney Employees.

1 Witkin Cal. Proc. Attys § 150

[§ 150] Acts of Nonattorney Employees.

In re Complex Asbestos Litigation (1991) 232 C.A.3d 572, 283 C.R. 732, involved "whether a law firm should be disqualified because an employee of the firm possessed attorney-client confidences from previous employment by opposing counsel in pending litigation." V was a paralegal with the B firm, which represented defendants in asbestos litigation. V's duties included settlement evaluations and preparation of specific cases, and he had access to B's computer records on each asbestos case. When his employment with B was terminated, V obtained a position with the H firm, which represented plaintiffs in asbestos litigation. Although V claimed that he had made a full disclosure to B and obtained B's consent to employment by H, B denied that disclosure or waiver, and the trial judge resolved this credibility dispute against V. When B learned that V was involved in H's asbestos litigation, B moved to disqualify H. The trial court found that V's work for the two firms was substantially related, and that there was no waiver by B; that there was a substantial likelihood that hiring V without an "ethical wall" or waiver would affect the outcome of the asbestos cases; that V obtained confidential information when he accessed B's computer records on H's cases; and that there was a reasonable probability that V used or disclosed that information to H. *Held*, affirmed.

(a) *Confidentiality and the nonlawyer employee.* When a former employee possesses confidential attorney-client information materially related to pending litigation, the hiring attorney must obtain the informed written consent of the former employer. Failing that, the hiring attorney is subject to disqualification unless the attorney can rebut a presumption that the confidential information has been used or disclosed in the new employment. (232 C.A.3d 592.) In cases dealing with disqualification of a firm when one attorney changes sides, the courts have disagreed on whether the disqualification should be automatic or whether a presumption of shared confidences should be rebuttable. (232 C.A.3d 593, citing *Chambers v. Superior Court* (1981) 121 C.A.3d 893, 175 C.R. 575, *supra*, §148, and *Klein v. Superior Court* (1988) 198 C.A.3d 894, 913, 914, 244 C.R. 226.) In the light of obvious differences between attorneys and their nonattorney employees, a rebuttable presumption of shared confidences provides a just balance. (232 C.A.3d 593.) The most likely means of rebutting the presumption is a procedure to screen the employee from any involvement with the litigation, before being hired. (232 C.A.3d 593.) Here, H's first conversation with V revealed a potential problem--V's work for B. (232 C.A.3d 594.)

(b) *The rule for disqualification.* Absent "written consent, the proper rule and its application for disqualification based on nonlawyer employee conflicts of interest should be as follows. The party seeking disqualification must show

that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court. The party should not be required to disclose the actual information contended to be confidential. However, the court should be provided with the nature of the information and its material relationship to the proceeding. ... Once this showing has been made, a rebuttable presumption arises that the information has been used or disclosed in the current employment. The presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff. ... To rebut the presumption, the challenged attorney has the burden of showing that the practical effect of formal screening has been achieved. The showing must satisfy the trial court that the employee has not had and will not have any involvement with the litigation, or any communication with attorneys or coemployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed. If the challenged attorney fails to make this showing, then the court may disqualify the attorney and law firm." (232 C.A.3d 596.) (See *Toyota Motor Sales, U.S.A. v. Superior Court* (1996) 46 C.A.4th 778, 782, 54 C.R.2d 22 [if former employee is shown to have possessed confidential information material to pending litigation, rebuttable presumption arises that employee has disclosed information to present counsel, and disqualification may be required if presumption is not rebutted].)

In re Complex Asbestos Litigation was distinguished in *Neal v. Health Net* (2002) 100 C.A.4th 831, 123 C.R.2d 202. The trial court granted defendant's motion to disqualify T from representing plaintiff in her wrongful termination action after T agreed to represent B, a legal secretary formerly employed by defendant who was terminated for accessing defendant's computer file containing attorney-client information related to plaintiff's action. *Held*, reversed.

(a) Although B may have worked in defendant's legal department and had access to the file, there was no evidence that B shared confidential information with T, and no grounds existed to permit a presumption that she had done so. B was not an attorney and had not become affiliated with T in an employment capacity. "The Supreme Court has never held that the presumption of possession of confidential information and the *automatic* disqualification rule applies when a nonlawyer client who may have access to privileged matters retains an attorney. In the absence of a constitutional provision, statute, regulation, direction from the Supreme Court, or other proper jurisprudential ground, we decline to adopt such a rule." (100 C.A.4th 841.)

(b) *In re Complex Asbestos Litigation* appropriately approved disqualification because the paralegal worked on the same litigation while working for both plaintiff's and defendant's attorneys. Here, B was not hired to work for plaintiff's counsel in any capacity, nor is there evidence suggesting that she was at all involved in the present litigation. She was a client and thus had the right to communicate fully and openly with her own counsel. (100 C.A.4th 847.)

One justice concurred, but expressed unease under the facts here and opined that access to an opposing party's confidential information without proof of actual knowledge of the information should, at the discretion of the trial court, be a basis for disqualification. (100 C.A.4th 851.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Representation Adverse to Current or Former Client.

8. Retention of Expert Consulted by Another Party.

1 Witkin Cal. Proc. Attys § 151

[§ 151] Retention of Expert Consulted by Another Party.

In *Shadow Traffic Network v. Superior Court* (1994) 24 C.A.4th 1067, 29 C.R.2d 693, M sued S, a competitor in the traffic reporting business. Attorneys from the A firm, which was representing M, met with T and other representatives of the D accounting firm to discuss the possibility of retaining them as expert witnesses. A subsequently decided not to retain D. Attorneys from the L firm, which was representing S, later met with some of the same representatives of D and retained T as an expert. M then moved to disqualify L, claiming that A had disclosed confidential matters and trial strategy during its meeting with D, and that L had wrongfully obtained access to those privileged communications. The trial judge granted the recusal motion, and S sought mandamus. *Held*, petition denied.

(a) S, noting that the attorney-client privilege would have been lost and D's reports would have been subject to disclosure if M had retained and designated D as an expert witness, argues that communications with a prospective but nonretained expert are not privileged and cannot prevent the expert from later being retained by another party. (24 C.A.4th 1078, 1079.) However, the federal cases on which S relies compel the contrary conclusion. "[C]ommunications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from subsequent disclosure even if the expert is not thereafter retained as long as there was a reasonable expectation of such confidentiality." (24 C.A.4th 1080.)

(b) The trial judge found that A told D that confidential information was being imparted; substantial evidence supports this finding. (24 C.A.4th 1082, 1083.) Execution of a formal confidentiality agreement prohibiting the disclosure of information learned by the expert during the meeting is a better practice, and such an agreement would have eliminated many of the factual disputes in this case. However, the absence of an agreement is not fatal. (24 C.A.4th 1083.)

(c) When L learned that A had already met with D, L should have spoken to A. "The point is clear: a brief but professional exchange can expeditiously resolve the issue and avoid needless litigation." (24 C.A.4th 1084.) Failing that, a rebuttable presumption arises that confidential information has been disclosed. Hence, S had the burden of proving by a preponderance of the evidence that D did not disclose to L the confidential information that A gave to D. (24 C.A.4th 1085.) That was an issue for the trial judge to decide, and the trial judge's implicit conclusion that S did not carry its burden does not exceed the bounds of reason. (24 C.A.4th 1087.)

(d) Disqualification of an entire law firm is a serious step. However, L should have contacted A before retaining D. Had A objected, L could have applied to the trial court for relief. Instead, L hired D and presumably gained the advantage of learning confidential information disclosed by its adversary. Under these circumstances, the trial judge did not abuse his discretion in disqualifying L. (24 C.A.4th 1088.)

(e) Furthermore, given the manner in which S has litigated the matter, there is no alternative to disqualifying the entire firm. Neither in the trial court nor in its petition for mandamus has S suggested that the recusal order should be narrowed to disqualify only certain personnel. At the hearing on the order to show cause, L declined an invitation to indicate if something less than disqualification of the entire firm would be appropriate. (24 C.A.4th 1088.) (See *Toyota Motor Sales, U.S.A. v. Superior Court* (1996) 46 C.A.4th 778, 782, 54 C.R.2d 22 [if former consultant is shown to have possessed confidential information material to pending litigation, rebuttable presumption arises that consultant has disclosed information to present counsel, and disqualification may be required if presumption is not rebutted].)

The disqualification of an expert, and by extension the law firm that retained the expert, can only be justified when the moving party establishes that the expert *actually* possessed confidential attorney-client information materially related to the existing proceedings. Showing merely potential access to confidences without actual exposure is insufficient. (*Western Digital Corp. v. Superior Court* (1998) 60 C.A.4th 1471, 1487, 71 C.R.2d 179 [following *Shadow Traffic Network*].)

Collins v. California (2004) 121 C.A.4th 1112, 18 C.R.3d 112, involved a personal injury action in which P, an attorney with the firm representing plaintiff, hired expert C, unaware that a year before C had been retained by defense counsel, S. After P disclosed C as a retained expert, C contacted P and told him that he had been previously retained by defense counsel, but had forgotten. P then told C that they could have no further contact until the matter was sorted out. P's firm corresponded with S requesting verification that S had imparted confidential information to C. S stated that he had discussed the nature of the case as well as theories and strategies with C, and had used C's advice in conducting discovery. S then filed a motion to disqualify plaintiff's counsel. P responded that C had failed to disclose the prior retainer, that C had not revealed confidential information that might have been received from defense counsel, and that P had terminated contact with C on learning of the conflict. The trial court granted the motion. *Held*, reversed.

(a) The trial court may justifiably disqualify counsel to prevent the unfair use of confidential information exchanged with experts, and to protect the attorney-client privilege. However, the party requesting disqualification must demonstrate that confidential information has been conveyed. If shown, a rebuttable presumption arises that the information conveyed has been used or disclosed to opposing counsel. (121 C.A.4th 1123.)

(b) Although S demonstrated that confidential attorney work product information was exchanged with C, C remained a consultant for S. The rebuttable presumption arises by necessity when an expert changes sides and is no longer available to the moving party in proving what has been disclosed. Here, however, the expert remains in the employ of counsel seeking disqualification, and no reason exists for shifting the burden because the source of information is readily available. Thus, "where the expert has remained under the control of the moving party, and there is no evidence counsel knowingly retained the opposing party's expert or that the expert intentionally advised both sides," the rebuttable presumption does not apply. S had the burden of proving that confidential information was transmitted to P and failed to do so. (121 C.A.4th 1129.)

(c) Disqualification was also inappropriate because plaintiff's counsel was innocent of wrongdoing in hiring C. Unlike counsel in *Shadow Traffic Network*, P's firm had no prior notice of a possible conflict until defense counsel so advised. Once P knew, further contact with C was suspended. Because P's firm received no privileged information from C and acted with high ethical standards on learning of the dual retention, recusal was unwarranted and an abuse of the trial court's discretion. (121 C.A.4th 1131.)

In *Shandralina G. v. Homonchuk* (2007) 147 C.A.4th 395, 54 C.R.3d 207, a medical malpractice action, defendant D retained L as a confidential medical consultant. Shortly before the deadline to designate expert witnesses, plaintiff's

counsel R, unaware of L's retention by D, had a brief telephone conversation with L in which L said he was not familiar with the parties to the action. R sent L medical records for review and, because time was running out, R designated L as a potential expert witness for plaintiff. Once the conflict surfaced, plaintiff's counsel had no further contact with L. Relying on *Shadow Traffic Network*, D sought disqualification of plaintiff's counsel, alleging that R had improperly obtained confidential information during the brief phone conversation, and that this "unauthorized contact" created a rebuttable presumption that confidential information had been disclosed by L to R. Plaintiff opposed the motion under *Collins*, asserting that the rebuttable presumption was not applicable because L remained under the control of D and thus D retained the burden of persuasion to affirmatively show that R actually obtained confidential information from L. The trial court granted the motion, concluding that the presumption applied and that plaintiff had failed to show that R had not received confidential information. *Held*, disqualification order reversed.

(a) *Presumption did not apply.* The trial court erred in applying *Shadow Traffic*. The presumption is necessary only in those cases where the moving party loses control of the expert or the ability to obtain information from the expert regarding what transpired with opposing counsel. Here, there was no practical or legal impediment to D obtaining evidence from L on the content of the conversation with R. Thus, the reasons for the presumption were absent in this case, and D retained the burden to show that confidential information was imparted to R. (147 C.A.4th 413.)

(b) *Disqualification was not required.* R denied receiving confidential information from L and asserted that he only became aware that D had retained L when so informed by defense counsel. D supplied no direct evidence to impeach that claim. Moreover, although D's primary evidentiary fact was that R had designated L as an expert, that fact alone does not permit an inference that the brief conversation necessarily encompassed substantive discussions in which L could have revealed confidential attorney work product. As R explained, the time deadline for designation was about to expire and he elected to designate L, knowing he could subsequently withdraw him. This is a common tactical procedure and has been so recognized by the courts. Thus, there was "no competent evidence of sufficient substantiality" that L disclosed confidential information to R, and the misallocation of the burden of proof was not harmless. (147 C.A.4th 417.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Representation Adverse to Current or Former Client.

9. Information Shared With Percipient Witness.

1 Witkin Cal. Proc. Attys § 152

[§ 152] Information Shared With Percipient Witness.

In *Roush v. Seagate Technology, LLC* (2007) 150 C.A.4th 210, 58 C.R.3d 275, plaintiff brought an action against defendant employer alleging sexual orientation discrimination and harassment. One basis of plaintiff's complaint stemmed from comments made by K, plaintiff's immediate supervisor, that defendant had misgivings about plaintiff's "lifestyle," which plaintiff understood referred to her sexual orientation. K also had issues with defendant, resigned, and engaged attorney M. When plaintiff ultimately resigned, she also engaged M based on K's introduction. However, M never represented plaintiff and K jointly in an action against defendant. K, with new counsel, brought an action against defendant, which ultimately settled. Under the settlement agreement, K waived any prior attorney-client privilege with M, agreed to supply defendant's counsel with all documents and information he possessed regarding plaintiff's claims, and agreed to meet with defendant's counsel as needed. Plaintiff sought to disqualify defendant's counsel contending that plaintiff and K enjoyed a joint privilege that could not be waived without both their consent, and that defendant's counsel improperly obtained plaintiff's confidential information from K. The trial court denied the motion. *Held*, affirmed.

(a) This is not an attorney-conflict case, as defendant's counsel had no prior attorney-client relationship with plaintiff. Nor is it a case where the alleged disclosure of confidential information was made by the attorney's own client. Also, K was not an employee of defendant when he negotiated the settlement agreement and thus his communications with defendant's counsel were not attorney-client communications. (150 C.A.4th 220.)

(b) The case is most similar to the expert witness and prior employee cases described by *In re Complex Asbestos Litigation* (1991) 232 C.A.3d 572, 283 C.R. 732, *supra*, §150, and *Shadow Traffic Network v. Superior Court* (1994) 24 C.A.4th 1067, 29 C.R.2d 693, *supra*, §151. In those cases, the party seeking disqualification has the burden to show that the relevant party had confidential information materially related to the proceedings currently before the court. Once shown, a rebuttable presumption arises that the information has been used or disclosed in the current action. (150 C.A.4th 220.)

(c) Applying the rule here, plaintiff failed in her burden to show that K possessed confidential information materially related to her proceedings. (150 C.A.4th 221.) The only evidence to support her claim was a declaration by M, which merely described a joint lunch meeting involving plaintiff, K, and M, where plaintiff's case was discussed.

However, the "content of those discussions were not privileged merely because counsel was present," nor was their confidential nature established. (*150 C.A.4th 221.*)

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CHAPTER I - Attorneys

Witkin Summary of California Law IV. COMPENSATION OF ATTORNEY A. Basis for Fee.

1. General Principle and Distinctions.

1 Witkin Cal. Proc. Attys § 153

[§ 153] General Principle and Distinctions.

Except where specifically provided for by statute, the amount and manner of attorneys' fees are left to the agreement of the parties. (*C.C.P. 1021*; see *Wyzard v. Goller* (1994) 23 *C.A.4th* 1183, 28 *C.R.2d* 608, 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §495 [propriety of judgment debtor's preferential transfer of security interests to attorney as payment for legal services]; *Rest.3d, The Law Governing Lawyers* §34 et seq. [legal controls on attorneys' fees]; C.E.B., 1 *Civil Proc. Before Trial* 3d, §§3.2 et seq., 6.2 et seq., 6.10 et seq.; C.E.B., *Fee Agreement Forms Manual* 2d; Rutter Group, *Professional Responsibility*, Chap. 5; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §273 et seq.; 10 *A.L.R.5th* 448 [excessiveness or adequacy of attorneys' fees in matters involving real estate]; 102 *A.L.R.5th* 253 [construction of attorney retainer fee or salary contract under state law]; 181 *A.L.R. Fed* 1 [construction of attorney classic retainer fee in bankruptcy context]; 3 *Am.Jur. Legal Forms* 2d (2003 ed.) §30:7 et seq., 30:112 et seq.; on attorney's lien, see *infra*, §166; on necessity of court approval of minor's contract for litigation services, see *Family C. 6602, 1 Summary* (10th), *Contracts*, §35.)

The attorney's claim of compensation may be based on the following:

- (1) An express contract for a fixed fee, a contingent fee, or the reasonable value of services. (See *infra*, §§154, 176, 194 et seq.)
- (2) An implied in fact contract or quasi-contractual right to the reasonable value of services. (See *infra*, §194 et seq.)
- (3) A statutory award in an amount or percentage fixed by statute, or allowance in an amount determined by the court. (See *infra*, §159.)

Methods of valuing services and fixing fees vary widely. However, the attorney should bear in mind the factors that a court would consider in determining the reasonable value of the services rendered. (See A.B.A. *Model Rules of Professional Conduct*, Rule 1.5; *Rules of Professional Conduct*, Rule 4-200, *infra*, §454 [fees for legal services]; C.J.E.R., *Judges Benchbook*, *Civil Proceedings: Trial*, §§16.76, 16.78, 16.80; *infra*, §199 et seq.)

The discussion of attorneys' fees in this chapter is confined to the liability of the client to the attorney. A different focus is involved where, by contract between the parties, or by statute or case law, the successful party in an action is entitled to recover attorneys' fees incurred prior to the action or in its prosecution from the adverse party. (See 7 *Cal. Proc.* (5th), *Judgment*, §149 et seq.) Similarly distinct is the right of the petitioner in an action for dissolution of marriage, legal separation, or judgment of nullity to obtain an award of attorneys' fees at the outset, in order to maintain the action. (See *Family C. 2030* and *2255*, *11 Summary* (10th), *Husband and Wife*, §173.) (On compensation of counsel in criminal cases, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §163.)

West's Key Number Digest, Attorney and Client 130 et seq.

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- A. Basis for Fee.
- 2. Fee Agreements.
- a. Formal Contract.

1 Witkin Cal. Proc. Attys § 154

[§ 154] Formal Contract.

(1) *In General.* An attorney's fee is often governed by a formal contract between the attorney and the client. The following cases contain illustrations of formal agreements for compensation:

Kirk v. Culley (1927) 202 C. 501, 504, 261 P. 994 [attorney's action to recover fees on written contract following discharge by client].

Preston v. Herminghaus (1930) 211 C. 1, 5, 292 P. 953 [detailed agreement reciting nature of contemplated litigation services and providing for specified percentage fees in event of various kinds of recovery].

Jackson v. Campbell (1932) 215 C. 103, 104, 8 P.2d 845 [construction of written contract to determine amount to be retained by attorney for services rendered].

Miller v. Wing (1935) 9 C.A.2d 483, 486, 50 P.2d 470 [discussion of services governed by general agreement].

Swanson v. Hempstead (1944) 64 C.A.2d 681, 683, 149 P.2d 404 [fee consisting of 50% of any recovery].

Floro v. Lawton (1960) 187 C.A.2d 657, 662, 10 C.R. 98 [written retainer agreement].

(2) *Contract Negotiated in Foreign Language.* An attorney who conducts negotiations for a contract primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean must deliver to the other party prior to execution a translation of the contract in the language in which it was negotiated. The remedy for noncompliance is rescission by the aggrieved party. (C.C. 1632(a)(5), (k); see 1 *Summary* (10th), *Contracts*, §124.)

(3) *Reasonable Certainty Is Required.* A contract for attorneys' fees must, like any other contract, be reasonably certain if it is to be enforceable. (See 1 *Summary* (10th), *Contracts*, §137 et seq.)

Goldberg v. Santa Clara (1971) 21 C.A.3d 857, 98 C.R. 862, illustrates this principle. Defendant city entered into an agreement to employ plaintiff, a Washington, D.C., attorney, to seek cancellation of its contract with a private power

company and to substitute a contract with the Bureau of Reclamation. A letter from plaintiff specified that his compensation was to be \$ 35 to \$ 45 per hour, with an estimated total fee of \$ 25,000 if the matter was settled, or \$ 35,000 if it was litigated. The letter also contained this statement: "If our efforts through settlement or hearing bring about savings to the City of such magnitude as, in our opinion, would justify additional compensation, we would present our views to the City at that time, but would leave to the City's judgment the additional compensation to be paid. We have no hesitation in relying on the fairness of the City in this regard." Plaintiff secured the required contract, handled litigation with the private power company, and was paid approximately \$ 50,000. He brought this action for additional compensation, alleging savings to the city of at least \$ 1 million and the city's unreasonable refusal to consider his claim. *Held*, judgment on demurrer affirmed.

(a) One party to a contract may allow the amount of compensation to be fixed by the other party, and if the other party acts in bad faith--as by setting an unreasonably low figure--a reasonable sum may be fixed by a jury or judge. In these cases only the amount to be paid is uncertain. (21 C.A.3d 861.)

(b) Here, the uncertainty was about what was to be paid for. The additional compensation was contingent on "savings to the City of such magnitude" as would justify it. However, there was no objective standard as to the necessary magnitude of savings and no limitation on the time when the savings were to be computed. This uncertainty was fatal to the making of a contract. (21 C.A.3d 861.)

In *Severson & Werson v. Bolinger* (1991) 235 C.A.3d 1569, 1 C.R.2d 531, the fee agreement letter provided for payment of the firm's "regular hourly rates." *Held*, "[w]hen a law firm quotes specifically hourly rates for the services of named attorneys to a prospective client who then agrees in writing to pay the firm's 'regular hourly rates,' the law firm cannot raise the rates charged by the named attorneys without first notifying the client." (235 C.A.3d 1570.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 222, line 18, "C.C. 1632(a)(5)" should be "C.C. 1632(b)".



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2. Fee Agreements.

b. Informal and Oral Agreements.

1 *Witkin Cal. Proc. Attys* § 155

[§ 155] Informal and Oral Agreements.

(1) *Informal Written Agreement.* The agreement may be made by letter or memorandum. (See *Miller v. Lantz* (1937) 9 C.2d 544, 546, 71 P.2d 585 [one attorney engaging others, providing for retainer, per diem charges, and expenses]; *Houge v. Ford* (1955) 44 C.2d 706, 709, 285 P.2d 257 [attorney employed to prepare contracts and take "other necessary legal steps to protect or collect legacy of client"; 40% contingency fee]; *McKee v. Lynch* (1940) 40 C.A.2d 216, 218, 104 P.2d 675 [letter outlining terms of employment and compensation]; *Benjamin v. Frenke* (1940) 40 C.A.2d 736, 105 P.2d 591 [client's letter to attorney as containing terms of agreement]; *Wagner v. Sariotti* (1943) 56 C.A.2d 693, 695, 133 P.2d 430 [client's letter to attorney]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 C.A.2d 212, 224, 64 C.R. 915 [attorney was permitted to testify to show reasonable value of services, as indication of what price parties were likely to have agreed on].)

A casual memorandum may be ineffective as a limitation on the extent of compensation. In *Shaw v. Leff* (1967) 253 C.A.2d 437, 61 C.R. 178, defendant engaged plaintiff as his attorney for a divorce proceeding. At defendant's request, "for his tax man," plaintiff gave him a memorandum reciting "Retainer, \$ 750, Court Time, \$ 150 per day, plus costs." The supposedly uncontested divorce turned out to be a strongly contested one, and plaintiff put in hundreds of hours of work. *Held*, the memorandum was not an integration, parol evidence was admissible, and it established the rendition of legal services worth \$ 13,500, which the jury properly awarded. (253 C.A.2d 439, 440.)

(2) *Oral Agreement.* An oral agreement is equally effective. (See *Stuart v. Preston* (1934) 2 C.A.2d 310, 315, 38 P.2d 155 [agreement between two lawyers for fair and reasonable fee]; *Kendrick v. Gould* (1921) 51 C.A. 712, 713, 197 P. 681 [reasonable fee]; *Harvey v. Ballagh* (1940) 38 C.A.2d 348, 350, 101 P.2d 147 [25% of whatever recovered, client to pay costs]; *Sattinger v. Golden State Glass Corp.* (1942) 53 C.A.2d 130, 134, 127 P.2d 653 [employment of attorney by majority directors of corporation in receivership, to represent corporation]; *Miller v. Pierce* (1944) 66 C.A.2d 126, 127, 152 P.2d 24 [various oral and written agreements]; *Hardy v. San Fernando Valley Chamber of Commerce* (1953) 119 C.A.2d 523, 525, 259 P.2d 728 [oral agreement found between attorney H and clients of attorney S]; *Thomson v. Casaudoumecq* (1962) 205 C.A.2d 549, 551, 23 C.R. 189 [oral agreement made during ongoing attorney-client relationship].)

However, an agreement must be in writing if the reasonably foreseeable expenses to the client will exceed \$ 1,000.
(*B. & P.C. 6148*, *infra*, §156.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Basis for Fee.

2. Fee Agreements.

c. When Written Agreement Is Required.

1 Witkin Cal. Proc. Attys § 156

[§ 156] When Written Agreement Is Required.

(1) *In General.* A contract for an attorney's services, other than a contingency fee contract, must be in writing if "it is reasonably foreseeable that total expense to a client, including attorney fees," will exceed \$ 1,000. A copy of the contract, signed by both parties, must be given to the client or the client's guardian or representative. (*B. & P.C. 6148(a).*) A written fee contract is a confidential communication within the meaning of *B. & P.C. 6068(e)* (*supra*, §90) and *Ev.C. 952 (2 Cal. Evidence (4th), Witnesses, §§108, 119, 120)*. (*B. & P.C. 6149.*) (For sample agreements, see *C.E.B., Fee Agreement Forms Manual 2d*; on requirements for contingency fee contracts, see *infra*, §180 *et seq.*)

(2) *Required Information.* The writing must contain the following information:

(a) The basis of compensation, including hourly rates, statutory fees, or flat fees, and other applicable standard rates, fees, and charges. (*B. & P.C. 6148(a)(1).*)

(b) The general nature of the legal services to be provided. (*B. & P.C. 6148(a)(2).*)

(c) The respective contractual responsibilities of the attorney and the client. (*B. & P.C. 6148(a)(3).*)

(3) *Bills.* An attorney's bills to a client must "clearly state the basis" of the charges. Thus, a bill for a fee must include the amount, rate, basis for calculation, or other method of determination. A bill for costs and expenses must clearly identify the costs and expenses and their amount. (*B. & P.C. 6148(b).*)

(4) *Effect of Noncompliance.* Failure to comply with *B. & P.C. 6148* renders the agreement voidable at the client's option. If voided, the attorney is entitled to collect a reasonable fee. (*B. & P.C. 6148(c).*) (See *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 C.A.4th 990, 995, 90 C.R.2d 665 [promissory note for alleged fees prepared after 4 years of representation failed to meet requirements of *B. & P.C. 6148* and could not support attorney's contract claim]; on reasonable value of services, see *infra*, §194.)

(5) *Exceptions.* *B. & P.C. 6148* does not apply in the following situations:

(a) When services are rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is impractical. (*B. & P.C. 6148(d)(1).*)

(b) When a fee arrangement is implied by the attorney's services that are of the same general kind as previously rendered to and paid for by the client. (*B. & P.C. 6148(d)(2).*)

(c) When the client knowingly states in writing, after full disclosure of *B. & P.C. 6148*, that a writing concerning fees is not required. (*B. & P.C. 6148(d)(3).*)

(d) When the client is a corporation. (*B. & P.C. 6148(d)(4).*)

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A. Basis for Fee.

3. Unilateral Determination by Attorney Is Improper.

1 Witkin Cal. Proc. Attys § 157

[§ 157] Unilateral Determination by Attorney Is Improper.

In *Trafton v. Youngblood* (1968) 69 C.2d 17, 69 C.R. 568, 442 P.2d 648, plaintiff claimed a fire loss of property. The insurer made its check payable to plaintiff, to the beneficiary of the trust deed, and to the contractor hired by plaintiff to repair the building. Plaintiff retained defendant, attorney Y, to get the money cleared, and Y settled the various claims and got the money into escrow. When \$ 11,886.34 remained, Y drew it out, paid \$ 4,672.21 to settle lien claims, and then sent plaintiff an itemized statement of his legal services and costs for this and other unrelated legal actions. The statement showed that Y had paid himself \$ 6,800 for services, and that a balance of \$ 6,800 was due. Plaintiff acknowledged receipt of this statement, ignored several later statements, and did nothing about the claim until nearly 2 years later. Plaintiff then filed this action to recover the amounts taken by Y for services, in violation of the escrow agreement. *Held*, judgment for plaintiff affirmed. An attorney may not unilaterally determine a fee and satisfy it by withdrawing funds held in trust for the client without the knowledge or consent of the client. (69 C.2d 26.) The unauthorized withdrawal was a violation of the strict fiduciary obligation of the attorney placing the burden on the attorney to show fairness, knowledge, and consent. (69 C.2d 28.)

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A. Basis for Fee.

4. Minimum Fee Schedules.

1 Witkin Cal. Proc. Attys § 158

[§ 158] Minimum Fee Schedules.

Local bar associations sometimes compile minimum fee schedules, covering charges for certain kinds of legal services. (See 49 A.B.A.J. 76 [defending use of schedules]; 48 A.B.A.J. 252 [arguing against fee schedules]; 57 A.B.A.J. 655 [same]; 85 Harv. L. Rev. 971 [critical economic and social analysis of fee schedules]; 1 Am.Jur. Trials 143 et seq.)

Minimum fee schedules enforced by ethical directives of an integrated bar may violate the Sherman Antitrust Act. In *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572, petitioners, seeking to purchase a home in Fairfax County, Virginia, needed title insurance to obtain a loan. This required a title examination that could be done only by a member of the State Bar. Lawyers in the county refused to perform the service for less than the minimum fee set forth in the schedule published by the county bar association (one percent of the value of the property). Petitioners then brought this class action against the State Bar and the county bar seeking injunctive relief and damages. *Held*, the Sherman Act applied.

(a) Defendants were engaged in price fixing. The minimum fee schedule involved was not purely advisory; it produced "a fixed, rigid price floor" that was enforced by the threat of professional discipline. (95 S.Ct. 2010, 44 L.Ed.2d 581.) And its restraint of competition and harm to consumers was unusually damaging, for the title examination was indispensable to financing a real estate purchase, and no alternative sources for this service were available. "On this record respondents' activities constitute a classic illustration of price fixing." (95 S.Ct. 2011, 44 L.Ed.2d 582.)

(b) The effect of the schedule on interstate commerce was substantial. A significant portion of funds for purchase of homes in the county came from outside the state; and where, "as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes." (95 S.Ct. 2012, 44 L.Ed.2d 584.)

(c) The "learned professions" are not totally exempt from Sherman Act restrictions. Professional services have been held subject to the Act (see *American Med. Assn. v. United States* (1943) 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434); the examination of land title is a service; and when performed for money it is "commerce." Activities of lawyers play an important part in commercial intercourse, and their anticompetitive activities "may exert a restraint on commerce." (95 S.Ct. 2014, 44 L.Ed.2d 585.)

(d) The bar's conduct is not "state activity" within the immunity declared in *Parker v. Brown* (1943) 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. No state statute or directive of the state Supreme Court compels adherence to minimum fee schedules; i.e., there is no requirement imposed by the state acting as sovereign. "The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." (95 S.Ct. 2015, 44 L.Ed.2d 587.)

(e) The states have a compelling interest in regulating the practice of professions; a state might decide that some forms of business competition might be "demoralizing to the ethical standards of a profession"; and the interest in regulating lawyers is especially great. Hence: "In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." (95 S.Ct. 2016, 44 L.Ed.2d 588.)

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A. Basis for Fee.

5. Statutory Regulation.

1 Witkin Cal. Proc. Attys § 159

[§ 159] Statutory Regulation.

As indicated by *C.C.P. 1021* (supra, §153), the fee a client must pay an attorney is sometimes regulated by statute.

(1) *Probate Proceedings*. The attorney for the estate receives for ordinary services a fixed fee based on certain percentages of the value of the estate (*Prob.C. 10810*), and for extraordinary services a reasonable sum determined by the court (*Prob.C. 10811*). (See 14 *Summary* (10th), *Wills and Probate*, §§528 et seq., 534 et seq.) The same rule applies in determining the fees, both for ordinary and for extraordinary services, rendered by the attorney for a special administrator. (*Prob.C. 8547(c)*, (d); see 14 *Summary* (10th), *Wills and Probate*, §429.)

(2) *Guardianship and Conservatorship Proceedings*. In guardianship and conservatorship proceedings, the compensation allowed the attorney for the guardian or conservator must be approved by the court. (*Prob.C. 2632(d)*, 2640(c), 2642; see 14 *Summary* (10th), *Wills and Probate*, §§1042, 1044.)

(3) *Paralegal Services*. Attorneys for executors, administrators, guardians and conservators may also apply for compensation for services performed by paralegals under the attorneys' supervision. The application must set forth the hours spent and services performed by the paralegal. (*Prob.C. 2632(d)*, 2640(c), 2642(a), 10811.)

(4) *Workers' Compensation Proceedings*. The fee of the claimant's attorney in a workers' compensation proceeding is determined by the Workers' Compensation Appeals Board. (*Lab.C. 4906*; see 2 *Summary* (10th), *Workers' Compensation*, §354 et seq.) (On statutory liens for attorneys' fees, see *infra*, §167.)

(5) *Attorney Serving as Fiduciary*. A number of statutes restrict the right of an attorney serving in a fiduciary capacity to recover compensation for providing legal services. Generally, court approval in advance is required, except for fiduciaries related by blood or marriage or cohabiting with designated persons. (See *Prob.C. 2645* [guardian or conservator]; *Prob.C. 10804* [personal representative]; *Prob.C. 15687* [trustee]; *B. & P.C. 6103.6* [violation of *Prob.C. 15687* is grounds for discipline].)

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6. Division of Fees Between Attorneys.

a. Construction of Agreement.

1 Witkin Cal. Proc. Attys § 160

[§ 160] Construction of Agreement.

In *Bunn v. Lucas, Pino & Lucas* (1959) 172 C.A.2d 450, 342 P.2d 508, defendant attorneys represented a client who would inherit a large sum if a will with ineffective charitable dispositions were set aside. After performing many services and filing a petition to determine heirship, defendants engaged plaintiff attorneys to assist in the preparation and presentation of the case. After some discussion, defendants met plaintiffs' demand for a \$ 15,000 contingent fee. Services were performed by plaintiffs for slightly less than 3 months, a settlement was obtained for the client of approximately \$ 1 million, and defendants received a very large (undisclosed) contingent fee. Plaintiffs then sought additional compensation on the theory that they were joint venturers with a right to share equally in the fees received. The trial judge rejected this theory and awarded them merely additional fees as the reasonable value of unanticipated services, \$ 40,000 in all. *Held*, affirmed. When attorneys jointly undertake to represent a client without an agreement on the division of fees, they are regarded as joint venturers entitled to share equally in the fees earned by their joint efforts. However, here the express agreement and the conduct of the parties prior to the final termination of their relationship showed that plaintiffs were employed, and were to be paid a fee for services. (172 C.A.2d 464.)

In *Dunne & Gaston v. Keltner* (1975) 50 C.A.3d 560, 123 C.R. 430, a law firm sought declaratory relief concerning its agreement to pay a withdrawing partner a certain share of "the attorneys' fees recovered" in a case. After the agreement was executed, the firm referred the case to other counsel, who settled it and retained 60% of the fee. The firm contended that the sharing agreement applied only to the part of the fee it actually received. *Held*, judgment for the ex-partner affirmed. He had neither intended nor consented to the referral and so was entitled to his agreed share of the full fee. (50 C.A.3d 563.)

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6. Division of Fees Between Attorneys.

b. Ethical Considerations.

1 Witkin Cal. Proc. Attys § 161

[§ 161] Ethical Considerations.

California Rules of Professional Conduct prohibit a fee division unless (1) the client consents in writing after full written disclosure that there will be a division and the terms of the division; and (2) the total fee charged is not increased and is not unconscionable. (*Rules of Professional Conduct, Rule 2-200(A)*; *infra*, §424 et seq.; see *Scolinos v. Kolts* (1995) 37 C.A.4th 635, 640, 44 C.R.2d 31 [referral agreement without disclosure and written consent, as required by former rule, was void as against public policy]; *Campagna v. Sanger* (1996) 42 C.A.4th 533, 542, 49 C.R.2d 676 [same].) The rules also provide that, except as otherwise permitted, an attorney may not compensate, give, or promise anything of value to another attorney for the purpose of recommending or securing employment, or as a reward for having made a recommendation resulting in employment of the attorney or his firm. However, giving a gift or gratuity to an attorney who has made a recommendation resulting in employment does not of itself violate the rule, if the gift or gratuity was not given in exchange for the recommendation or for future referrals. (*Rules of Professional Conduct, Rule 2-200(B)*.) (See A.B.A. Model Rules of Professional Conduct, Rule 1.5(e) [requirements for division of fee between attorneys not in same firm]; 3 Am.Jur. Legal Forms 2d (2003 ed.), §30:119 [disclosures to client of division of fees].)

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6. Division of Fees Between Attorneys.

c. Referral Fee Is Valid.

1 Witkin Cal. Proc. Attys § 162

[§ 162] Referral Fee Is Valid.

(1) *A.B.A. Rules.* Payment of a forwarding fee by one attorney to another merely for referral of a case was condemned by the A.B.A. Canons and by the former A.B.A. Code, which required that a division of fees be made in proportion to the services performed and the responsibility assumed by each attorney. This requirement of a proportionate division of fees has been continued in the current A.B.A. rule. (See A.B.A. Model Rules of Professional Conduct, Rule 1.5(e); 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §284; 6 *A.L.R.3d* 1446 [splitting fees with other attorney or layman as ground for disciplinary proceeding]; 28 *A.L.R.4th* 665 [validity and enforceability of referral fee agreement between attorneys].)

(2) *California Rules.* Although earlier Rules of Professional Conduct prohibited a forwarding fee that was not in proportion to the services performed or the responsibility assumed, *Rules of Professional Conduct, Rule 2-200(A)* (supra, §161; infra, §424 et seq.), does not require a proportionate division. (See C.E.B., 1 Civil Proc. Before Trial 4th, §3.35; C.E.B., 1 Debt Collection Practice 2d, §1.22; C.E.B., Civil Litigation Forms Manual §1.12 [disclosure and consent to fee splitting]; Rutter Group, 1 Professional Responsibility, §5.480 et seq.)

(3) *Decisions.* The practice of paying a pure referral fee received early judicial sanction in California. (See *Turner v. Donovan* (1935) 3 *C.A.2d* 485, 39 *P.2d* 858 [Texas forwarding attorney was entitled to fee under established custom among attorneys in both states].) Also, under the former California Rule prohibiting a "pure forwarding fee," a division of fees was proper where it was in proportion to services performed or responsibility assumed. This exception was applied in *Breckler v. Thaler* (1978) 87 *C.A.3d* 189, 151 *C.R.* 50, where the three tests of the rule were met: (a) The client consented to the arrangement after full disclosure; (b) the division was made in accordance with substantial services performed; (c) the total fee was not increased by the arrangement. (87 *C.A.3d* 195.)

In *Altschul v. Sayble* (1978) 83 *C.A.3d* 153, 147 *C.R.* 716, a contract between plaintiff attorney and defendant attorney for a 10% referral fee was held illegal. The court reasoned that the original endorsement of the A.B.A. Canons in the State Bar Rules, and the later formal statement of the A.B.A. Code provision, constituted a recognition of an existing public policy making referral contracts illegal. (83 *C.A.3d* 161.)

Moran v. Harris (1982) 131 *C.A.3d* 913, 182 *C.R.* 519, rejected the reasoning and holding in *Altschul*. Plaintiff

attorney referred a malpractice client to attorney V under an agreement to divide the fee equally. V filed the complaint, but was unable to continue with the work and transferred the case to defendant attorney, who agreed to be bound by the contract. After the case was settled, defendant refused to honor the agreement, and the trial judge, bound by *Altschul*, denied enforcement, awarding only the reasonable value of services actually rendered by plaintiff. *Held*, judgment reversed; the agreement was valid.

(a) *Not contrary to public policy.* A 1979 amendment to the Rules of Professional Conduct eliminated the prohibition of referral fee contracts, and no public policy to the contrary exists. (131 C.A.3d 920.)

(b) *Ethical objections to forwarding fees.* "The pure referral fee, which compensates one lawyer with a percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement while the lawyer to whom the case is referred performs the work, is far from necessary to the injured person's recovery. To the extent that the referral fee is paid for that purpose, loss has not been socialized. Rather, the obtaining of business by a lawyer who, by his own motion, has conceded his inability to handle it has been subsidized." (131 C.A.3d 921.)

(c) *Justification for forwarding fees.* "If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields." (131 C.A.3d 922.) Although the holding is not an encouragement of referral fee agreements, "there is considerable distance between prohibition and encouragement," and that distance may be the breathing space necessary "to accommodate both the public nature of the legal profession and commercial milieu within which it must survive." (131 C.A.3d 922.)

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B. Reimbursement for Expenses.

1. Agreement With Client.

1 Witkin Cal. Proc. Attys § 163

[§ 163] Agreement With Client.

The contract of employment may provide for reimbursement of the attorney for specific contemplated expenses. If it does, the extent of the attorney's right is simply a matter of interpretation of the agreement. (See *Darnell v. Woodruff* (1936) 14 C.A.2d 628, 634, 58 P.2d 975 [agreement held to cover traveling expenses]; *Eaton v. Thieme* (1936) 15 C.A.2d 458, 463, 59 P.2d 638 [contingent fee agreement calling for reimbursement for "court costs and for other necessary expenses"; did not include fees of other attorneys employed to assist]; 66 A.L.R.4th 256 [personal liability of attorney for expenses incurred]; 3 Am.Jur. Legal Forms 2d (2003 ed.), §30:108.)

A special statute, however, provides that, as between attorney and client, the attorney is personally liable for expenses and fees awarded to an adverse party who prevails on a motion for a change of venue, on the ground of improper venue. (C.C.P. 396b(b); see 3 Cal. Proc. (5th), Actions, §937.)

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2. In Absence of Agreement.

1 Witkin Cal. Proc. Attys § 164

[§ 164] In Absence of Agreement.

In the absence of a provision in the agreement (see *supra*, §163), the following general rules are recognized:

(1) *Costs of Suit*. The attorney is entitled to be repaid for the costs of suit, e.g., filing fees, witness fees, and jury fees. (*Cooley v. Miller & Lux* (1909) 156 C. 510, 525, 105 P. 981; *Tasker v. Cochrane* (1928) 94 C.A. 361, 366, 271 P. 503; see Rutter Group, 1 Professional Responsibility, §5:570.)

(2) *Personal and Travel Expenses*. The attorney is not entitled to reimbursement for personal and travel expenses. "The ordinary rule is that the overhead expense of counsel in maintaining their offices, the cost of their traveling expenses, their board bill and outlays of that kind are, save and except as to the board bill, matters to be taken into consideration in determining the value of an attorney's services and in fixing his fees therefor. But counsel are not entitled to have all of those matters taken into consideration in the fixing of fees, and then maintain an action to recover for their personal expenses, unless there has been an agreement to that effect." (*Tasker v. Cochrane, supra*, 94 C.A. 368; cf. *Darnell v. Woodruff* (1936) 14 C.A.2d 628, 634, 58 P.2d 975 [terms of agreement referring to "as in the past" included client's past practice of covering travel and other expenses].)

(3) *Hiring Others*. The attorney has no implied authority by virtue of the employment to hire, on behalf of the client, attorneys as assistants or associates, or investigators. If the attorney does so without express authority or ratification, no claim can be made for reimbursement for the expense of their services. (*Porter v. Elizalde* (1899) 125 C. 204, 57 P. 899 [defendant's attorney, without express authority, employed assistant to help him try case; defendant's knowledge and failure to object did not make her liable for assistant's fee]; *Davis v. Mackay* (1920) 50 C.A. 251, 255, 194 P. 738 [detective]; *Cormac v. Murphy* (1922) 58 C.A. 366, 208 P. 360 [Irish attorney requested plaintiff attorney to make inquiries about defendant client's interest in estate in probate in California]; *Eaton v. Thieme* (1936) 15 C.A.2d 458, 463, 59 P.2d 638 [contingent fee contract provision that client "advance money for court costs and for other necessary expenses" did not entitle attorney to charge client with fees of other counsel hired to assist]; *Johnson v. California Interurban Motor Trans. Assn.* (1938) 24 C.A.2d 322, 335, 340, 74 P.2d 1073 [associate counsel]; cf. *Miller v. Ballerino* (1902) 135 C. 566, 68 P. 600 [assistant counsel; court recognized rules, but upheld questionable finding that client authorized employment and thereby impliedly agreed to pay for services].)

The foregoing cases emphasize the necessity of caution in engaging assistants or associates. The power to employ associate attorney and the authority of the employees or associates to represent the client are undisputed (*supra*, §§44, 45); but the fact that they become attorneys for the client in this indirect manner does not impose liability on the client for compensation.

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B. Reimbursement for Expenses.

3. Attorney's Agreement To Bear Expenses.

1 Witkin Cal. Proc. Attys § 165

[§ 165] Attorney's Agreement To Bear Expenses.

(1) *In General.* The former A.B.A. Code, while approving the advancement of litigation expenses subject to reimbursement (see *supra*, §§163, 164), stated that it was improper for an attorney to agree ultimately to bear the expenses. Nevertheless, a provision to this effect is sometimes included in contingent fee contracts. Moreover, attorneys who advance litigation expenses under a contingent fee contract frequently do not seek repayment if there is no recovery, even though the contract provides for reimbursement. (See *55 Cal. L. Rev. 1441.*) The current A.B.A. rule eliminates the requirement that the client remain ultimately liable for expenses. (A.B.A. Model Rules of Professional Conduct, Rule 1.8(e).) (See *Rest.3d, The Law Governing Lawyers* §36 [forbidden attorney-client financial arrangements]; *8 A.L.R.3d 1155* [validity and propriety of arrangement by which attorney pays or advances expenses of client]; *66 A.L.R.4th 256* [attorney's personal liability for expenses incurred in relation to services for client].)

(2) *California Rule.* The Rules of Professional Conduct prohibit an attorney from directly or indirectly paying or agreeing to pay a current or prospective client's personal or business expenses. (*Rules of Professional Conduct, Rule 4-210(A).*) However, an attorney may lend money to a client on the client's written promise to repay the loan (*Rules of Professional Conduct, Rule 4-200(A)(2)*) and may advance litigation costs with repayment contingent on the outcome of the matter (*Rules of Professional Conduct, Rule 4-200(A)(3)*). (See Rutter Group, 1 Professional Responsibility, §5:580 et seq.)

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C. Attorney's Lien.

1. Common Law Liens.

1 Witkin Cal. Proc. Attys § 166

[§ 166] Common Law Liens.

(1) *Nature of Liens.* Two types of attorneys' liens to secure expenses and fees are recognized in most jurisdictions: (a) A general retaining (possessory) lien on papers and personal property of the client coming into the attorney's possession. (b) A specific charging (nonpossessory) lien or equitable right to satisfy the attorney's expenses and fees out of the judgment recovered. (*Tracy v. Ringole* (1927) 87 C.A. 549, 550, 262 P. 73 [contract for lien on judgment in amount of contingent fee was valid]; see C.E.B., 1 Civil Proc. Before Trial 4th, §3.25; Rutter Group, 1 Professional Responsibility, §5:763; 23 A.L.R.4th 336 [charging lien as including services or disbursements in other action]; 45 A.L.R.4th 198 [retaining lien as affected by action to collect fees]; 69 A.L.R.4th 974 [attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct]; 70 A.L.R.4th 826 [property subject to retaining lien]; 27 A.L.R.5th 764 [priority between attorney's charging lien against judgment and opposing party's right of setoff against same judgment]; 7 Am.Jur.2d (2007 ed.), Attorneys at Law §310 et seq.)

(2) *Possessory Lien.* Despite dicta that no common law attorneys' lien exists in California (see *Ex parte Kyle* (1850) 1 C. 331; *Wagner v. Sariotti* (1943) 56 C.A.2d 693, 697, 133 P.2d 430), the question remains open. (See *Isrin v. Superior Court* (1965) 63 C.2d 153, 157, 45 C.R. 320, 403 P.2d 728, 3 Cal. Proc. (5th), Actions, §429; *Spencer v. Spencer* (1967) 252 C.A.2d 683, 692, 60 C.R. 747; *Hulland v. State Bar* (1972) 8 C.3d 440, 447, 105 C.R. 152, 503 P.2d 608, citing the text; *Academy of Calif. Optometrists v. Superior Court* (1975) 51 C.A.3d 999, 1003, 124 C.R. 668, *infra*, §175, quoting the text; 28 Cal. L. Rev. 594; 29 Cal. L. Rev. 628.)

The retaining lien, if recognized, does not attach to papers or other property coming into the attorney's hands as trustee or for some special purpose. (*Spencer v. Spencer*, *supra*, 252 C.A.2d 693 [parties deposited disputed funds in bank in joint names of their attorneys pending resolution of dispute]; *Severdia v. Alaimo* (1974) 41 C.A.3d 881, 890, 116 C.R. 405 [following *Spencer*].)

(3) *Charging Lien.* Under the influence of *Ex parte Kyle*, *supra*, California courts have not given judicial approval to a common law charging lien. (See *Wagner v. Sariotti*, *supra*, 56 C.A.2d 697; *Gelfand, Greer, Popko & Miller v. Shivener* (1973) 30 C.A.3d 364, 370, 375, 105 C.R. 445, *infra*, §169 [contingent fee contract alone does not create lien, but factual issue was presented]; Rutter Group, 1 Professional Responsibility, §5:765; 28 Cal. L. Rev. 594.) However, there is no public policy objection, for it does have statutory recognition in a few special situations, and it can be freely

created by express contract (infra, §168 et seq.). (See *Isrin v. Superior Court*, *supra*, 63 C.2d 158 ["it is problematical whether much vitality remains in the Kyle rule"]; *Cetenko v. United Calif. Bank* (1982) 30 C.3d 528, 531, 179 C.R. 902, 638 P.2d 1299 [lien on proceeds of judgment may be created by express contract or may be implied if retainer agreement indicates that lawyer is to look to judgment for payment of fee].)

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C. Attorney's Lien.

2. Statutory Liens.

1 Witkin Cal. Proc. Attys § 167

[§ 167] Statutory Liens.

An attorney has a lien by statute in the following instances:

(1) *Workers' Compensation*. In a workers' compensation proceeding, an attorney who represents the employee before the Workers' Compensation Appeals Board or before the appellate courts is entitled to a lien on the award to secure reasonable attorneys' fees and reasonable disbursements. (*Lab.C. 4903(a)*; see 2 *Summary* (10th), *Workers' Compensation*, §§358, 406.)

(2) *Condemnation*. On abandonment of a condemnation proceeding under *C.C.P. 1268.510*, *C.C.P. 1235.140(b)*, and *1268.610* (giving landowner attorneys' fees) create an equitable interest in the attorney that is the substantial equivalent of a lien. (*Los Angeles v. Knapp* (1936) 7 *C.2d* 168, 174, 60 *P.2d* 127 [construing former statute]; see 29 *Cal. L. Rev.* 631; 8 *Summary* (10th), *Constitutional Law*, §§1171, 1265.)

(3) *Marital Proceeding*. In actions for dissolution of marriage, judgment of nullity of marriage, and legal separation the attorney has a statutory right superior to a lien and may receive a direct award. (See *Family C. 272*, 11 *Summary* (10th), *Husband and Wife*, §9.)

(4) *Probate*. In probate proceedings, the attorney has a statutory right superior to a lien and may receive a direct award. (See *Prob.C. 10830*, 14 *Summary* (10th), *Wills and Probate*, §540.)

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C. Attorney's Lien.

3. Contractual Liens.

a. Express Contract.

1 Witkin Cal. Proc. Attys § 168

[§ 168] Express Contract.

(1) *In General.* An attorney's specific charging lien on the judgment may be given by express contract. (See *Haupt v. Charlie's Kosher Market* (1941) 17 C.2d 843, 844, 112 P.2d 627 [contingent fee contract; attorney to receive one-third of recovery and have "lien on the said cause of action, judgment, settlement, amount due or to be paid or become due" for fees and costs]; *Cetenko v. United Calif. Bank* (1982) 30 C.3d 528, 531, 179 C.R. 902, 638 P.2d 1299 [provision that most of fee would be deferred and fees owed by client would become lien on recovery]; *Tracy v. Ringole* (1927) 87 C.A. 549, 551, 262 P. 73 [lien provision "constitutes a valid equitable assignment of the judgment *pro tanto* and creates a lien upon the specific fund notwithstanding that the action in which the judgment was obtained was on a cause of action for a tort in itself unassignable"]; *Wagner v. Sariotti* (1943) 56 C.A.2d 693, 697, 133 P.2d 430, *infra*, §169; *Gostin v. State Farm Ins. Co.* (1964) 224 C.A.2d 319, 323, 36 C.R. 596, *infra*, §174; *Hansen v. Jacobsen* (1986) 186 C.A.3d 350, 355, 230 C.R. 580, *infra*, §173, citing the text; *Hoover-Reynolds v. Superior Court* (1996) 50 C.A.4th 1273, 58 C.R.2d 173, *infra*, §171 [attorney's contractual charging lien does not attach to child support award]; *Rest.3d, The Law Governing Lawyers* §43 [lawyer liens]; on charging lien as adverse interest within meaning of *Rules of Professional Conduct*, Rule 3-300, see *Fletcher v. Davis* (2004) 33 C.4th 61, 69, 14 C.R.3d 58, 90 P.3d 1216, *infra*, §514.)

(2) *Time of Creation.* The contract for the lien may be made before the legal services are rendered and the judgment is obtained. (C.C. 2883(a), 2884; *Wagner v. Sariotti*, *supra*, 56 C.A.2d 697.) The lien has priority over a subsequent attachment. (*Haupt v. Charlie's Kosher Market*, *supra*, 17 C.2d 846; see 29 Cal. L. Rev. 628.)

In *Saltarelli & Steponovich v. Douglas* (1995) 40 C.A.4th 1, 46 C.R.2d 683, the retainer agreement between plaintiff, a law firm, and defendant, a former client, provided that the firm would have a lien against defendant's recovery if the firm withdrew from the case. Plaintiff later withdrew from the case, claiming nonpayment of fees, and sued defendant for the fees. Defendant filed a petition for bankruptcy, listed plaintiff as an unsecured creditor, obtained a discharge of the debt, and moved to dismiss plaintiff's action. The motion was granted. *Held*, reversed.

(a) Defendant's *personal liability* to plaintiff was discharged in bankruptcy. However, the *lien* was neither avoided nor disallowed by the bankruptcy court and hence, if it existed before the bankruptcy, survived the discharge. (40

C.A.4th 5, 6.)

(b) The retainer agreement, if otherwise valid, created a lien, and that lien arose on execution of the agreement. *(40 C.A.4th 6.)* An independent action is necessary to establish the amount and to enforce the lien. However, neither notice of the lien nor a judgment on it is a condition precedent to its existence or viability. *(40 C.A.4th 6, 7.)* Thus, the trial court erred in finding that the lien was unperfected. *(40 C.A.4th 7.)*

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b. Creation by Implication.

1 *Witkin Cal. Proc. Attys* § 169

[§ 169] Creation by Implication.

(1) *Lien May Be Implied From Contract*. Express language is not essential to the creation of a lien; one may be implied if the retainer agreement indicates that the lawyer is to look to the judgment for payment of the fee. (*Cetenko v. United Calif. Bank* (1982) 30 C.3d 528, 531, 179 C.R. 902, 638 P.2d 1299; *Bartlett v. Pacific Nat. Bank* (1952) 110 C.A.2d 683, 689, 244 P.2d 91.)

In *Wagner v. Sariotti* (1943) 56 C.A.2d 693, 133 P.2d 430, a simple letter of employment on a one-third contingent fee was followed by an assignment to the attorney of a one-third interest in any recovery. *Held*, this was a valid lien or "equitable assignment for security," though the term "lien" was not mentioned in either writing. "The real question in each case is, whether or not the parties have contracted that the lawyer is to look to the judgment he may secure as security for his fee. If so, an equitable lien is created." (56 C.A.2d 697.)

(2) *Circumstantial Evidence of Intent*. In *Gelfand, Greer, Popko & Miller v. Shivener* (1973) 30 C.A.3d 364, 105 C.R. 445, S, an Oklahoma resident, retained a California attorney to represent him in a proceeding to apportion a \$ 100,000 settlement for the wrongful death of his son, which had been obtained by other counsel representing S's ex-wife and his son's widow. The retainer contract provided for "50% of all sums awarded," but made no mention of a lien, security, or assignment. S was awarded 20% of the fund. His ex-wife, with notice of the fee contract, obtained a judgment against S for arrearages in spousal support, and sought to garnish S's share of the fund. S's attorney gave notice of the contract, and obtained summary judgment for one-half of S's award. *Held*, reversed for factual finding on whether the parties intended to create a lien. "It cannot be said as a matter of law a lien was not created by contract. There may be one or more circumstances which, taken together with the written agreement, would support a finding a lien was created." One circumstance might be that S was in Oklahoma, and the fund and his attorney were in California. Payment of the entire fund to S in Oklahoma might make it difficult for the attorney to collect his fee. It was immaterial that the attorney had not participated in obtaining the settlement. (30 C.A.3d 375.)

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c. Lien Survives Attorney's Discharge or Withdrawal.

1 Witkin Cal. Proc. Attys § 170

[§ 170] Lien Survives Attorney's Discharge or Withdrawal.

The creation of a contractual lien will not prevent the client from discharging the attorney. The attorney does not acquire ownership of any part of the cause of action independent of the services as attorney, and the attorney's interest is "in the proceeds" of the agency and is not a power coupled with an interest. (*Cassetta v. Del Frate* (1931) 116 C.A. 255, 2 P.2d 533; *Wagner v. Sariotti* (1943) 56 C.A.2d 693, 697, 133 P.2d 430; see 3 *Summary* (10th), *Agency and Employment*, §220; supra, §76.) However, the lien survives the discharge and the attorney is entitled to enforce the lien to the extent of the reasonable value of services performed up to the date of discharge. (*Weiss v. Marcus* (1975) 51 C.A.3d 590, 598, 124 C.R. 297; *Hansen v. Jacobsen* (1986) 186 C.A.3d 350, 355, 356, 230 C.R. 580, infra, §173.)

The contractual lien also survives the proper voluntary withdrawal of the attorney where the client's conduct makes it unreasonably difficult for the attorney to perform (*Pearlmutter v. Alexander* (1979) 97 C.A.3d Supp. 16, 20, 158 C.R. 762 [client's refusal to consummate agreed-upon settlement]), but not where the withdrawal is without cause (*Hensel v. Cohen* (1984) 155 C.A.3d 563, 568, 202 C.R. 85, infra, §§212, 213 [withdrawal based on attorney's belief that case could not be won]).

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d. Enforcement.

1. In General.

1 Witkin Cal. Proc. Attys § 171

[§ 171] In General.

(1) *Independent Action*. Because the lien does not create a power coupled with an interest, it can only be enforced by an independent action against the client after recovery in the main action. (*Bandy v. Mt. Diablo Unified School Dist.* (1976) 56 C.A.3d 230, 234, 126 C.R. 890, *supra*, §76.)

A previously discharged attorney may file a notice of lien in a pending action, but an independent action is necessary to enforce the lien. (*Hansen v. Jacobsen* (1986) 186 C.A.3d 350, 356, 358, 230 C.R. 580, *infra*, §173; *Valenta v. Regents of Univ. of Calif.* (1991) 231 C.A.3d 1465, 1470, 282 C.R. 812; see *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 C.A.4th 1011, 1020, 43 C.R.2d 717, 2 Cal. Proc. (5th), *Jurisdiction*, §337 [following *Valenta*]; *Carroll v. Interstate Brands Corp.* (2002) 99 C.A.4th 1168, 1174, 121 C.R.2d 532 [trial court had neither jurisdiction to determine validity of attorney's lien nor power to expunge notice of lien as requested by plaintiffs].)

In *Brown v. Superior Court* (2004) 116 C.A.4th 320, 9 C.R.3d 912, attorney B appeared in the client's underlying action for the limited purpose of asserting his contractual lien against the client's judgment and contesting a creditor's judgment lien. B claimed that his lien was senior, arising from a fee agreement 2 years before the judgment lien, and sought an order to that effect. The trial court granted the creditor's application to satisfy its lien from the judgment proceeds, concluding that B was not a party to the client's action and had no right to intervene. *Held*, the validity and amount of an attorney's contractual lien must be established in a separate action.

(a) Under *Carroll, supra*, although B was entitled to assert his lien claim against the proceeds of the judgment by filing a notice of lien in the action, the trial court had no power to determine *in that action* whether B's lien claim was valid. (116 C.A.4th 329.)

(b) B must bring a separate action to establish and enforce his lien. This does not require that B sue his former client for breach of contract or obtain a money judgment and then a judgment lien. A declaratory relief action would be proper, in which B and the creditor could litigate the validity, amount, and priority of B's lien. If B's fee agreement is valid, it will have priority and B may enforce it in the declaratory relief action. (116 C.A.4th 333.) (See *Cal-Western*

Reconveyance Corp. v. Reed (2007) 152 C.A.4th 1308, 1321, 62 C.R.3d 244 [trial court erred in distributing surplus proceeds from trustee's sale of residential property to debtor's former attorney who was retained to assist debtor in collection of proceeds from sale under agreement that attorney had lien on proceeds and surplus funds; attorney's lien on prospective recovery must be enforced in separate action; following *Brown*.])

(2) *Distinction: Action Involving Compromise of Minor's Claim.* *Curtis v. Estate of Fagan* (2000) 82 C.A.4th 270, 98 C.R.2d 84, involved a former attorney's fee claim filed in a pending action involving the compromise of a minor's claim under *Prob.C. 3600* et seq. (14 *Summary* (10th), *Wills and Probate*, §1070 et seq.). (82 C.A.4th 278.) Pursuant to *Prob.C. 3601(a)*, the trial court determined the amount and granted the request for quantum meruit attorneys' fees. *Held*, the trial court had jurisdiction to determine and order the reasonable amount of fees to be paid. *Valenta* and *Law Offices of Stanley J. Bell*, both holding that an attorney is required to file an independent action against the client to determine the existence and amount of a lien and to enforce it, are distinguishable. "When deciding the extent of the trial court's jurisdiction to consider an attorney claim for fees in an action, we must consider the type of action involved." (82 C.A.4th 279.) If the action concerns the compromise of a minor's claim, the language in the statute clearly empowers the court to make an order regarding all costs and fees. The attorneys are not required to file an independent action against the minor's guardian in order to obtain that determination. (82 C.A.4th 279.) (See *Padilla v. McClellan* (2001) 93 C.A.4th 1100, 1105, 113 C.R.2d 680 [following settlement of minor's personal injury action, trial court had jurisdiction under *Prob.C. 3601* to hold evidentiary hearing and determine allocation of attorneys' fees between original and subsequent attorneys where original attorney had filed lien; no independent action was required; following *Curtis*.])

(3) *No Enforcement Against Child Support Award.* In *Hoover-Reynolds v. Superior Court* (1996) 50 C.A.4th 1273, 58 C.R.2d 173, petitioner in an action for dissolution of marriage signed a retainer agreement granting her attorneys a charging lien on any money awarded in the action, and the attorneys sought to enforce the lien out of funds collected for past due child support. *Held*, an attorney's lien does not attach to court-ordered child support awards.

(a) The majority of states that have considered the issue have ruled that a charging lien may not be enforced against child support awards, and the public policy of preserving child support awards from diminution supports the rule. (50 C.A.4th 1277, 1278.)

(b) The fact that the funds involved are for past due support does not change the result. The custodial spouse may have been forced to borrow or to deplete savings, and the arrearages, when finally collected, may be as critical to the child's welfare as are current payments. "[P]ublic policy precludes an attorney's charging lien from being enforced against court-ordered child support payments." (50 C.A.4th 1280.) (See 49 A.L.R.5th 595 [alimony or child support award as subject to attorneys' liens].)

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- 2. Priority.

1 Witkin Cal. Proc. Attys § 172

[§ 172] Priority.

Under C.C. 2897, different liens on the same property generally have priority according to the time of creation. Thus, an attorney's contractual lien on a judgment for payment of hourly fees prevails over a subsequent judgment creditor's lien perfected under *C.C.P. 708.410* et seq. (*Haupt v. Charlie's Kosher Market* (1941) 17 C.2d 843, 845, 121 P.2d 627; *Cetenko v. United Calif. Bank* (1982) 30 C.3d 528, 534, 179 C.R. 902, 638 P.2d 1299 [former C.C.P. 688.1; applying rule stated in *Haupt*]; see 34 A.L.R.4th 665 [priority between attorney's lien for fees against judgment and lien of creditor against same judgment]; 27 A.L.R.5th 764 [priority between attorney's charging lien against judgment and opposing party's right of setoff against same judgment].)

The following cases are illustrative:

Cappa v. F & K Rock & Sand (1988) 203 C.A.3d 172, 175, 249 C.R. 718 [following *Cetenko*, and refusing to create exception for judgments based on child support arrearages].

Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 C.A.3d 1149, 1158, 1159, 254 C.R. 198 [attorney's contractual lien for fees unrelated to underlying action prevails over subsequent attachment lien under *C.C.P. 491.410*; following *Cetenko*].

Wujcik v. Wujcik (1994) 21 C.A.4th 1790, 1794, 27 C.R.2d 102 [under C.C. 2897, attorney's contractual lien on plaintiff's judgment in personal injury action took precedence over judgment lien of plaintiff's former spouse for child support, because contractual lien predated divorce judgment; following *Cappa*].

Brienza v. Tepper (1995) 35 C.A.4th 1839, 1850, 42 C.R.2d 690 [attorney's contractual lien was entitled to priority over subsequently assigned right of offset from third-party judgment creditor].

In *Epstein v. Abrams* (1997) 57 C.A.4th 1159, 67 C.R.2d 555, an attorney representing three defendants obtained summary judgment awarding attorneys' fees in one client's favor. The attorney later withdrew and filed a notice of lien

against the attorneys' fees judgment. His former clients then entered a global settlement, approved by the trial court, under which the first client executed a satisfaction of the judgment for attorneys' fees. *Held*, reversed. The trial court did not have authority, under either the judgment lien statutes (C.C.P. 708.410 et seq.) or the attachment lien statutes (C.C.P. 491.410 et seq.), to approve a settlement discharging the attorneys' fees judgment. (57 C.A.4th 1166, 1167.) More importantly, an attorney's lien is an equitable right, and a court should not approve a settlement intended to defeat an existing attorney's lien. (57 C.A.4th 1169.)

In *Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 C.A.4th 1039, 119 C.R.2d 416, judgment debtor P retained attorney W in an action against an accounting firm and others. The legal fee agreement provided for a lien for fees to be paid out of proceeds recovered by P. Judgment creditor A gave notice, under C.C.P. 708.410 et seq., of a judgment lien against proceeds P might obtain. P and the accounting firm settled, and the proceeds were paid to W to hold in trust. The trial court ordered W to pay A's lien with the trust account funds. *Held*, this was error. Because A did not file notice of its judgment lien before P and W entered into their fee agreement, public policy and equitable considerations favor giving W's contractual lien priority over A's lien. (97 C.A.4th 1039.) Moreover, P was still involved with nonsettling parties in the same litigation that created the settlement fund. The public policy behind *Cetenko* requires that attorneys be assured that they will be repaid for their labor in order to encourage contingent fee representation. Thus, "an attorney's contractual lien over the proceeds of litigation must have priority until the litigation is finally resolved, and *all* related fees have been billed and paid." (97 C.A.4th 1055.)

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See *Waltrip v. Kimberlin* (2008) 164 C.A.4th 517, 532, 79 C.R.3d 460 [attorney's lien had priority on settlement proceeds from commercial tort action where creditor's judgment lien in that action was filed after creation of attorney's lien under fee agreement; creditor's lien did not relate back to earlier judgment lien on client's personal property, which was different property and did not include later commercial tort claim]

(New) *Attorney's lien for fees and costs has priority over medical lien regardless of time of creation:* In *Gilman v. Dalby* (2009) 176 C.A.4th 606, 98 C.R.3d 231, plaintiff's business consisted of "factoring medical accounts" in which he paid the medical bills of an injured person who is pursuing litigation to recover damages. Pursuant to a contract, plaintiff then obtained a medical lien against any recovery. Plaintiff paid an injured person's medical bills and entered into such a contract. The injured person later retained defendant attorneys to recover damages. Because the action settled for an amount that was less than the cost of litigation, defendants waived their fees and were just able to cover their costs. Plaintiff sought recovery from defendants on several theories. Defendants demurred to some claims and sought summary judgment on a conversion claim, asserting that there were liens that were superior to plaintiff's lien that had to be paid. However, defendants presented no evidence of their lien. The trial court nevertheless granted defendants' motion for summary judgment. *Held*, judgment reversed and case remanded; although an attorney's lien has priority over a medical lien regardless of when created, there was no evidence of defendants' lien.

(a) Although similar equities favor the priority of medical liens and attorney liens, a medical lien against a recovery in a personal injury action is not equal in equity to an attorney lien for fees and costs. Because many injured persons have limited financial resources, a medical lien has value only if the injured person recovers in an action against a tortfeasor, and chances of recovery without an attorney are greatly diminished. For both the injured party and medical lien holder, the services of an attorney are often essential. (176 C.A.4th 618.)

(b) Because most personal injury plaintiffs also are unable to afford legal representation, almost all plaintiff retainer agreements are on a contingency fee basis with an attorney lien against the recovery to cover fees and costs. This lien also benefits other creditors, such as medical lienholders, because without the attorney's services, there may not be a judgment from which the other liens could be satisfied. Therefore, attorney liens are essential (1) to allow injured persons to obtain legal representation in pursuit of adequate compensation for injuries, (2) to hold tortfeasors accountable for injuries caused, and (3) "to provide medical lienholders with a source for compensation that they otherwise might not have. Thus, public policy and equity favor giving an attorney lien for fees and costs priority over a medical lien, regardless of which lien was first in time." (176 C.A.4th 619.)



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3. Discharged Attorney's Notice of Lien.

1 Witkin Cal. Proc. Attys § 173

[§ 173] Discharged Attorney's Notice of Lien.

In *Hansen v. Jacobsen* (1986) 186 C.A.3d 350, 230 C.R. 580, plaintiffs engaged claimant attorneys to file a personal injury action, under a written contingency fee contract providing that fees and costs would be a lien on future judgments. After more than 2 years of services, claimants were discharged and plaintiffs substituted another law firm as their counsel. Claimants filed a "Notice of Lien" in the pending action and served copies on plaintiffs, their new attorneys, and defense counsel. The notice stated that claimants held a lien "in a sum yet to be ascertained against any judgment or settlement ... as security for payment of attorneys fees and costs." The trial judge granted a motion to strike the claim on the ground that an independent action for enforcement was required. *Held*, reversed.

(a) A client has power to discharge an attorney without cause, but a valid contractual lien survives the discharge, and establishes priority of the lien as of the time it was created. (186 C.A.3d 355, 356.)

(b) Because the discharged attorney is not a party to the pending action and may not intervene, the trial court has no jurisdiction to award fees to the attorney; hence, it has been held that a subsequent independent action is required to establish the amount of the lien and to enforce it. (186 C.A.3d 356.)

(c) The court in *Cetenko v. United Calif. Bank* (1982) 30 C.3d 528, 534, 179 C.R. 902, 638 P.2d 1299, observed that there is no requirement that the attorney file a notice of lien to protect the attorney's security interest against a creditor who levies on the judgment or an assignee of the judgment. (186 C.A.3d 357.) However, it appears that "attorneys have routinely filed notices of their contractual liens without having the propriety of the practice questioned," and "[w]e find such general acceptance of the practice persuasive, despite the legislative void." (186 C.A.3d 357.)

(d) "In *Cetenko* the Supreme Court held that an attorney's lien is entitled to priority and stated that a notice of lien need not be filed. In keeping with the spirit of that decision, we hold that a previously discharged attorney may file a notice of lien in a pending action." (186 C.A.3d 358.) The lien is for the reasonable value of services rendered to the time of discharge; and if the ultimate recovery is insufficient to pay both the discharged and current attorneys, proportional recovery may be appropriate. (186 C.A.3d 356.) (See *Bree v. Beall* (1981) 114 C.A.3d 650, 659, 171 C.R.

73 [conclusionary statement of claim with no factual information was insufficient for notice]; *Levin v. Gulf Ins. Group* (1999) 69 C.A.4th 1282, 1287, 82 C.R.2d 228 [insurer and attorneys defending insureds are liable for intentional interference with prospective economic advantage of discharged attorney when, after receiving notice of lien for attorneys' fees and costs, they pay attorney's former client and client's new attorney in settlement or satisfaction of judgment]; Rutter Group, 1 Professional Responsibility, Form 5:O [notice of lien]; 3 Am.Jur. Legal Forms 2d (2003 ed.), §30:173 et seq. [notice].)

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- e. Ineffective Language.

1 Witkin Cal. Proc. Attys § 174

[§ 174] Ineffective Language.

A lien is security for an obligation, and therefore an enforceable lien is dependent on the existence of an obligation. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §47.)

In *Gostin v. State Farm Ins. Co.* (1964) 224 C.A.2d 319, 36 C.R. 596, plaintiff attorneys, engaged by C to sue for personal injuries, had C sign a "Retainer Agreement." It recited that, in consideration of legal services to be rendered, "I ... do set over and assign to them a lien of 33 1/3 percent of any and all amounts recovered by compromise." C discharged plaintiffs and settled with the tortfeasor's insurer for \$ 4,370. Plaintiffs sued C and the insurer. C was not served, and the remaining parties agreed that the judge could make findings in accordance with the allegations of the complaint not denied by the answer. The judge did so and gave judgment against the insurer for one-third of the settlement. *Held*, reversed. The agreement did not expressly provide for the payment of fees for services or for a one-third interest in a compromise recovery, but only for the creation of a lien; i.e., no obligation was pleaded or found. Hence, a retrial was ordered, so that proper pleadings and proof might show "that the agreement in question actually although ambiguously set over to the plaintiffs a designated percentage of the amount recovered, or that they are entitled to a fee which was secured by a lien created thereby." (224 C.A.2d 326.)

Even if the attorney neglects to use language of either lien or assignment in the original contract of employment, equivalent protection may be available later. Thus, in *McGown v. Dalzell* (1925) 72 C.A. 197, 201, 236 P. 941, W, an attorney with a 25% contingent fee contract, obtained a judgment for client M against defendant. M then agreed that W could collect the judgment, take out W's share, and account for the balance. Defendant, with knowledge of this arrangement, paid M and took a release. *Held*, defendant was liable to W for the amount of W's interest.

In *Harvey v. Ballagh* (1940) 38 C.A.2d 348, 101 P.2d 147, plaintiff attorneys were orally engaged to sue on notes, for 25% of the recovery. The suit was successful but the clients satisfied the judgments by accepting an oil lease and a \$ 4,000 bonus. In this action the trial judge awarded plaintiffs 25% of the bonus and a 25% interest in all future royalties from the lease. Here, there was no contractual lien or assignment either at the outset or later; but the court, in this action for the fee, gave specific relief in the form of a constructive trust. (38 C.A.2d 353, 354.)

In *Trimble v. Steinfeldt* (1986) 178 C.A.3d 646, 224 C.R. 195, the client entered into a retainer agreement with a specific attorney, who in turn entered into an agreement with an associate attorney. *Held*, an agreement between client and attorney is required to create a lien; hence, the associate had no contractual basis for asserting a lien against the client. (178 C.A.3d 651.)

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f. Invalid Possessory Lien.

1 *Witkin Cal. Proc. Attys* § 175

[§ 175] Invalid Possessory Lien.

In *Academy of Calif. Optometrists v. Superior Court* (1975) 51 C.A.3d 999, 124 C.R. 668, client A engaged attorney D to prosecute a lawsuit. The retainer agreement provided for an hourly fee and for a percentage of the recovery. It further stated that "Counsel shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law." In the event of the client's election to terminate, all accrued fees and costs were to become immediately due, and "Counsel shall have a retaining lien on all files, papers, and documents in its possession to secure payment of all sums owed to it hereunder, and shall not be obligated to release the same to Client or to substitute Counsel unless and until all such fees and costs have been paid."

D rendered substantial services and A paid \$ 27,500 for monthly billings; then, with disputed charges of \$ 9,300 unpaid, A discharged D. D refused to turn over the files to new counsel unless the \$ 9,300 claim was paid. The lower court denied counsel's motion for an order requiring delivery of the files; and, because the 5-year period for bringing the case to trial was about to expire, counsel sought mandamus. *Held*, writ granted; this contractual possessory lien was unenforceable.

(a) The subject matter--pleadings, numerous discovery proceedings, and other papers, covering 5 years of representation--are of no pecuniary value and could not be sold to satisfy the claim for fees. But they are of great value to the client: intangibly because they consist in part of material indispensable to the trial of the case; tangibly because the cost of copying those that can be found in the clerk's files is substantial. (51 C.A.3d 1004, 1005.)

(b) Former Rules of Professional Conduct, Rule 2-111(A)(2) (now *Rules of Professional Conduct*, Rule 3-700(D), *infra*, §450) calls for the return of papers to the client on an attorney's withdrawal; and this rule applies equally to termination by discharge. (51 C.A.3d 1006.)

(c) The attorney, by withholding the client's papers, which are of no direct benefit to the attorney, solely to compel the client to give up the right to litigate the disputed fee, violates his or her ethical duties. And a contract that violates the canons of professional ethics is contrary to public policy and illegal. (51 C.A.3d 1006.)

The court narrowed its precise holding by emphasizing that the papers were of no economic value to the attorney, and expressed no opinion on the situation in which the subject of the lien is something of pecuniary value. (*51 C.A.3d 1004*, footnote 4, 1006.) This distinction provoked a strong disagreement by the concurring justice: "The tenets are violated without regard to the pecuniary value of the withheld material. I see no logical justification for the court's dicta limiting our decision to property without pecuniary worth. These dicta will stimulate confusion and litigation. They obscure the guidance which the opinion should supply the legal profession." (*51 C.A.3d 1007*.)

When discharged by a client, an attorney has an ethical duty under the Rules of Professional Conduct to forward the client's files to the successor attorney. Refusal to do so until the successor attorney has executed an agreement for division of fees is a breach of the rule, and the fee-splitting contract is therefore illegal and unenforceable. (*Kallen v. Delug (1984) 157 C.A.3d 940, 950, 951, 203 C.R. 879*, citing *Academy*.)

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D. Contingent Fees.

1. In General.

1 Witkin Cal. Proc. Attys § 176

[§ 176] In General.

A contingent fee contract "is one providing for a fee the size or payment of which is conditioned on some measure of the client's success." (*Rest.3d, The Law Governing Lawyers* §35, Comment a.) Contingent fee arrangements are common in actions for damages for personal injuries and actions on behalf of persons claiming interests in estates and, subject to several limitations imposed by case law and statute, their validity is well established.

In *Eaton v. Thieme* (1936) 15 C.A.2d 458, 59 P.2d 638, the agreement provided that (a) the attorney would prosecute a claim of plaintiff against an estate, and advance money for court costs and other expenses; (b) compensation was to be one-third the net amount of distribution to plaintiff, plus reimbursement for advances of court costs and taxes (to be deducted from the gross recovery); (c) all other expenses were to be paid by the attorney. (15 C.A.2d 461, 462.) "The contract is one of a very common variety entered into by attorneys or speculators on the one part, and persons claiming some right of action which they are either unable or unwilling to prosecute at their own expense, on the other, and by which the attorney or speculator undertakes to render legal or other services, either personally or through an agent, and to take his compensation in the form of a stated proportion of the amount recovered if a recovery be effected. Frequently in such a contract he agrees to pay or advance the necessary expenses, to be reimbursed only in the event of recovery." (15 C.A.2d 463.) (See *Estate of Kerr* (1966) 63 C.2d 875, 878, 48 C.R. 707, 409 P.2d 931; *Swanson v. Hempstead* (1944) 64 C.A.2d 681, 688, 149 P.2d 404 [50% of property recovered and assignment of claims was not unconscionable]; *Estate of Schnell* (1947) 82 C.A.2d 170, 174, 185 P.2d 854; *Estate of Raphael* (1951) 103 C.A.2d 792, 796, 230 P.2d 436 ["[c]ontingent fees of 50 per cent have been upheld"]; *Hendricks v. Sefton* (1960) 180 C.A.2d 526, 532, 4 C.R. 218 [one-third of recovery]; *Gelfand, Greer, Popko & Miller v. Shivener* (1973) 30 C.A.3d 364, 377, 105 C.R. 445, supra, §169 [50% fee for services in 2-hour hearing upheld]; *Cazares v. Saenz* (1989) 208 C.A.3d 279, 256 C.R. 209, infra, §214 [pro rata recovery where contract cannot be fully performed]; *Ramirez v. Sturdevant* (1994) 21 C.A.4th 904, 913, 914, 26 C.R.2d 554, supra, §98 [rejecting claim that contingency fee calculated on basis of gross recovery, rather than net recovery after costs, was unconscionable].)

The contingent fee agreement creates a sufficient interest to support a tort action by the attorney against one who intentionally induces the client to breach the agreement. (*Herron v. State Farm Mut. Ins. Co.* (1961) 56 C.2d 202, 205, 14 C.R. 294, 363 P.2d 310, 5 Summary (10th), Torts, §756.) It does not, however, make the attorney a real party in interest to the client's action. (*Isrin v. Superior Court* (1965) 63 C.2d 153, 161, 45 C.R. 320, 403 P.2d 728, 3 Cal. Proc.

(5th), *Actions*, §429.)

Commentary and practice advice are extensive. (See 42 *Cal. L. Rev.* 866; 37 *U.C.L.A. L. Rev.* 29 [exhaustive discussion of background, ethics, risk requirement, and form of agreement]; 37 *U.C.L.A. L. Rev.* 949 [validity and propriety of contingent fee controls]; A.B.A. Model Rules of Professional Conduct, Rule 1.5; C.E.B., 1 *Civil Proc. Before Trial* 4th, §3.22 et seq.; C.E.B., *Fee Agreement Forms Manual* 2d, §1.26 [sample agreement]; C.E.B., *Civil Litigation Forms Manual* §1.5 [sample agreement]; Rutter Group, 1 *Professional Responsibility* §5:77 et seq.; 3 *Am.Jur. Legal Forms* 2d (2003 ed.), §30:129 et seq.; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §258 et seq.; 13 *A.L.R.3d* 673 [construction of contingent fee contract as to services after judgment or on appeal]; 9 *A.L.R.4th* 191 [validity and construction of contingent fee contract between defendant and attorney].)

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2. Where Contingent Fee Is Invalid.

1 Witkin Cal. Proc. Attys § 177

[§ 177] Where Contingent Fee Is Invalid.

(1) *Actions for Dissolution of Marriage.* A contingent fee agreement for services in bringing an action for dissolution of marriage is held entirely void. Such an agreement is deemed to promote divorce and is illegal. (*Newman v. Freitas* (1900) 129 C. 283, 289, 61 P. 907; *Ayres v. Lipschutz* (1924) 68 C.A. 134, 139, 228 P. 720; *Theisen v. Keough* (1931) 115 C.A. 353, 356, 1 P.2d 1015; see *Coons v. Kary* (1968) 263 C.A.2d 650, 653, 69 C.R. 712, 1 Summary (10th), *Contracts*, §640 [attorney for wife prosecuting divorce action entered into agreement for fee contingent on value of property obtained; *held*, agreement was invalid because attorney's financial interest might cause him to oppose reconciliation]; A.B.A. Model Rules of Professional Conduct, Rule 1.5(d)(1) [condemning contingent fee arrangements in domestic relations cases]; 7 *Am.Jur. 2d* (2007 ed.), *Attorneys at Law* §260; 1 Summary (10th), *Contracts*, §620.)

Even this rule is limited to contracts with a party *seeking* a dissolution. In *Krieger v. Bulpitt* (1953) 40 C.2d 97, 251 P.2d 673, defendant, sued for divorce, retained plaintiff attorneys to represent him and obtain a favorable property settlement. The agreement called for a fee of 10% of the value of property obtained, but not less than \$ 5,000 or more than \$ 7,500. *Held*, the agreement was enforceable. It was in no sense promotive of divorce and the public policy against contingent fee contracts in divorce actions was therefore not involved. (40 C.2d 101.)

(2) *Criminal Cases.* Contingent fee agreements in criminal cases are condemned by A.B.A. Model Rules of Professional Conduct, Rule 1.5(d)(2). (See *Rest.3d, The Law Governing Lawyers* §35(1)(a); Rutter Group, 1 Professional Responsibility, §5:137 et seq.)

(3) *Contracts Secured by Improper Means.* A contract secured by "ambulance chasing," i.e., through the services of a runner or capper, is void. (*B. & P.C. 6154*; see *infra*, §527.)

(4) *Contracts With Government Attorneys.* In appropriate circumstances, the government may hire a private attorney on a contingent fee basis. However, if the particular action demands absolute neutrality on the part of the government attorney, a contingent fee arrangement is improper. (See *People v. Superior Court (Clancy)* (1985) 39 C.3d 740, 748, 218 C.R. 24, 705 P.2d 347, *supra*, §146 [contingent fee arrangement was invalid for attorney prosecuting public nuisance abatement action].)

(5) *Reasonable Value of Services Is Recoverable.* Except when the contract is entirely void, recovery of the reasonable value of services is possible, despite the invalidity of a contingent fee provision or the attempt to prevent the client from settling the case. (See *infra*, §§196, 198.) For example, a contingent fee provision in a contract to bring an action for child support is unenforceable, because payment of the agreed fee out of the recovery would deprive the child of money necessary for support and also because the compensation should be fixed by the court. (See *Kyne v. Kyne* (1943) 60 C.A.2d 326, 329, 140 P.2d 886.) Moreover, a contract with a minor for litigation services is void unless approved by the court. (*Family C.* 6602; 1 *Summary* (10th), *Contracts*, §35.) Hence, the contingent fee in an unapproved agreement cannot be recovered, but the value of the services may. (*Leonard v. Alexander* (1942) 50 C.A.2d 385, 387, 122 P.2d 984; see 13 A.L.R.3d 1251 [minor's liability for services rendered by attorney].)

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3. Excessive Fee Is Invalid.

1 Witkin Cal. Proc. Attys § 178

[§ 178] Excessive Fee Is Invalid.

The amount of the fee in the contingent contract is too important a matter to be left entirely to free bargaining by the parties. It has already been noted that, in cases where substantial services are to be performed and expenses incurred, fees equal to one-third or one-half the recovery may be approved. (See *supra*, §176.) However, if the services are slight, or, though substantial, the amount of the fee is more than one-half, a court may refuse to enforce the provision. (See *Estate of Raphael* (1951) 103 C.A.2d 792, 796, 230 P.2d 436 ["[a] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable"]; *Setzer v. Robinson* (1962) 57 C.2d 213, 218, 18 C.R. 524, 368 P.2d 124 [amount is judged by situation as it appeared at time contract was made]; *Rader v. Thrasher* (1962) 57 C.2d 244, 253, 18 C.R. 736, 368 P.2d 360 [contingent fee involves gamble and may properly provide for larger compensation than would otherwise be reasonable]; A.B.A. Model Rules of Professional Conduct, Rule 1.5 [amount must be "reasonable" and agreement must be in writing]; 28 Cal. L. Rev. 591; 7 Am.Jur.2d (2007 ed.), Attorneys at Law §240.)

In *Blattman v. Gadd* (1931) 112 C.A. 76, 296 P. 681, a reclamation district, having repaired a levee, was entitled to reimbursement from the state reclamation board. Defendant M, an attorney, contracted to collect the district's claim for a contingent fee of 20% on sums up to \$ 40,000, and 50% on any amount over that. The claim was allowed for \$ 160,000. In this taxpayer's action attacking the \$ 68,000 fee, the court held the agreement void. There was no actual dispute about the validity of the claim or any likelihood that its prosecution would involve anything beyond simple proof of the items; and it was actually allowed in a short hearing a month after the attorney's contract was made. (112 C.A. 93.) The decision was further supported by considerations of public policy (protecting funds of a governmental agency from dissipation), and by evidence that the district had been deceived by representations of the influence that the attorney's associate, a former member of the state board, could bring to bear; "the proceeding in its inception indicated a scheme rather than a contract." (112 C.A. 96.) Nevertheless, the opinion appears to state a general principle applicable equally to contracts with private clients, for it expressly approves an Illinois decision holding invalid a 50% contingent fee contract to collect the proceeds of a life insurance policy, where there was no denial of liability, payment was promptly made on presentation of proof of death, and there was no reason to apprehend the necessity for litigation. (112 C.A. 93.)

In *Denton v. Smith* (1951) 101 C.A.2d 841, 845, 226 P.2d 723, the attorney for an administrator-heir obtained an

agreement from him to pay one-fourth of the value of the estate recovered, without informing him of the statutory fees. No services were performed other than as the attorney for the estate. *Held*, the agreement was unfair, lacking in consideration, and therefore unenforceable.

In *Jackson v. Campbell* (1932) 215 C. 103, 8 P.2d 845, a contingent fee contract to bring a wrongful death action provided for fees from the amount recovered as follows: (a) collection without suit, 20%; (b) suit, client to pay costs and expenses, 35%; (c) settlement after suit, 35%; (d) if judgment appealed, client to pay all costs and attorney to "receive as compensation for his services therein," 35%. (215 C. 104.) The attorney contended that, after judgment for his client and affirmance on appeal, he was entitled to 70%, but waived his right to any amount above 50%. *Held*, this interpretation would call for grossly excessive compensation, probably making the contract unenforceable. The ambiguity was properly resolved against him by the trial judge, who concluded that the contract did not expressly provide for a "further" or "additional" 35% on appeal, and that consequently the same 35% was meant to cover services on trial and appeal. (See *Dalzell v. State Bar* (1936) 6 C.2d 433, 57 P.2d 1300, *infra*, §490.)

Although attempts to regulate contingent fee amounts by statute or rule generally have failed in California, fee limits are imposed in medical malpractice cases (*infra*, §182), written disclosures are required in most cases (*infra*, §180), and the Rules of Professional Conduct contain a general prohibition on collection of an illegal or unconscionable fee (*infra*, §454).

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4. Provision Preventing Settlement Is Invalid.

1 Witkin Cal. Proc. Attys § 179

[§ 179] Provision Preventing Settlement Is Invalid.

A form of interference with the client's ownership of the cause of action and control over the suit is a condition that prohibits the client from settling the case without the attorney's consent. Such a provision is probably void. (See *Calvert v. Stoner* (1948) 33 C.2d 97, 103 199 P.2d 297 [provision that client "would not make a settlement of her claim against the estate or enter into a compromise in the litigation except in the presence" of her attorney and, if she did, would nevertheless pay attorney contract fee].)

In *Hall v. Orloff* (1920) 49 C.A. 745, 194 P. 296, the contract provided that neither party could settle without the consent of the other, and that "in event of any settlement being made" the client would pay the attorney 50% of the settlement, but "not less than \$ 1000." *Held*, the \$ 1,000 provision was a penalty, designed to prevent the client from settling by himself. The opinion quotes from a New York case as follows: "The employment of a lawyer to serve for a contingent fee does not make it the client's duty to continue the lawsuit and thus increase the lawyer's profit. The lawsuit is his own. He may drop it when he will. Even an express agreement to pay damages for dropping it without his lawyer's consent would be against public policy and void." (49 C.A. 749.)

However, the speculative possibility that a contingent fee agreement might inhibit settlement is not enough to condemn it. In *Wiener v. Van Winkle* (1969) 273 C.A.2d 774, 784, 78 C.R. 761, a promissory note provided for attorneys' fees fixed by the court in the event of an action to collect the note (see 7 Cal. Proc. (5th), Judgment, §169). Plaintiff holders made an agreement with their attorney under which the attorney's sole compensation would be the amount awarded by the court under that provision. Defendant guarantors contended that the provision was illegal and therefore that the award of attorneys' fees against them was improper. The argument was rejected. "There is nothing in the attorney-client contract which inherently thwarts settlement. The mere fact that the contract requires the attorney to rely on the discretion of the court to determine the reasonable value of his services ... in no way encourages unnecessary legal proceedings." (273 C.A.2d 785.)

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5. Required Disclosures to Client.

1 Witkin Cal. Proc. Attys § 180

[§ 180] Required Disclosures to Client.

(1) *Statutory Requirements.* When an attorney contracts to represent a client on a contingent fee basis, the contract must be in writing and a copy, signed by the attorney and the client, must be provided to the client at the time the contract is entered into. (*B. & P.C. 6147(a).*) The contract must include the following:

(a) A statement disclosing the contingent fee rate. (*B. & P.C. 6147(a)(1).*)

(b) A statement as to how disbursements and costs will affect the contingent fee and the client's recovery. (*B. & P.C. 6147(a)(2).*)

(c) A statement about the extent to which the plaintiff could be required to pay the attorney compensation for related matters not covered by the contract. (*B. & P.C. 6147(a)(3).*)

(d) With respect to claims not subject to the medical malpractice fee limits of *B. & P.C. 6146* (*infra*, §182), "a statement that the fee is not set by law but is negotiable between attorney and client." (*B. & P.C. 6147(a)(4).*)

(e) If the claim is subject to the medical malpractice fee limits, a statement that the rates set forth in *B. & P.C. 6146* "are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate." (*B. & P.C. 6147(a)(5).*)

B. & P.C. 6147 applies to contingent fee agreements in both litigation and nonlitigation matters. (See *Rutter Group*, 1 Professional Responsibility, §§5:82, 5:695.)

(2) *Effect of Noncompliance.* Failure to comply with *B. & P.C. 6147* renders the agreement voidable at the client's option, and the attorney is then entitled to collect a reasonable fee. (*B. & P.C. 6147(b)*; see *Alderman v. Hamilton* (1988) 205 C.A.3d 1033, 1038, 252 C.R. 845 [client may waive right to deny enforceability of entire contract that fails to comply with *B. & P.C. 6147*, and instead may deny enforceability of single provision]; *Fergus v. Songer* (2007) 150 C.A.4th 552, 573, 59 C.R.3d 273 [in determining reasonable fee, trier of fact may not consider contingent nature of fee arrangement where agreement failed to comply with *B. & P.C. 6147(a)(5)*].)

(3) *Exceptions.* *B. & P.C. 6147* does not apply to contingent fee contracts (a) for the recovery of workers' compensation benefits (*B. & P.C. 6147(c)*) or (b) for the recovery of claims between merchants (*B. & P.C. 6147.5*, *infra*, §181).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Requirements.* See *Stroud v. Tunzi* (2008) 160 C.A.4th 377, 382, 72 C.R.3d 756 [written letters purporting to modify original contingent fee agreement were ineffective for failure to comply with *B. & P.C. 6147*; documents were not signed by attorneys, did not state contingency rate or discuss costs, and did not disclose that fees were negotiable and not established by law].



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6. Contracts Involving Claims Between Merchants.

1 Witkin Cal. Proc. Attys § 181

[§ 181] Contracts Involving Claims Between Merchants.

(1) *Written Agreement and Disclosures Are Not Required.* Neither the disclosure requirements of *B. & P.C. 6147* (supra, §180) nor the writing requirements of *B. & P.C. 6148* (supra, §156) apply to contingent fee contracts between an attorney and a merchant with 10 or more employees for recovery of a claim between merchants (as defined in U.C.C. 2104) involving the sale or lease of goods, services rendered, or money loaned for use in a business or profession. (*B. & P.C. 6147.5(a).*)

(2) *Fee Limits.* If, as allowed by *B. & P.C. 6147.5(a)*, there is no written contract for legal services, the attorney is subject to contingency fee limits as follows: (a) 20% of the first \$ 300 collected; (b) 18% of the next \$ 1,700 collected; (c) 13% of amounts collected in excess of \$ 2,000. However, an attorney may charge the following minimums: \$ 25 in collections of \$ 75 to \$ 125, and 33 1/3% in collections less than \$ 75. (*B. & P.C. 6147.5(b).*)

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7. Fee Limits in Medical Malpractice Cases.

a. Statutory Provisions.

1 Witkin Cal. Proc. Attys § 182

[§ 182] Statutory Provisions.

(1) *In General.* The Medical Injury Compensation Reform Act of 1975 (MICRA) regulates medical malpractice litigation, the practice of medicine, and the insurance industry. (See 6 *Summary* (10th), *Torts*, §940 et seq.) Under the Act, contingent fee contracts for the representation of medical malpractice plaintiffs are limited to specified percentages of the total recovery. (*B. & P.C. 6146*; see 12 *A.L.R.4th* 23 [validity of statute establishing contingent fee scale for attorneys in medical malpractice actions]; 19 *Loyola L.A. L. Rev.* 623 [effectiveness of limits on fees].)

(2) *Limitations on Fees.* An attorney representing a person in an action against a "health care provider" for "professional negligence" may not contract for or collect a contingent fee in excess of specified limits. The limits are 40% of the first \$ 50,000 recovered, 33 1/3% of the next \$ 50,000, 25% of the next \$ 500,000, and 15% of any amount above \$ 600,000. (*B. & P.C. 6146(a)*.) (See *In the Matter of Shalant* (2005) 4 Cal. State Bar Ct. Rptr. 829, 836 [statute does not allow contingent fee in medical malpractice action to provide for nonrefundable flat fee in addition to statutory maximum contingent fee; thus, agreement so providing was illegal at time it was entered into].)

The limits apply "whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind." (*B. & P.C. 6146(a)*.)

(3) *Value of Periodic Payments.* If periodic payments of future damages are ordered under *C.C.P. 667.7* (see 6 *Summary* (10th), *Torts*, §966 et seq.), *B. & P.C. 6146* requires the court to place a total value on these payments based on the plaintiff's projected life expectancy. That amount is then included in computing the total award from which attorneys' fees are calculated. (*B. & P.C. 6146(b)*.)

(4) *Definitions.*

(a) "Recovered" is defined as the net sum recovered after deducting disbursements and costs, but neither the costs of medical care nor the attorney's office overhead costs may be deducted. (*B. & P.C. 6146(c)(1)*.)

(b) "Health care provider" is broadly defined to include specified licensed or certified health care professionals and

facilities and their legal representatives. (*B. & P.C. 6146(c)(2).*)

(c) "Professional negligence" is defined as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (*B. & P.C. 6146(c)(3).*) It has been suggested that actions on the theory of battery for lack of informed consent may not be subject to the limits. (See *Waters v. Bourhis* (1985) 40 C.3d 424, 220 C.R. 666, 709 P.2d 469, *infra*, §185.)

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b. Constitutionality.

1 Witkin Cal. Proc. Attys § 183

[§ 183] Constitutionality.

In *Roa v. Lodi Med. Group* (1985) 37 C.3d 920, 211 C.R. 77, 695 P.2d 164, the Supreme Court rejected several constitutional challenges to B. & P.C. 6146 (supra, §182).

(a) *Due process.*

(1) Civil litigants have the right under the due process guarantee to representation by retained counsel. *B. & P.C. 6146* does not limit a medical malpractice victim's right in this regard; the statute simply limits the compensation an attorney may receive under a contingent fee agreement. (37 C.3d 925, 926.) Statutory limits on attorneys' fees are common, and the validity of these limits is well established. (37 C.3d 926, 927.)

(2) The adequacy of the fee limits is largely an empirical matter, and plaintiffs have made no factual showing to support the claim that the fees authorized by the statute are so low as to make it impossible to retain an attorney. Moreover, the fees authorized by the statute are not unusually low when compared with those under other statutory schemes. (37 C.3d 928.)

(3) Potential conflicts of interest between attorney and client are inherent in all contingent fee agreements, but studies have suggested, and the Legislature could rationally conclude, that the sliding scale approach is the best way to ensure the fairness of attorneys' fees. (37 C.3d 929.)

(4) There is no factual support for the argument that the fee limits will drive the most competent attorneys out of medical malpractice litigation, and no authority "suggests that due process requires a single, uniform attorney fee schedule for all areas of practice." (37 C.3d 930.)

(b) *Equal protection.*

(1) The limits on contingent fees are part of a legislative attempt to alleviate the crisis in the medical malpractice field by reducing insurance costs, and are rationally related to this objective. First, by permitting plaintiffs to retain a larger portion of any settlement, the limits encourage the acceptance of smaller settlements. (37 C.3d 931.) Second, the

limits may deter attorneys from filing frivolous actions or holding out for unrealistically high settlements. (37 C.3d 931.) Finally, other sections of the statute limit a plaintiff's recovery, and the limitations on contingency fees may have been considered an appropriate means of protecting the plaintiff's already diminished compensation from further reduction. (37 C.3d 932.)

(2) The failure to limit the fees of defense attorneys does not impermissibly discriminate against plaintiffs' attorneys. (37 C.3d 932.)

(3) The sliding scale aspect of the limits, rather than discriminating against more seriously injured victims, may protect those plaintiffs by insuring that the attorney does not obtain a windfall. (37 C.3d 933.)

(c) *Separation of powers.* The argument that the appropriateness of attorneys' fees is a matter committed solely to the judiciary is without merit. Statutory limits on attorneys' fees are common, and California authority upholds the Legislature's power in this field. (37 C.3d 933.)

Three justices dissented, arguing that the statute, by impairing victims' ability to obtain competent representation in medical malpractice actions, impermissibly infringes their First Amendment right to petition for redress of grievances (37 C.3d 936, 942); that the statute, by reducing recoveries, exacerbating the conflict of interest between attorneys and their clients, and restricting the filing of meritorious claims, also violates the federal and state *Due Process Clauses* (37 C.3d 942, 948); and that the statute, by selectively imposing restrictions on medical malpractice victims, in particular on the most seriously injured victims, and by restricting only plaintiffs and not defendants, violates equal protection guarantees. (37 C.3d 948, 952.)

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c. Limits May Not Be Waived.

1 Witkin Cal. Proc. Attys § 184

[§ 184] Limits May Not Be Waived.

In *Hathaway v. Baldwin Park Community Hosp.* (1986) 186 C.A.3d 1247, 231 C.R. 334, plaintiffs recovered judgment in the amount of \$ 889,500, and petitioned the trial court to permit them to compensate their trial attorney at the rate of one-third of the recovery instead of the lower amount prescribed by *B. & P.C. 6146* (supra, §182). They contended that the statute does not prohibit a court from awarding *extraordinary fees* (e.g., as allowed in probate), and that the circumstances of this case (several attorneys participating) justified a higher fee. *Held*, the statute does not authorize the trial court to make such an award. (186 C.A.3d 1253.)

In *Fineberg v. Harney & Moore* (1989) 207 C.A.3d 1049, 255 C.R. 299, plaintiff, on defendant attorney's request, agreed to waive the limitation provisions of *B. & P.C. 6146*. Defendant obtained a substantial settlement, and plaintiff then sued to recover the amount of the fee in excess of the statutory limits. *Held*, the statute was intended to further a significant public policy, and its protection cannot be waived. (207 C.A.3d 1050, 1055.) (See *Schultz v. Harney* (1994) 27 C.A.4th 1611, 1619, 33 C.R.2d 276 [client cannot waive fee limitation of *B. & P.C. 6146* and is entitled to recover any fees paid beyond statutory limit].)

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d. Hybrid Proceeding.

1 *Witkin Cal. Proc. Attys* § 185

[§ 185] Hybrid Proceeding.

In *Waters v. Bourhis* (1985) 40 C.3d 424, 220 C.R. 666, 709 P.2d 469, W retained attorney B to represent her in an action against a psychiatrist who had allegedly engaged in sexual activities with her while she was a patient. W and B entered into a contingent fee agreement providing for fees in excess of those permitted by *B. & P.C. 6146* (supra, §182), and B filed a complaint against the psychiatrist seeking recovery on theories of professional negligence and intentional tort. The case was settled for \$ 200,000, and B received a fee pursuant to the agreement in excess of that permitted under *B. & P.C. 6146*. W then sued B contending that B's fee exceeded that allowable under *B. & P.C. 6146*. B's motion for summary judgment, on the ground that the original action was not based on "professional negligence" as defined in *B. & P.C. 6146(c)(3)*, was granted. *Held*, reversed.

(a) B's argument that the recovery in the original action was not based on an action for professional negligence is untenable. The complaint in the original action sought recovery on two theories, and because the action was settled without resolving the various factual allegations, it cannot be said as a matter of law that the recovery was not based on professional negligence. (40 C.3d 433, 434.) B claims that, because the psychiatrist's sexual misconduct was a basis for disciplinary action by the licensing agency, his actions were within a "restriction imposed by the licensing agency" and hence excluded from the definition of "professional negligence" in *B. & P.C. 6146(c)(3)*. This argument misconceives the purpose and scope of that proviso. The proviso does not exclude an action from the statute merely because a health care provider acts contrary to professional standards or engages in unprofessional conduct, but instead the proviso renders the statute "inapplicable when a provider operates in a capacity for which he is not licensed--for example, when a psychologist performs heart surgery." (40 C.3d 436.)

(b) Neither *B. & P.C. 6146* nor other provisions of MICRA (supra, §182) address the question of how to treat a hybrid proceeding in which both MICRA and non-MICRA theories are joined. A plaintiff potentially benefits by proceeding on a non-MICRA theory, because the action is not subject to the limits on recovery contained in MICRA. However, a potential detriment to a plaintiff is that the plaintiff's attorney may charge a greater fee than is permitted under MICRA. When an action that joins both MICRA and non-MICRA theories is settled, the plaintiff generally will have benefited by obtaining a larger settlement than if the plaintiff had proceeded on a MICRA theory alone. Hence, it would be inequitable to permit the plaintiff to insist that the attorneys' fees are limited by MICRA. "For this reason, we

conclude that when a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of section 6146 should not apply." (40 C.3d 437.)

(c) Because there may be a potential conflict of interest between attorney and client in these situations, an attorney who seeks a larger fee than permitted by *B. & P.C. 6146* "must specifically advise the client or potential client of the pros and cons of alternative litigation strategies, including potential attorney fees, and obtain the client's consent to pursue and settle a non-MICRA as well as a MICRA claim." (40 C.3d 438.) Here, there is a conflict whether the advice was given and consent was obtained; hence, summary judgment was improper. (40 C.3d 438, 439.)

One justice dissented, arguing that the psychiatrist's sexual misconduct constituted an intentional tort rather than professional negligence. (40 C.3d 439.)

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e. Calculation of Fee.

1 Witkin Cal. Proc. Attys § 186

[§ 186] Calculation of Fee.

In *Schneider v. Kaiser Foundation Hosp.* (1989) 215 C.A.3d 1311, 264 C.R. 227, plaintiffs sued defendant hospital for damages due to negligence during and following the birth of their child, J. An arbitration panel awarded the total sum of \$ 3.624 million in the form of a \$ 1 million lump sum payment and \$ 2.624 million in periodic payments pursuant to a purchased annuity at \$ 3,650 per month until J's death or the fund is exhausted, whichever occurs first. The issue on appeal arose from the claim of plaintiffs' attorney, F, to a contingent fee based on the arithmetic sum of all payments (\$ 3.624 million). *Held*, the value of an award of periodic payments, for the purpose of calculating a contingent fee, is the present value of the periodic payments, normally best represented by the cost of the annuity.

(a) The issue is one not yet answered by any California decision, but experienced practitioners and courts are virtually unanimous in supporting the present value method for structured settlements (215 C.A.3d 1318); the same approach has been used by courts of other states in determining the value of a periodic payment award (215 C.A.3d 1319).

(b) "[T]he notion of a contingent fee paid forthwith to an attorney based on the sum of future payments to the attorney's client is inherently contradictory. A contingent fee contemplates the lawyer will receive a fee based upon what the client actually receives or the present value of what the client will receive." Here, it would be reasonable for F to receive a fee based on the lump sum cash payment of \$ 1 million and a statutorily authorized percentage of each monthly installment paid to J. In these circumstances, F would be subjecting himself to the potential risk that his fees would terminate on J's death. However, F does not request that his fee be paid in this manner. He wants the economic benefit that accompanies the certainty of payment while avoiding the loss of that benefit that accompanies conditional payment. "It does not require great financial sophistication to appreciate that the value of a 60-year annuity paying \$ 3,650 monthly is far less than the forthwith payment of \$ 2,624,000, the sum total of all the monthly payments. We would be violating the legislative mandate of section 6146 if we were to validate an attorney's fee based on the face value of an award when the client receives a lesser value tied to the cost of obtaining a stream of payments distributed over a substantial period of time." (215 C.A.3d 1319.)

Nguyen v. Los Angeles County Harbor/UCLA Med. Center (1995) 40 C.A.4th 1433, 48 C.R.2d 301, discusses

methods of valuing periodic payments for purposes of computing the maximum attorneys' fees allowable under *B. & P.C. 6146(b)* (supra, §182), which requires the trial court to place a "total value" on periodic payments but does not specify the method of doing so. Under the present value approach, the court determines the projected total sum of future payments and applies a discount rate to reduce that sum to its value in today's dollars. (*40 C.A.4th 1450.*) Under the cost approach, the cost of the annuity that funds the periodic payments is presumed to be the value of those payments. (*40 C.A.4th 1451.*) A trial court may use the cost approach to determine the presumptive value of periodic payments, but the plaintiff's attorney must be given the opportunity to show in a given case that the cost of the annuity does not reflect the reasonable present cash value. (*40 C.A.4th 1453, 1454.*) (See *Holt v. Regents of Univ. of Calif. (1999) 73 C.A.4th 871, 883, 86 C.R.2d 752* [trial court did not abuse discretion by calculating attorneys' fees using jury's specific finding of present value of future damages].)

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f. Method of Payment.

1 Witkin Cal. Proc. Attys § 187

[§ 187] Method of Payment.

Nguyen v. Los Angeles County Harbor/UCLA Med. Center (1995) 40 C.A.4th 1433, 48 C.R.2d 301, discusses the alternatives available for collection of attorneys' fees when a damage award is split between a current cash payment and periodic payments of future damages.

(a) Generally, the preferable approach is to satisfy the attorneys' fees immediately out of the cash payment. (*40 C.A.4th 1444*.) This ensures that the attorney receives what has been earned and avoids the risk of nonpayment in the event of the plaintiff's early death. (*40 C.A.4th 1445*.)

(b) There may be situations where the client's best interests preclude full recovery from the cash payment, e.g., where the plaintiff is deeply in debt and payment of attorneys' fees would eat up almost all of the cash payment. (*40 C.A.4th 1445*.) In those situations, there are approaches that would still allow immediate payment of the full fee. One approach is to reduce the periodic payments by an amount sufficient to cover the balance of attorneys' fees and add that sum to the cash payment under the judgment. This is permissible under *C.C.P. 667.7(a)*, which gives the trial court authority to order future damages to be paid "in whole or in part by periodic payments." (*40 C.A.4th 1446*.)

(c) A similar approach is a "pay-and-recoup" plan, under which the defendant pays the plaintiff an advance against future periodic payments in an amount sufficient to pay attorneys' fees in full, then recovers the advance by reducing future periodic payments to the plaintiff by a percentage determined by the court. (*40 C.A.4th 1447*.)

(d) Even experienced attorneys may encounter pitfalls in collecting fees in these cases. One possibility is to request that the trial court stay entry of judgment until the amount and method of payment of attorneys' fees have been determined. The court can then enter judgment dividing future damages between lump sum and periodic payments as appropriate. (*40 C.A.4th 1448*.)

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g. Medical-Legal Consulting Fee.

1 Witkin Cal. Proc. Attys § 188

[§ 188] Medical-Legal Consulting Fee.

May a plaintiff in a medical malpractice case validly contract with a medical-legal consulting service to assist the plaintiff's attorney where the consideration for these services is a contingent fee calculated as a percentage of the plaintiff's ultimate recovery? In *Ojeda v. Sharp Cabrillo Hosp.* (1992) 8 C.A.4th 1, 10 C.R.2d 230, the trial court, reviewing the compromise of plaintiff minor's claim, concluded that a contingent fee contract with a consulting service was invalid. *Held*, reversed and remanded; "California's statutory limitations on attorney fees in medical malpractice cases requires that the plaintiff's arrangement with both the consulting service and the lawyers be closely scrutinized to ensure that the consulting contract does not subvert the legislative scheme." (8 C.A.4th 4.)

(a) The propriety of contingent fee consulting contracts has been discussed in the ethics opinions of state and national bar associations, and three out-of-state cases have reached inconsistent conclusions. To the extent that two of them conclude that these contracts violate public policy, they are contrary to the conclusion of most courts and bar associations, which reject the view of automatic invalidity, while pointing out the aspects of the contracts that may run afoul of specific ethical prohibitions. (8 C.A.4th 9, 13.)

(b) There was no evidence before the trial court to suggest that the service engaged in the unauthorized practice of law, or that the attorneys did not retain complete control of the litigation. (8 C.A.4th 14.) Moreover, the contract did not provide expert testimony for a contingent fee. The experts who were consulted in anticipation of providing trial testimony were paid by plaintiff on an hourly flat rate basis and would have been similarly compensated had their testimony been required. (8 C.A.4th 15.) Some of the ethics opinions suggest that a consulting service may have a "stake" of experts with a stake in the outcome of the litigation due to their repeated utilization. "We fail to see, however, how this 'stake' is any different than that of the expert who is repeatedly retained by a particular lawyer or law firm. While frequent retention--by a lawyer or consulting service--may harm a witness's credibility, we do not think utilization of such a witness constitutes a violation of the rules of professional conduct." (8 C.A.4th 15.)

(c) A California ethics opinion states that *B. & P.C. 6146* (supra, §182) makes it impossible to utilize a contingent fee consulting contract in a medical malpractice case without violating the fee-splitting prohibition of *Rules of Professional Conduct, Rule 1-320* (infra, §414). (8 C.A.4th 16.) This conclusion is based on the notion that the fee is first

deducted before the attorney's percentage is applied to the net recovery. However, the accepted method for calculating a lawyer's contingent fee is to apply the agreed-upon percentage to the net recovery after deducting the reimbursable costs of prosecution. "If the conclusions in the California and Georgia ethics opinions were correct, this supposedly preferred method--mandated by the Legislature in medical malpractice cases--would violate the ethical fee-splitting prohibition at least in every other type of case. Such a result makes no sense." (8 C.A.4th 16.)

(d) The reasonableness of the fee has been the subject of several ethics opinions. (8 C.A.4th 17.) California has statutorily limited the contingent fees that can be charged by lawyers in medical malpractice cases. "To the extent a California lawyer continues to charge the maximum MICRA fee but succeeds in transferring significant amounts of work and/or economic burden to a consulting service which is separately compensated by the client without regard to the MICRA limitations, the purpose of the legislation is frustrated. We therefore believe the trial court must have the opportunity to review the entire package of attorney and consultant fees in this case. One cannot be declared 'reasonable' or 'unreasonable' without reference to the other." (8 C.A.4th 19.)

(e) "Certainly the restrictions we have articulated which will be applied by the trial court on remand will insure that contingent fee consulting contracts cannot be used as a simple end run around the MICRA limitations. If that is their principal purpose, we suspect such contracts will quickly become a legal dinosaur and this opinion a mere academic footnote. The fact that the contracts are utilized in states without any attorney fee cap, however, would suggest that there may be other reasons for their existence. If so, we hope this opinion will help focus the public policy discussion which may occur elsewhere and provide guidance to trial courts asked to enforce consultant contracts and to lawyers attempting to advise clients and prosecute lawsuits consistent with the practical challenges of real world legal economics." (8 C.A.4th 22.) (On detailed directives to trial court on performance of its task, see 8 C.A.4th 19.) (See 70 A.L.R.5th 513 [validity and construction of contracts between legal consulting firms and litigants and attorneys].)

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E. Construction of Contract in Client's Favor.

1. General Principle.

1 Witkin Cal. Proc. Attys § 189

[§ 189] General Principle.

The making of the original contract of employment is precedent to the fiduciary relationship the contract creates and is free from the ordinary presumption of undue influence (*supra*, §97). Hence, a contract for legal services at a specified compensation is valid in the absence of an affirmative showing of some ground of invalidity. (*Cooley v. Miller & Lux* (1909) 156 C. 510, 525, 105 P. 981.) Nevertheless, the contract is usually drafted by the attorney, and under the ordinary rule of interpretation will be construed most strongly against the attorney and in favor of the client. (*Jackson v. Campbell* (1932) 215 C. 103, 106, 8 P.2d 845; *Boardman v. Christin* (1924) 65 C.A. 413, 418, 224 P. 97; *Rieck v. Chapman* (1927) 83 C.A. 735, 739, 257 P. 168 [written agreement and copies lost by attorneys; client's version accepted]; *Sayble v. Feinman* (1978) 76 C.A.3d 509, 142 C.R. 895, *infra*, §190; *Alderman v. Hamilton* (1988) 205 C.A.3d 1033, 1037, 252 C.R. 845 [fee agreement is strictly construed against attorney]; *Severson & Werson v. Bolinger* (1991) 235 C.A.3d 1569, 1573, 1 C.R.2d 531 [fee agreement calling for "regular hourly rates" construed in client's favor to preclude increase in rates without notice to client].)

The rule of construction against the attorney does not apply where the plain wording of the contract leaves no doubt as to its meaning. (*Houge v. Ford* (1955) 44 C.2d 706, 711, 285 P.2d 257.)

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2. Illustrations.

1 Witkin Cal. Proc. Attys § 190

[§ 190] Illustrations.

In *Mahoney v. Sharff* (1961) 191 C.A.2d 191, 12 C.R. 515, plaintiff engaged attorney S to represent her in an existing annulment action and a divorce action then on file. The agreement provided for a \$ 1,000 retainer fee, which was paid, and further compensation of one-third of the "amount recovered" before trial or 40% after trial. The services were performed and recovery obtained, but plaintiff contended that the contract compensation should be reduced in the amount of the fees awarded by the court (\$ 4,500). *Held*, the contention was sound. The contract was silent on the point, and should be construed against the attorney. (191 C.A.2d 195.) The court also applied the rule of construction to deny a fee for "recovery" of \$ 5,403.07 of community debts which the divorce court ordered paid by plaintiff's husband. Although technically this might be deemed a recovery by the wife, the meaning of this term to a lay person is something tangible received, which this was not. (191 C.A.2d 198, 199.) (On invalidity of contingent fee contract in bringing action for dissolution of marriage, see *supra*, §177.)

In *Sayble v. Feinman* (1978) 76 C.A.3d 509, 142 C.R. 895, plaintiff attorneys drafted a contingent fee agreement to represent defendant in a wrongful death action. The agreement provided that plaintiffs should be paid 28 1/3% of "any money recovered." Plaintiffs obtained a settlement with a cash payment of \$ 200,000 and an annuity of \$ 2,500 per month for defendant's lifetime. Plaintiffs were admittedly entitled to \$ 56,000 immediately, but they contended that they were also entitled to immediate payment of the specified percentage of the discounted present cash value of the life annuity. Because defendant's life expectancy was 46.7 years, plaintiffs were demanding some 80% of the money already paid to defendant. *Held*, plaintiffs' rights were limited to their percentage of the monthly payments when received by defendant.

(a) The words of a contract are to be understood in their ordinary and popular sense unless there is evidence that they were used in a different sense. (See 1 *Summary* (10th), *Contracts*, §745.) There was no such evidence here; the parties had contemplated recovery of a lump sum and had merely neglected to make specific provision for the situation that arose. Thus, the ordinary meaning of "money" is to be applied, and defendant does not recover "money" from the annuity until payments are made. Plaintiffs' position would have been more persuasive if the provision had been stated as "the recovery," or "the full recovery," or "the value of the entire recovery," or "the amount realized." (76 C.A.3d 514.)

(b) Because plaintiffs prepared the contract it should be construed against them (see 1 *Summary* (10th), *Contracts*,

§757), and a construction calling for such a large share of the money received to date would be unreasonable, unfair, and improper (see 1 *Summary* (10th), *Contracts*, §750). (76 C.A.3d 515.)

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3. Uncontemplated Services.

a. Additional Compensation Denied.

1 Witkin Cal. Proc. Attys § 191

[§ 191] Additional Compensation Denied.

A typical problem of interpretation arises when the attorney seeks to recover additional compensation as the reasonable value of services not within the scope of the original contract. The two rules that work against the attorney in this situation are: (1) ambiguities are resolved against the attorney (*supra*, §189), and (2) the client is entitled to know in advance if additional compensation is to be claimed. (See *13 A.L.R.3d* 673 [contingent fee contract as including compensation for services after judgment or on appeal].)

In *Reynolds v. Sorosis Fruit Co.* (1901) 133 C. 625, 66 P. 21, plaintiff attorney contracted in writing to advise defendant client on a certain matter, and to take four trips if necessary, for a fee of \$ 400, final payment to be made "when the business is successfully concluded." Plaintiff gave the advice and took the trips; he also filed some actions, and appeared in and tried cases brought against the client. The client, however, did not request the additional services and did not expressly promise to pay for them. *Held*, plaintiff could not recover above the contract amount, despite the fact that the services were valuable and that he had made a bad bargain. "It is not reasonable to suppose that defendant took the precaution to make a contract in writing with plaintiff as to advice and consultation fees, and did not intend to make any contract about attorney's fees in contemplated suit. Neither is it reasonable to suppose that defendant employed plaintiff as its attorney to act for it in and about contemplated litigation, and agreed to pay plaintiff a fee of four hundred dollars for advice, in addition to fees for such litigation as might arise. Plaintiff said nothing to defendant about any extra charge, or any charge outside the contract, until the suits had been terminated. If he contemplated such charges, it would have been only fair to have so notified defendant." (133 C. 629.) (See *Baldie v. Bank of America* (1950) 97 C.A.2d 70, 73, 217 P.2d 111 [following *Reynolds*].)

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3. Uncontemplated Services.

b. Additional Compensation Allowed.

1 Witkin Cal. Proc. Attys § 192

[§ 192] Additional Compensation Allowed.

Reynolds v. Sorosis Fruit Co. (1901) 133 C. 625, 66 P. 21, supra, §191, should be contrasted with *McKee v. Lynch* (1940) 40 C.A.2d 216, 104 P.2d 675. Plaintiff attorney contracted in writing with decedent to perform services that "do not involve any unusual, extraordinary or complicated situations" for a monthly retainer of \$ 100, with \$ 100 a day for court or other outside services, and reimbursement of expenses. Plaintiff later advised decedent of a government tax claim that eventually became a demand for \$ 184,592, which plaintiff after much labor settled for \$ 24,000. Defendant conceded that the work done was unusual and justified the additional fee awarded by the trial judge, but contended that a client, having arranged for a stated compensation, is entitled to assume that no additional compensation will be required, and that if it is sought, the client should have the right to determine whether to continue employing the attorney under the new arrangement. *Held*, plaintiff was entitled to recover the additional fee; the original contract did not contemplate this kind of service and therefore did not exclude compensation for it. (40 C.A.2d 225.) (See *Brooks v. Van Winkle* (1958) 161 C.A.2d 734, 740, 327 P.2d 151 [express contract provided for specified, limited service, and client later requested broadened services; distinguishing *Reynolds*]; *Bunn v. Lucas, Pino & Lucas* (1959) 172 C.A.2d 450, 468, 342 P.2d 508, infra, §199 [court awarded compensation for unanticipated services but amount was less than requested by attorneys].)

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4. Substantial Performance by Attorney.

1 Witkin Cal. Proc. Attys § 193

[§ 193] Substantial Performance by Attorney.

The theory of construction against the attorney (*supra*, §189) is balanced by the rule of reasonable construction in the light of all of the circumstances, and by the doctrine of substantial performance. Thus, in a proper case, the attorney may recover fees. (See *Preston v. Herminghaus* (1930) 211 C. 1, 10, 292 P. 953 [detailed formal contract]; *Benjamin v. Frenke* (1940) 40 C.A.2d 736, 105 P.2d 591 [short agreement]; *Crocker v. Crocker First Nat. Bank* (1943) 60 C.A.2d 725, 727, 141 P.2d 482 [substantial performance]; *Harvey v. Ballagh* (1940) 38 C.A.2d 348, 352, 101 P.2d 147 [same; client's narrow interpretation rejected].)

One important illustration is the right of an attorney ordinarily to receive a fee for services in the trial court, even though the client desires to appeal. In *Pinto v. Seely* (1913) 22 C.A. 318, 326, 135 P. 43, the attorney contracted to represent the client, in an action to recover money, for 10% of the recovery. He obtained judgment for \$ 3,900, but refused to take an appeal unless he was paid \$ 100. The client appealed with other counsel, then abandoned the appeal, and the judgment was satisfied. *Held*, the attorney was not guilty of a breach and the client was liable for the 10% fee. "In the absence of an express or implied agreement to that effect there is no unqualified rule of law which requires the services of an attorney under a contract of employment in a particular piece of litigation, to continue until the final determination of the controversy upon appeal, before the attorney can claim compensation for the services contracted for. Nor does the mere acceptance of a retainer under such a contract necessarily imply a retainer and consequent obligation to carry the controversy to the court of last resort." (22 C.A. 326.) (See 13 A.L.R.3d 673 [construction of contingent fee contract regarding compensation for services after judgment or on appeal].)

Another illustration is where an act of the client prevents a condition from occurring. In *Setzer v. Moore* (1927) 202 C. 333, 260 P. 550, the client contracted to pay a \$ 10,000 fee for pending litigation in which he was the plaintiff, \$ 5,000 on execution of the agreement, and \$ 5,000 on commencement of the trial or on the date the action was settled. The client, for sufficient consideration (advantages secured in other litigation) entered a dismissal without prejudice, and refused to pay the second \$ 5,000 because the case had neither been tried nor settled. *Held*, the term "settled" has no fixed universal meaning, and, in light of the voluminous evidence of the negotiations of the parties, the trial court properly construed the contract as calling for a \$ 10,000 fee, the second installment of which was payable when the pending litigation terminated, either by trial or dismissal without trial.

Frustration of the object by the acts of third persons raises a similar problem. In *Crestview Cemetery Assn. v. Dieden* (1960) 54 C.2d 744, 752, 8 C.R. 427, 356 P.2d 171, M, an attorney and officer of plaintiff nonprofit corporation, owned land that plaintiff desired to develop as a cemetery. The area was in a residential zone, and M, after an unsuccessful attempt to obtain a variance, orally employed D as attorney on a \$ 7,500 contingent fee to obtain a variance or rezoning. D succeeded in having the city council vote a rezoning ordinance. M promptly paid \$ 5,000 and promised to pay the balance but neglected to do so. Later a referendum petition qualified and the council, instead of calling a special election, repealed the ordinance. M then refused to pay the balance and demanded back the \$ 5,000. *Held*, D was entitled to judgment on his cross-complaint for the balance. Interpreting the contract in conformity with the practical construction given by the parties (see 1 *Summary* (10th), *Contracts*, §749): (a) M insisted that D perform within 3 months, time enough to secure a rezoning ordinance, but not enough to protect it against subsequent attacks. (b) M immediately congratulated D on his success, paid a substantial part of the fee, and, with knowledge that a referendum was being sought by opponents, several times later promised to pay the balance. (c) Thus, both parties acted in the belief that the work contemplated had been completed. (54 C.2d 752.)

In some situations a contract employing an attorney to prosecute an action impliedly obligates the attorney to *file* it without a further request by the client. However, in *Carter v. Baldwin* (1892) 95 C. 475, 30 P. 595, plaintiff attorneys, engaged to prosecute certain libel suits as *associates* of defendant's regular counsel, performed some of the services but were never requested to commence the final action. *Held*, under the circumstances plaintiffs were entitled to directions from defendants or from senior counsel, and recovery of the agreed fee, on the theory of waiver of the remaining performance, was proper. (95 C. 478.)

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F. Reasonable Value of Services.

1. When Reasonable Value Is Recoverable.

a. Valid Express or Implied Contract.

1 Witkin Cal. Proc. Attys § 194

[§ 194] Valid Express or Implied Contract.

(1) *Contract Without Specified Fee.* An attorney is sometimes employed with no definite provision for compensation made. Accordingly, the consideration for the services is the implied promise to pay their reasonable value. "In the absence of an agreement upon the subject, defendant must be deemed to have promised to pay the reasonable value of the services performed in his behalf and with his consent and knowledge." (*Batcheller v. Whittier* (1909) 12 C.A. 262, 266, 107 P. 141; see *Buck v. Eureka* (1899) 124 C. 61, 66, 56 P. 612; *Elconin v. Yalen* (1929) 208 C. 546, 549, 282 P. 791 [oral contract of employment, different proposals of fee, no agreement reached]; *Cusick v. Boyne* (1905) 1 C.A. 643, 645, 82 P. 985; *Sattinger v. Golden State Glass Corp.* (1942) 53 C.A.2d 130, 135, 127 P.2d 653; *Rest.3d, The Law Governing Lawyers* §39; Rutter Group, 1 Professional Responsibility, §5:1088 et seq.; 57 A.L.R.3d 475 [amount of attorney's compensation in absence of contract or statute fixing amount]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §286.)

The effect is the same where the parties expressly agree that the compensation for the services will be their reasonable value. (See *Stuart v. Preston* (1934) 2 C.A.2d 310, 315, 38 P.2d 155; *Hannon v. Goucher* (1931) 117 C.A. 455, 457, 4 P.2d 239.)

(2) *Discharge of Attorney.* An attorney who is discharged is entitled to recover the reasonable value of services rendered up to the time of termination of the contract, regardless of whether the discharge was with or without cause. (See *infra*, §215 et seq.)

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1. When Reasonable Value Is Recoverable.
- b. Valid Contract But Performance Excused.

1 Witkin Cal. Proc. Attys § 195

[§ 195] Valid Contract But Performance Excused.

An express contract may be made with a definite provision for compensation, but the contemplated performance by the attorney may become impossible or may be otherwise excused without the fault of either party. In this situation the recovery is based on a theory of rescission and restitution, the attorney being entitled to the reasonable value of services performed up to the time the impossibility or other excuse occurred.

In *Boardman v. Christin* (1924) 65 C.A. 413, 224 P. 97, plaintiff attorney, as the guardian of a minor, was about to commence an action to determine water rights of the minor. Defendant, the sister of the minor, with similar interests in adjoining land, agreed to pay plaintiff a sum equal to that which the superior court would award for services to the minor, for "procuring a judgment determining the rights." Before trial, the minor became of age and substituted other counsel, and the superior court awarded plaintiff \$ 1,000 for his services. Plaintiff then brought this action against the sister for an equivalent sum. *Held*: (a) Plaintiff could not recover the stipulated amount because the condition precedent--procuring a judgment determining the water rights--had not been performed. (b) But the prevention was a result of the exercise of a legal right by a third person (the minor). Hence, plaintiff was entitled to recover the reasonable value of services actually performed under his contract. (65 C.A. 419.) (See *Cazares v. Saenz* (1989) 208 C.A.3d 279, 256 C.R. 209, *infra*, §214 [determining reasonable value of services rendered under contingent fee agreement where contract cannot be fully performed].)

The situation is similar where the performance of litigation services is partially prevented by the client's exercise of the right to compromise and dismiss the action. The client's act is not wrongful and the client is not guilty of a breach; the attorney's remedy is an action for the reasonable value of services rendered. (See *Green v. Sherritt* (1936) 17 C.A.2d 732, 736, 62 P.2d 769 [reaching this result but not clear on theory].)

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1. When Reasonable Value Is Recoverable.

c. Valid Contract With Invalid Compensation Provision.

1 Witkin Cal. Proc. Attys § 196

[§ 196] Valid Contract With Invalid Compensation Provision.

If the contract is otherwise valid, but the provision for compensation is for some reason invalid or unenforceable, recovery of the reasonable value of services is uniformly allowed. The basis of recovery is seldom made clear, and perhaps it could be sought on alternative theories of quasi-contract or implied covenant.

One example is a contingent fee contract that contains a provision requiring the client to pay a specified sum as a penalty for settlement or dismissal without the attorney's consent. The penalty provision is probably void, but the attorney may recover the reasonable value of services performed up to the time the employment is terminated. (*Hall v. Orloff* (1920) 49 C.A. 745, 749, 194 P. 296, supra, §179 [dictum]; *Calvert v. Stoner* (1948) 33 C.2d 97, 104, 199 P.2d 297.)

A related problem arises where the relationship of attorney and client already exists at the time the contract for particular services is made. It is sometimes said that, because the attorney cannot be permitted to gain an improper advantage and must affirmatively show that the compensation is fair, recovery will be limited to the reasonable value of the attorney's services. Though this rule seems correct on principle, it is not to be invariably applied. In *Countryman v. California Trona Co.* (1917) 35 C.A. 728, 170 P. 1069, the court said: "[A]n examination of the cases cited by the appellant's counsel in support of this rule satisfies our minds that the equitable principle it embodies, however sound in the abstract, is not to be given universal application to every agreement made between attorney and client while the relation exists, but only to those agreements where the circumstances under which they are entered into disclose some special reason for its application--as where the written contract provides for greater compensation than was either expressly or impliedly agreed upon prior to the existence of the confidential relation ... or where special relations of confidence exist, or where the client had no other independent legal adviser; or where there was some failure on the part of the attorney to make full disclosure to the client as to the extent of the services required." (35 C.A. 735.) (See *Estate of Mallory* (1929) 99 C.A. 96, 103, 278 P. 488, quoting *Countryman* with approval.)

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d. Unenforceable Contract.

1 Witkin Cal. Proc. Attys § 197

[§ 197] Unenforceable Contract.

If the contract is merely unenforceable, the attorney is entitled to the reasonable value of the services rendered on quasi-contract principles. (See 1 *Summary* (10th), *Contracts*, §1036.) Typical illustrations are contracts with a minor or incompetent client, which may be avoided at the election of the client. (See *Spencer v. Collins* (1909) 156 C. 298, 306, 104 P. 320 [minor disaffirmed contract of employment after paying sums found by court to be equal to value of attorney's services]; 13 *A.L.R.3d* 1267 [extent of minor's liability for attorney's services].)

Quasi-contract recovery is also allowed where services are performed for an incompetent, on request, without an express contract. (See *Estate of Doyle* (1932) 126 C.A. 646, 647, 14 P.2d 920.)

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1. When Reasonable Value Is Recoverable.

e. Illegal Contract.

1 Witkin Cal. Proc. Attys § 198

[§ 198] Illegal Contract.

A severable illegal provision in the contract will not preclude recovery where the contract is not otherwise tainted with illegality. (See *supra*, §196.) However, if the entire contract is of a type prohibited by statute or public policy, recovery in quasi-contract is as objectionable as enforcement of the express terms, and, under the general rule, no recovery is allowed. (See 1 *Summary* (10th), *Contracts*, §436.)

In a number of cases, however, the California courts have allowed an attorney to disregard the illegal agreement and recover the reasonable value of the services. The opinions, which are not at all clear on the theory of decision, fall into two classes:

(1) Cases in which the agreement had an illegal object or was in some other vital respect contrary to public policy. The holdings in these cases appear to be erroneous. (See *Theisen v. Keough* (1931) 115 C.A. 353, 360, 1 P.2d 1015 [contingent fee contract to obtain divorce]; *Wiley v. Silsbee* (1934) 1 C.A.2d 520, 36 P.2d 854 [same]; *Rosenberg v. Lawrence* (1938) 10 C.2d 590, 602, 75 P.2d 1082 [contract to split fees with layman customs broker].)

(2) Cases in which the illegality did not involve serious objections of public policy. These seem to reach the correct result and are distinguishable from *Wiley* and *Rosenberg*. (See *Calvert v. Stoner* (1948) 33 C.2d 97, 104, 199 P.2d 297 [contingent fee agreement containing illegal provision preventing client from settling case was severable and did not affect compensation features of agreement]; *Leonard v. Alexander* (1942) 50 C.A.2d 385, 387, 122 P.2d 984 [express contract for legal services to minor was wholly void because of lack of court approval required by former Prob.C. 1509 (now *Family C. 6602*); but statute allows recovery of reasonable sum fixed by court].)

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2. Determination of Reasonableness.

a. In General.

1 Witkin Cal. Proc. Attys § 199

[§ 199] In General.

The opinions frequently set forth as a guide to the determination of reasonableness of fees the following kind of general statement of important factors: "The nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure of the attorney's efforts, the attorney's skill and learning, including his age and experience in the particular type of work demanded." (*Los Angeles v. Los Angeles-Inyo Farms Co. (1933) 134 C.A. 268, 276, 25 P.2d 224* [stressing value of property involved]; see *Collins v. Welsh (1934) 2 C.A.2d 103, 110, 37 P.2d 505* [stressing amount involved and success of efforts]; *Berry v. Chaplin (1946) 74 C.A.2d 669, 679, 169 P.2d 453*; *Cline v. Zappettini (1955) 131 C.A.2d 723, 728, 281 P.2d 35* [applying former A.B.A. Canon 12]; *California v. Westover Co. (1956) 140 C.A.2d 447, 449, 295 P.2d 96*; *Shannon v. Northern Counties Title Ins. Co. (1969) 270 C.A.2d 686, 689, 76 C.R. 7*, quoting the text; *Hadley v. Krepel (1985) 167 C.A.3d 677, 682, 214 C.R. 461*; *Stokus v. Marsh (1990) 217 C.A.3d 647, 656, 266 C.R. 90*, citing the text; C.E.B., 1 Civil Proc. Before Trial 4th, §5.45; Rutter Group, 1 Professional Responsibility, §5:407; 7 *Am.Jur.2d (2007 ed.)*, *Attorneys at Law* §286 et seq.; 57 *A.L.R.3d 475* [compensation in absence of contract or statute fixing amount]; 57 *A.L.R.3d 550* [compensation in matters involving guardianships and trusts]; 57 *A.L.R.3d 584* [compensation in tort actions]; 58 *A.L.R.3d 235* [compensation in matters involving commercial and general business activities]; 58 *A.L.R.3d 317* [compensation in proceedings involving wills and administration of decedents' estates]; 10 *A.L.R.5th 448* [excessiveness or adequacy of attorneys' fees in matters involving real estate]; 17 *A.L.R.5th 366* [excessiveness or adequacy of attorneys' fees in domestic relations cases].)

In *Bunn v. Lucas, Pino & Lucas (1959) 172 C.A.2d 450, 468, 342 P.2d 508*, plaintiff attorneys, engaged by defendant attorneys to assist in a will contest for a \$ 15,000 fee, were awarded an additional \$ 25,000 for un contemplated services. Plaintiffs attacked the award as insufficient, in view of the much larger contingent fee collected by defendants. *Held*, the trial judge properly exercised his discretion in fixing the amount, for (a) the period of total services was less than 3 months; (b) the case took only a portion of their professional time; (c) most of the services rendered were contemplated at the time the original fee was set; (d) settlement of the case relieved plaintiffs of substantial work that clearly would have been within the contemplation of the original agreement; (e) the services performed after the new development could reasonably have been found by the trial judge to be of no greater value than

the earlier services. (172 C.A.2d 468, 469.)

The factor of retainer is explained in a Kansas case quoted in *Knight v. Russ* (1888) 77 C. 410, 19 P. 698, as follows: "When an attorney is engaged to prosecute or defend in an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. He is retained by his client for that entire action; and whether his client may ever call upon him to perform services or not, he cannot perform services in that action for the adverse party, nor can he receive any fee or compensation from the adverse party. All his skill and ability for that case is at the command of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney; and *whether the attorney is ever called upon to perform any services or not* in that case, he may, when the case is terminated, recover for whatever the evidence shows the retainer was worth." (77 C. 412.)

One more general observation, in *Matthiesen v. Smith* (1936) 16 C.A.2d 479, 60 P.2d 873, deserves notice: "The amount of their compensation must vary with the place in which their services are rendered, for the same services are of more value in a large city than in a small community. The standing of the lawyer who renders them must be taken into consideration as must also the importance of the matters involved in the litigation, the amount involved and the result attained. It is evident that the responsibility, the care, anxiety and mental labor are much greater in a case where the amount involved is large than where it is comparatively insignificant. Nor is this responsibility, care and labor dependent alone upon the number of hours or days, as here contended, which may be given to the preparation and trial or argument of the case. All elements should be considered in fixing the value of the attorney's services." (16 C.A.2d 483.)

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2. Determination of Reasonableness.

b. Rules of Professional Conduct.

1 Witkin Cal. Proc. Attys § 200

[§ 200] Rules of Professional Conduct.

California's Rules of Professional Conduct prohibit "illegal or unconscionable" fees. (*Rules of Professional Conduct, Rule 4-200(A).*) *Rules of Professional Conduct, Rule 4-200(B)* (infra, §454) sets forth 11 factors to be considered in determining conscionability:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The lawyer's and the client's relative sophistication.
- (3) The novelty and difficulty of the questions involved and the required skill.
- (4) The likelihood, if apparent to the client, that acceptance of the employment will preclude other employment by the attorney.
- (5) The amount involved and the results obtained.
- (6) Time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The attorney's experience, reputation, and ability.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The client's informed consent to the fee.

The relevant issue in determining whether an attorney's fee is unconscionable is whether the client got what the client paid for. None of the factors listed in Rule 4-200 suggests that the attorney's profit margin is relevant to the issue

of unconscionability. (*Shaffer v. Superior Court* (1995) 33 C.A.4th 993, 1000, 1002, 39 C.R.2d 506.) (See A.B.A Model Rules of Professional Conduct, Rule 1.5; *Rest.3d, The Law Governing Lawyers* §34, Comment c.)

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c. Contingency of Success.

1 *Witkin Cal. Proc. Attys* § 201

[§ 201] Contingency of Success.

An attorney may perform valuable services, and recover accordingly, even though the litigation is not successful. "A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect and for that purpose." (*Cullinan v. McColgan* (1927) 87 C.A. 684, 698, 263 P. 353, quoting Michigan case.) However, if the attorney does make a special contract under which the compensation is contingent on success, it would seem that the risk of not being paid at all justifies a higher award than in the usual case. (See *Estate of Duffill* (1922) 188 C. 536, 553, 206 P. 42 [approval of attorneys' fee that was wholly contingent on successful preservation of \$ 1 million trust from which fee was derived]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §299; *Rules of Professional Conduct*, Rule 4-200(B)(9), *supra*, §200, and *infra*, §454; A.B.A. Model Rules of Professional Conduct, Rule 1.5(a)(8).)

A contingent fee contract provision for a specified percentage of the recovery is, however, not controlling on the issue of the reasonable value of services; it is only one factor to be considered. (*Vella v. Hudgins* (1984) 151 C.A.3d 515, 520, 521, 198 C.R. 725.)

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d. Other Special Factors.

1 *Witkin Cal. Proc. Attys* § 202

[§ 202] Other Special Factors.

(1) *Unenforceable Agreed Fee*. Where there was originally a stipulated fee, but the express contract or the fee provision is for some reason unenforceable, it is nevertheless an evidentiary factor to which the court may look in making its determination. (*Mitchell v. Towne* (1939) 31 C.A.2d 259, 266, 87 P.2d 908.) However, it cannot justify an award completely opposed to the weight of evidence as to the actual services performed. (See *Berry v. Chaplin* (1946) 74 C.A.2d 669, 681, 169 P.2d 453, *infra*, §207.)

(2) *Prior Court Award of Fees in Dissolution Proceeding*. Where an attorney represents a spouse in a proceeding for dissolution of marriage and obtains an award of court costs and fees to maintain the litigation, does this normally determine the value of the services and preclude any further recovery from the client? Intimations that it might have that effect appear in *Theisen v. Keough* (1931) 115 C.A. 353, 361, 1 P.2d 1015, but the decision was limited to its special facts.

In *Collins v. Welsh* (1934) 2 C.A.2d 103, 110, 37 P.2d 505, plaintiff attorney had obtained for the wife in a divorce action a \$ 75 monthly allowance and most of the property (worth over \$ 500,000). In this action against her for the value of his services, a \$ 15,000 verdict of the jury was upheld, despite the fact that in the divorce action plaintiff had received \$ 300 for fees. The award at the inception of a divorce action is merely to enable the wife to proceed with the litigation. "The amount awarded is not in any sense a determination by the trial court of the reasonable value of all legal services to be rendered as the amount and nature of said services cannot then be ascertained. Supplemental allowances may be made ... and frequently are made in practice. ... In cases where the wife has some separate property, even though it be nonincome producing, the necessity may not be so great in the mind of the trial court and this fact may be taken into consideration in determining the amount required to meet the wife's immediate needs. It is thus apparent that the amount, if any, awarded by the trial court in a preliminary order for counsel fees does not necessarily bear any relation to the reasonable value of the legal services to be performed thereafter." (2 C.A.2d 109.) (See 17 A.L.R.5th 366 [excessiveness or adequacy of attorneys' fees in domestic relations cases].)

(3) *Negligent Handling of Case*. In *Bridges & Hall v. Paige* (1859) 13 C. 640, the court held that a client may offer evidence of negligence of the attorney by way of reducing the amount recoverable, and that this is so even though

judgment was rendered in favor of the client, for negligence may have caused greater expense in obtaining it or might enhance the difficulties of prevailing on appeal. (See *Estate of Kruger* (1900) 130 C. 621, 626, 63 P. 31 [reversal of order allowing \$ 6,000 fee, for failure to consider negligence causing loss of assets worth more than amount of fee]; on attorney's liability to client for damages caused by negligence, see *infra*, §285 et seq.)

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3. Proof.

a. Testimony and Other Evidence.

1 Witkin Cal. Proc. Attys § 203

[§ 203] Testimony and Other Evidence.

An attorney seeking to establish the right to recover the sum demanded in the complaint as a reasonable fee usually offers (1) evidence, documentary and oral, of the services actually performed, and (2) expert opinion, by the attorney and other lawyers, as to what would be a reasonable fee for the services. The defendant, of course, may offer similar evidence in rebuttal of the claim. (See *Estate of Duffill* (1922) 188 C. 536, 549, 206 P. 42 [briefs and transcripts filed in main action, testimony of member of firm reciting services in detail, expert testimony as to their value]; *Treadwell v. Nickel* (1924) 194 C. 243, 263, 228 P. 25 [long hypothetical question to experts, based on kind of services rendered]; *Campbell v. Hanford* (1924) 67 C.A. 155, 165, 227 P. 234 [evidence of work by many attorneys and assistants]; *Matthiesen v. Smith* (1936) 16 C.A.2d 479, 481, 60 P.2d 873 [detailed testimony as to nature of services, experts on value]; *Darnell v. Woodruff* (1936) 14 C.A.2d 628, 633, 58 P.2d 975 [evidence of long continued services]; *Betts v. Republic Indem. Co. of America* (1950) 97 C.A.2d 451, 454, 217 P.2d 742 [testimony as to nature of services, opinions on value]; *Kurland v. Simmons* (1954) 126 C.A.2d 79, 81, 271 P.2d 553 [expert testimony]; *California v. Westover Co.* (1956) 140 C.A.2d 447, 453, 295 P.2d 96 [same]; *Martino v. Denevi* (1986) 182 C.A.3d 553, 558, 227 C.R. 354, quoting the text; *Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 25, 267 C.R. 896 [fee award in complex litigation was reversed because of failure to submit documentation sufficient to determine if bills were for activities within scope of order appointing law firm]; *Mardirossian & Associates v. Ersoff* (2007) 153 C.A.4th 257, 270, 273, 62 C.R.3d 665 [where plaintiff contingent fee attorneys did not keep time sheets, trial court properly allowed their testimony based on personal knowledge of number of hours worked and contingent fee expert's testimony on reasonableness of hours claimed]; C.E.B., 1 Civil Proc. Before Trial 4th, §5.30 et seq.; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §306.)

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3. Proof.

b. Independent Judgment of Jury or Court.

1 Witkin Cal. Proc. Attys § 204

[§ 204] Independent Judgment of Jury or Court.

Where the nature and extent of the actual services are shown by the evidence, expert opinions of the proper fee are neither necessary nor controlling. The jury or the court, from its own experience, may determine what those services are worth. "If this doctrine is applicable to jury trials, there is much more reason for applying the doctrine in cases tried before a court. The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value." (*Spencer v. Collins* (1909) 156 C. 298, 307, 104 P. 320; see *Kirk v. Culley* (1927) 202 C. 501, 510, 261 P. 994 [trial court, on erroneous theory, awarded contract sum; Supreme Court, exercising fact-finding power, determined reasonable fee from evidence and modified judgment accordingly]; *Elconin v. Yalen* (1929) 208 C. 546, 550, 282 P. 791 [testimony of plaintiff attorney and defendant client; plaintiff sought \$ 1,500, award of \$ 300 was upheld]; *Estate of Iser* (1921) 52 C.A. 405, 408, 198 P. 1014; 7 Am.Jur.2d (2007 ed.), Attorneys at Law §§306, 307.)

That the court should not give its rubber stamp approval to so-called expert opinion in these cases was declared long ago in *Freese v. Pennie* (1895) 110 C. 467, 42 P. 978. An \$ 80,000 fee to a firm of attorneys for an estate was upheld, partly on the ground of consent to the fee by the sole heir, but with the following admonition: "Attorneys are inclined to place a very high estimate upon the value of their services when rendered in important litigation; and, also, inclined to look with kindly eyes and sympathetic feelings upon the efforts of brother attorneys when engaged in establishing before the court the value of services performed in large estates fortunate enough to possess well-filled coffers. Under these conditions, when upon the witness-stand as experts, they entertain most liberal views as to what should be the amount of a brother attorney's allowance, and hold large ideas as to the importance of the litigation in which he has been engaged. It is well, and it is the law, that the court should temper this kind of evidence with its own calm judgment, based upon the amount and kind of labor performed, and to thereupon make its decree." (110 C. 469, 470.) (On discretion of trial judge, see *California v. Westover Co.* (1956) 140 C.A.2d 447, 450, 295 P.2d 96; *Bunn v. Lucas, Pino & Lucas* (1959) 172 C.A.2d 450, 342 P.2d 508, supra, §199; *Shannon v. Northern Counties Title Ins. Co.* (1969) 270 C.A.2d 686, 688, 76 C.R. 7, quoting the text [determination is seldom overturned even where amount appears small in relation to time involved]; *Melnyk v. Robledo* (1976) 64 C.A.3d 618, 623, 134 C.R. 602; on abuse of discretion, see *Boller v. Signal Oil & Gas Co.* (1964) 230 C.A.2d 648, 41 C.R. 206, infra, §207; *Hurst v. Hurst* (1964)

227 C.A.2d 859, 39 C.R. 162, infra, §207.)

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4. Review of Fee Awards.

a. Illustrations of Large Awards Upheld.

1 Witkin Cal. Proc. Attys § 205

[§ 205] Illustrations of Large Awards Upheld.

Verdicts and judgments for the reasonable value of attorneys' services are usually upheld. The only basis for reversal would be that the amount was so large (or so small) as to "shock the conscience" and suggest that passion and prejudice influenced the determination. However, the factors to be considered (*supra*, §199 et seq.) give such a wide discretion to the trial court or jury that attempts to show an abuse on appeal are seldom successful. (See *Libby v. Kipp* (1927) 87 C.A. 538, 548, 262 P. 68 [observing that the award seems large "from the cold record," but that the transcript cannot adequately present the situation before the trial court]; *Mayock v. Splane* (1943) 56 C.A.2d 563, 573, 132 P.2d 827; *California v. Westover Co.* (1956) 140 C.A.2d 447, 451, 295 P.2d 96 [condemnation of 6,000-acre tract, jury award of over \$ 1.5 million, proceeding abandoned; award of \$ 150,000 to three attorneys upheld]; *Estate of Lanza* (1964) 229 C.A.2d 720, 727, 40 C.R. 528; *Hadley v. Krepel* (1985) 167 C.A.3d 677, 686, 214 C.R. 461, quoting the text.)

The factor of the *amount involved* (see *Rules of Professional Conduct, Rule 4-200(B)(5)*, *infra*, §454) seems by far the most important in sustaining large fees. In *Los Angeles v. Los Angeles-Inyo Farms Co.* (1933) 134 C.A. 268, 25 P.2d 224, landowners sought attorneys' fees after abandonment of a condemnation proceeding involving land valued between \$ 323,000 and \$ 1.5 million. The attorneys offered evidence of 80 days of preparation, and expert opinions supporting a fee of \$ 16,000 or higher. In opposition, evidence was given that 6 to 10 days was enough preparation because the attorneys had been fully prepared by a prior proceeding; and experts testified that \$ 1,000-\$ 1,500 would be adequate compensation. An award of \$ 13,200 was affirmed on the ground that the appellate court will not try the issue *de novo* and that no abuse of discretion was established, although appellant's contention "is not lacking in merit," the suit "was not a complicated action," and "[a]t first blush, therefore, the court's award appears excessive." (134 C.A. 276.)

In *Stuart v. Preston* (1934) 2 C.A.2d 310, 38 P.2d 155, plaintiff attorney represented defendant attorneys in the trial of a difficult action to recover attorneys' fees from clients, obtaining a judgment of \$ 259,960. Plaintiff's witnesses valued the services at \$ 46,000 to \$ 62,500; defendants' witnesses thought them at \$ 1,500 to \$ 3,500. A jury's verdict of \$ 50,400 was upheld. (2 C.A.2d 317.)

In *Matthiesen v. Smith* (1936) 16 C.A.2d 479, 60 P.2d 873, plaintiff firm was engaged to collect six promissory notes totaling \$ 171,358.08. After filing of the action, attachment, demurrer, depositions, and some other steps, the

debtor paid in full without going to trial. *Held*, a \$ 12,500 award was proper. (16 C.A.2d 481, 482.)

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4. Review of Fee Awards.

b. Illustrations of Large Awards Annulled.

1 *Witkin Cal. Proc. Attys* § 206

[§ 206] Illustrations of Large Awards Annulled.

Where the factors justifying a large award (*supra*, §205) are not present, the court may refuse to sanction it. (See *Werschull v. United Calif. Bank* (1978) 85 C.A.3d 981, 1005, 149 C.R. 829 [class action; award of \$ 400,000 bore no relationship to rate of compensation and number of hours spent by attorneys]; *In re Marriage of Cueva* (1978) 86 C.A.3d 290, 300, 303, 149 C.R. 918, 11 Summary (10th), *Husband and Wife*, §196 [substantial award in brief default hearing where no evidence of reasonable value of services was offered; reversed and remanded for redetermination of amount]; *Martino v. Denevi* (1986) 182 C.A.3d 553, 559, 227 C.R. 354 [\$ 40,000 fee award was reversed in absence of documentary evidence of computation]; *Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 25, 267 C.R. 896 [large award to designated defense counsel in complex litigation was reversed because of failure to submit documentation sufficient to determine if bills were for activities within scope of order appointing law firm].)

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4. Review of Fee Awards.

c. Reversal for Inadequate Award.

1 *Witkin Cal. Proc. Attys* § 207

[§ 207] Reversal for Inadequate Award.

Opinions reversing verdicts or judgments as inadequate are scarce. The following, however, are good examples:

In *Hedden v. Waldeck* (1937) 9 C.2d 631, 72 P.2d 114, the attorneys made an uncontradicted showing of services in protracted litigation on trial and appeal. A \$ 2,000 award was held so unreasonably small as to constitute an abuse of discretion. (9 C.2d 639.)

In *Berry v. Chaplin* (1946) 74 C.A.2d 669, 678, 169 P.2d 453, the attorney and his associates performed lengthy and valuable services in several different proceedings in the trial and appellate courts, reviving an action that appeared to be dead. They were successful in establishing the parentage of an illegitimate child and his right to support. The trial judge, following the compensation provisions of a stipulation held void in a previous appeal, awarded \$ 5,000 (an initial payment of \$ 5,000 had already been made). *Held*, judgment reversed with instructions to the trial judge to disregard the stipulation and determine the fee in accordance with the evidence. "It seems incredible that he would have considered such a small amount to be a reasonable compensation for the services performed, and we are impelled to draw the inference that he considered himself bound by the stipulation." (74 C.A.2d 681.)

Hurst v. Hurst (1964) 227 C.A.2d 859, 39 C.R. 162, involved services successfully rendered on behalf of a minor illegitimate child. The attorney, experienced and distinguished, showed 277 hours of preparation, 6 days in court on trial, and many other court appearances. *Held*, a \$ 10,000 award was inadequate. "Considering the difficulty of the case, especially in overcoming the previous stipulation, the results accomplished, the nature and extent of the services rendered, the importance of the issues litigated, the financial position of the parties, and the years of experience, standing and qualifications of plaintiff's counsel, we hold that the award of \$ 10,000 was wholly inadequate and an abuse of the discretion vested in the trial court." (227 C.A.2d 871.)

In *Boller v. Signal Oil & Gas Co.* (1964) 230 C.A.2d 648, 41 C.R. 206, plaintiff, an outstanding expert in property tax litigation, was engaged to handle a difficult appeal, and did so successfully. In this action for the reasonable value of his services, the trial judge fixed them at \$ 7,500, observing that plaintiff had devoted more time than was warranted and that the case did not involve the expertise that plaintiff admittedly had. *Held*, the court was wrong in both of these

assumptions. But the judgment was not reversed for a retrial: The expert testimony in the record indicated that \$ 17,500 was a proper sum. And, "since this court possesses the same basic expertise with regard to counsel fees as does a trial court," its fact-finding power (see 9 *Cal. Proc.* (5th), *Appeal*, §309) was exercised by making a finding of \$ 17,500 as the reasonable value of the services, and the judgment was modified accordingly. (230 *C.A.2d* 656.)

In *Marshall v. Department of Water and Power* (1990) 219 *C.A.3d* 1124, 268 *C.R.* 559, the jury in an eminent domain proceeding awarded the plaintiff property owner \$ 1. The court, based on the contingency fee agreement of 331/3%, awarded attorneys' fees for 30% in the amount of 30 cents. *Held*, remanded for redetermination of award. "The contingent nature of the fee contract is only one element of evidence of the value of the attorney's services; it is not controlling. ... An attorney should not be punished for the unbelievability of his or her clients." That this was a 3-week trial alone indicated that the court could not have properly exercised discretion. (219 *C.A.3d* 1150.)

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1. In General.

1 Witkin Cal. Proc. Attys § 208

[§ 208] In General.

The former A.B.A. Canons and former A.B.A. Code both provided that an attorney should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client. (See *Salopek v. Schoemann* (1942) 20 C.2d 150, 156, 124 P.2d 21 [concurring opinion citing former Canon 14: "It is recognized as a part of the ethical rules governing the legal profession that an attorney will not sue a client for a fee except to prevent injustice, imposition or fraud"].) The current A.B.A. Model Rules have no provision on the subject, although the comment to the provision on fees suggests that arbitration or mediation, where available, is a preferable method of resolving fee disputes. (A.B.A. Model Rules of Professional Conduct, Rule 1.5, Comment [9].)

The implication that an action for a fee is a type of disfavored action appears to be unfounded in the light of two other considerations: (1) One of the stated justifications for the unlimited power of the client to discharge an attorney (supra, §75) is the right of the attorney to sue for damages for breach of contract. (2) Cases denying the existence of a common law lien for fees (see supra, §166) assert that the normal and proper remedy of the attorney is an action at law against the client. (See *Rest.3d, The Law Governing Lawyers*, §42 [remedies and burden of persuasion]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §301; 2C *Am.Jur. P.P. Forms* (2000 ed.), *Attorneys at Law*, §202 et seq.; Rutter Group, 1 *Professional Responsibility*, §5:1010 et seq.; for discussion of jury instructions in action for fees, see *Sloan v. Stearns* (1955) 137 C.A.2d 289, 298, 290 P.2d 382.)

Actions for fees are, in fact, quite common, and fall into the following classes:

- (1) Actions after full or substantial performance. (See *infra*, §209.)
- (2) Actions after the attorney's withdrawal with or without cause. (See *infra*, §212 et seq.)
- (3) Actions after discharge of the attorney with or without cause. (See *infra*, §215 et seq.)

Except in cases where special statutes govern (e.g., dissolution of marriage, probate; see supra, §§153, 159), the attorney's compensation must be sought in a new, independent action against the client, and not by an application to the court in which the litigation is pending. The reason is that the attorney is not a party to the main action, and a judgment

in the attorney's favor would be void. (*Overell v. Overell* (1937) 18 C.A.2d 499, 503, 64 P.2d 483; see 2 Cal. Proc. (5th), *Jurisdiction*, §315; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §300.)

In probate proceedings, attorneys' fees are recoverable by filing a claim, and no action lies against an executor or administrator. (*Houghton v. Coberly* (1962) 201 C.A.2d 820, 823, 20 C.R. 489; see 14 *Summary* (10th), *Wills and Probate*, §540 et seq.; 13 A.L.R.3d 518 [personal liability of executor or administrator for fees of attorney employed for benefit of the estate].)

Under California's attorney fee arbitration statutes (*B. & P.C. 6200* et seq., *infra*, §221 et seq.) either before or on commencing an action for fees, the attorney must provide the client with a written notice of the client's right to arbitration, and failure to do so may be a ground for dismissal of the action. (*B. & P.C. 6201(a)*, *infra*, §226; C.E.B., 1 Civil Proc. Before Trial 4th, §5.41.)

West's Key Number Digest, Attorney and Client 157.1 et seq.

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2. Performance.

1 Witkin Cal. Proc. Attys § 209

[§ 209] Performance.

The simplest situation is where the attorney is not discharged but fully performs and the client fails to pay the agreed fee or a reasonable charge. The action is for damages for breach of contract, and the measure of damages is ordinarily the agreed fee, whether fixed or contingent. (*Carter v. Baldwin* (1892) 95 C. 475, 478, 30 P. 595 [all services performed except those waived by client]; *Joseph E. Di Loreto v. O'Neill* (1991) 1 C.A.4th 149, 157, 1 C.R.2d 636 [attorney fully performed under contingency fee agreement and was entitled to agreed percentage]; see 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §§273, 303.) If no fee was agreed on, the measure is the reasonable value of the services. (See *Roche v. Baldwin* (1902) 135 C. 522, 525, 67 P. 903; *supra*, §§194, 195.)

If the action is for an agreed fee, interest is recoverable from the time of completion of the services. (See 1 *Summary* (10th), *Contracts*, §888.) If the action is for the reasonable value of services, interest dates from the judgment. (*Johnson v. Marr* (1935) 8 C.A.2d 312, 314, 47 P.2d 489.) (See 29 *A.L.R.3d* 824 [time from which interest begins to run on fee or disbursements owed by client to attorney].)

Interest on contingent fees has been awarded from various dates, including the date of settlement, the date judgment was entered in the client's behalf, the date property was transferred to or became available to the client, and the date of the attorney's demand or judgment in an action for compensation. (See *Joseph E. Di Loreto v. O'Neill*, *supra*, 1 C.A.4th 149, 155 [interest from disbursement dates].)

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3. Prevention of Performance.

1 Witkin Cal. Proc. Attys § 210

[§ 210] Prevention of Performance.

In *Stone v. Carpenter* (1963) 211 C.A.2d 491, 27 C.R. 203, the contingent fee contract called for securing interests in property desired by defendant client. Defendant refused to pay on the ground that a condition in the contract--title quieted--had not been performed; but the evidence showed that defendant had refused to execute the necessary documents. *Held*, the condition was excused. (211 C.A.2d 496.)

It is generally held that, where the death of an attorney employed on a contingent basis occurs before final determination of the case, the attorney's estate may recover the reasonable value of services performed on the subsequent successful termination of the litigation. (See *Cazares v. Saenz* (1989) 208 C.A.3d 279, 256 C.R. 209, *infra*, §214 [applying rule to permit recovery by law firm associated by attorney where firm dissolved prior to completion of case]; 33 A.L.R.3d 1375 [attorney's death affecting compensation under contingent fee contract].)

One kind of prevention apparently leaves the attorney without a remedy. In *Schwartz v. Schwartz* (1953) 119 C.A.2d 102, 259 P.2d 33, the attorney filed a divorce action for plaintiff wife, but the parties later reconciled, and the wife told him to dismiss the case. Instead, he filed a complaint in intervention for conspiracy to deprive him of his fee. Affirming an order striking the pleading, the court said: "Appellant had no right to refuse to follow his client's instruction to dismiss the case and then to assume a position hostile to his own client. Public policy favors the home and normal parenthood and not the disruption and distress which are inherent in the broken home. ... It is one of the occupational hazards of an attorney, in handling domestic relations matters, that time and attention may be devoted to such a case, that emotional stress may be shared with a client and when the maximum good is accomplished in the reconciliation of the parties that the attorney may receive a minimum fee." (119 C.A.2d 105.)

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4. Attorney's Disqualification for Ethical Breach.

1 Witkin Cal. Proc. Attys § 211

[§ 211] Attorney's Disqualification for Ethical Breach.

In *Cal Pak Delivery v. United Parcel Service* (1997) 52 C.A.4th 1, 60 C.R.2d 207, supra, §127, the attorney for plaintiff and the class it sought to represent offered to dismiss the action in exchange for a payment to the attorney personally of \$ 8 million to \$ 10 million, with the class receiving nothing. The trial court disqualified the attorney and ordered that he receive no fees in the case. *Held*, disqualification affirmed, but the order denying fees for services prior to breach was premature.

(a) The general rule is that an attorney who violates his or her ethical duties to a client is not entitled to any fee. (52 C.A.4th 14, discussing prior cases.) However, a partial fee recovery may be allowed (1) if the client does not object; (2) for services rendered before the breach; or (3) on an unjust enrichment theory, if the client's recovery is a direct result of the attorney's services. (52 C.A.4th 16.)

(b) Here, counsel spent 3 years on the case before his ethical breach. It is unknown whether the class will or will not benefit from these efforts. Whether to award fees for those services must await the outcome of the underlying litigation. However, the denial of fees for services rendered *after* the misconduct was clearly proper. (52 C.A.4th 16.) (See *A.I. Credit Corp. v. Aguilar & Sebastinelli* (2003) 113 C.A.4th 1072, 1078, 6 C.R.3d 813 [where trial court disqualified attorney from representing current client in collection action against former client, attorney was not entitled to fees; following *Cal Pak Delivery*].)

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5. Attorney's Voluntary Withdrawal.

a. Recovery Is Allowed When Withdrawal Is for Cause.

1 Witkin Cal. Proc. Attys § 212

[§ 212] Recovery Is Allowed When Withdrawal Is for Cause.

It is generally held that an attorney may recover compensation for services only when the withdrawal is for justifiable cause. Recovery is not allowed if the attorney abandons or withdraws without good cause. (*Hensel v. Cohen* (1984) 155 C.A.3d 563, 567, 202 C.R. 85; *Estate of Falco* (1987) 188 C.A.3d 1004, 1013, 233 C.R. 807, *infra*, §213; see 53 A.L.R.5th 287 [circumstances under which attorney retains right to compensation after voluntary withdrawal from case]; 59 A.L.R.5th 693 [attorney's right to compensation as affected by disbarment or suspension before complete performance]; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §264.)

In *Hensel v. Cohen*, *supra*, the opinion presents this question and answer: "May an attorney accept a personal injury case on a contingent fee basis, determine that it is not worth his time to pursue the matter, instruct his client to look elsewhere for legal assistance, but hedge his bet by claiming a part of the recovery if a settlement is made or a judgment obtained through the efforts of a subsequent attorney? We answer this question with a resounding 'No.' " (155 C.A.3d 564.) (Cf. *Joseph E. Di Loreto v. O'Neill* (1991) 1 C.A.4th 149, 157, 158, 1 C.R.2d 636 [recovery was allowed where withdrawal occurred only after attorney's full performance of obligations under written employment contract; distinguishing *Hensel* and *Falco*].)

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5. Attorney's Voluntary Withdrawal.

b. What Constitutes Good Cause.

1 Witkin Cal. Proc. Attys § 213

[§ 213] What Constitutes Good Cause.

In *Estate of Falco* (1987) 188 C.A.3d 1004, 233 C.R. 807, a will contest involving a contingent fee contract, the attorneys representing four of decedent's five sisters filed a motion to withdraw after their clients had denied them authority to settle the case. The motion was granted on the ground that the attorney-client relationship had completely broken down. The clients, under the trial judge's supervision, then settled, and the attorneys' subsequent petition for fees was denied. *Held*, judgment affirmed.

(a) *Rule governing discharge is not applicable.* *Fracasse v. Brent* (1972) 6 C.3d 784, 100 C.R. 385, 494 P.2d 9, *infra*, §215, held that an attorney discharged with or without cause is entitled to recover the reasonable value of services rendered up to the time of discharge. Also, dicta in *Pearlmutter v. Alexander* (1979) 97 C.A.3d Supp. 16, 20, 158 C.R. 762, applied this rule to withdrawal cases. (188 C.A.3d 1013.) The correct rule, however, is that enunciated in *Hensel v. Cohen* (1984) 155 C.A.3d 563, 202 C.R. 85, *supra*, §212: recovery is permitted only if there was justifiable cause for the withdrawal. (188 C.A.3d 1013.) Petitioners' attempt to distinguish *Hensel*, on the basis of fewer hours spent prior to withdrawal compared to the present case, is misplaced. The crucial element is the existence of justifiable cause, not the quantity of time expended. (188 C.A.3d 1014.)

(b) *Withdrawal for ethical reasons constitutes good cause.* Petitioners argue that their withdrawal was for good cause because, having determined that the case was without merit, they were ethically bound to withdraw by *B. & P.C. 6068(c)* (*infra*, §541), requiring attorneys to maintain only those actions that appear to be legal or just. Although this position has the drawbacks of encouraging attorneys to abandon failing claims under the guise of an ethical duty and requiring trial judges to determine whether withdrawing attorneys were motivated by ethical or financial considerations, it must nevertheless be adopted. Otherwise, there would be the inequity of attorneys compelled to withdraw by the provisions of the ethical codes being denied compensation. (188 C.A.3d 1016.)

(c) *Petitioners lacked ethical cause for withdrawal.* Because petitioners' claim of an ethical cause for withdrawal was based on their determination that the case was without merit, they were required to establish this as a fact. (188 C.A.3d 1015.) There was sufficient evidence to support the trial judge's finding to the contrary; e.g., the subsequent settlement giving the contesting sisters a 36% share of the net balance of the estate, and petitioners' recognition that the

case was not completely without merit by arguing that their proposed settlement was more than any *possible recovery* that could be obtained in a trial. (188 C.A.3d 1017.)

(d) *Client's refusal to settle is not good cause.* A client's right to reject settlement is absolute. The exercise of that right is implicit in the contract between client and attorney, and cannot constitute a breach of contract. Hence, its exercise cannot constitute cause for the purpose of awarding attorneys' fees. (188 C.A.3d 1018, disagreeing with *Pearlmutter*.)

(e) *Recovery is permitted if client later accepts terms negotiated.* "While a client's exercise of the right to reject settlement is not cause for withdrawal, a client should be required to make restitution to the attorney, under a theory of unjust enrichment, if the client subsequently accepts settlement terms substantially similar to those negotiated by the attorney prior to his or her withdrawal." (188 C.A.3d 1019.) Here, there was no unjust enrichment. Petitioners merely offered to settle at a rate of 50%, 3 days before receiving word from their clients denying that petitioners had authority to settle. There are no grounds for disturbing the trial judge's finding that the subsequent settlement, giving all five sisters 36% of the net estate, was not the direct result of petitioners' efforts, but rather was the result of 6 weeks of negotiations under court supervision. (188 C.A.3d 1019.)

(f) *Clients' conduct did not justify petitioners' withdrawal.* Other jurisdictions have recognized that a client's failure to cooperate may be justifiable cause for the attorney's withdrawal. (188 C.A.3d 1019.) However, the clients' failure to heed petitioners' advice concerning settlement did not constitute lack of cooperation, because their right to reject settlement is absolute. (188 C.A.3d 1020.) (See *Rus, Miliband & Smith v. Conkle & Olesten* (2003) 113 C.A.4th 656, 675, 6 C.R.3d 612 [attorneys' claim of "breakdown in communications" with client, without stating factual reasons, did not support good cause withdrawal; following *Estate of Falco*].)

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6. Attorney's Incapacity To Complete Performance.

1 Witkin Cal. Proc. Attys § 214

[§ 214] Attorney's Incapacity To Complete Performance.

In *Cazares v. Saenz* (1989) 208 C.A.3d 279, 256 C.R. 209, defendant S, an attorney of limited experience, represented a Mexican national, G, in a personal injury case, under a retainer agreement authorizing him to retain cocounsel and providing for a contingent fee of 33 1/3%. S associated the firm of C & T, intending to maintain personal contact solely with C because C spoke Spanish and S respected his work in the Mexican-American community. S and C orally agreed to divide the contingent fee evenly. The G complaint was filed in November 1979; in June 1981, the C and T partnership was dissolved, but the G matter was kept as a partnership asset; in May 1982, C was appointed to the municipal bench. In January 1983, T offered to assist in preparation of the case, but S instead associated attorney K and hired M, a young assistant. In April 1983, S settled the case for \$ 1.1 million and received a fee in excess of \$ 366,000, out of which he paid K \$ 40,000 and M \$ 7,000. C claimed that S owed the former partnership more than \$ 183,000, and brought this action. At a trial before a referee by stipulation, the referee gave judgment for the former partners in the sum of \$ 159,833, representing 50% of the fee after deducting the payments to K and M. *Held*, reversed for determination of a fee based on the reasonable value of the services performed.

(a) "Where a contract contemplates the personal services of a party, performance is excused when that party dies or becomes otherwise incapable of performing." (208 C.A.3d 285.) Here, the parties contemplated that C would personally perform the firm's obligations, and he did so for over 2 years. When he became legally incapable of performing by reason of his appointment to the bench, performance by the firm was not technically impossible, but both S and C testified that C's performance was a "basic assumption on which the contract was made." (208 C.A.3d 285.)

(b) Although no case in point has been found, a similar situation occurs when a client hires a firm with the expectation of obtaining the services of a particular attorney. If that attorney dies or becomes incapacitated, the client may discharge the firm subject only to the obligation to compensate the firm for the reasonable value of services rendered before the discharge. "We see no reason why a similar rule should not apply when an attorney on behalf of a client enters into an association agreement with another firm of lawyers. A lawyer who associates a firm on a specific case in order to obtain the services of a particular professional colleague is certainly no less likely than the client to be relying on that colleague's unique legal talents." (208 C.A.3d 286.)

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7. Attorney's Discharge.

a. Former Law.

1 Witkin Cal. Proc. Attys § 215

[§ 215] Former Law.

Formerly, damages an attorney might recover depended on whether the client's discharge was with or without cause. If the discharge was for cause, there was no breach of contract and no action for damages was available. The attorney was entitled only to the reasonable value of services rendered up to the time of termination. (*Salopek v. Schoemann* (1942) 20 C.2d 150, 153, 124 P.2d 21; see *Moser v. Western Harness Racing Assn.* (1948) 89 C.A.2d 1, 8, 200 P.2d 7 [attorney was entitled to contract rate up to time of discharge; following *Salopek*].)

If the discharge was held to be without cause and before performance was completed, the client was in breach, and the attorney could recover contract damages. (*Countryman v. California Trona Co.* (1917) 35 C.A. 728, 736, 170 P. 1069; *Oliver v. Campbell* (1954) 43 C.2d 298, 304, 306, 273 P.2d 15.) If the contract did not clearly provide a method for determining the fee, the reasonable value of the services could be recovered. (*Lessing v. Gibbons* (1935) 6 C.A.2d 598, 608, 45 P.2d 258; *Neblett v. Getty* (1937) 20 C.A.2d 65, 69, 66 P.2d 473; *supra*, §194.) Even if the contract contained express provisions for a fee, the attorney could elect the remedy of rescission and, as restitution, recover the reasonable value of the services. (*Lessing v. Gibbons, supra*, 6 C.A.2d 606.)

In contingent fee agreements, if the discharge was without cause, the attorney was allowed to recover the full amount specified on the completion of the litigation. This was the majority rule. (*Bartlett v. Odd Fellows' Savings Bank* (1889) 79 C. 218, 222, 21 P. 743; *Kirk v. Culley* (1927) 202 C. 501, 506, 261 P. 994; *Zurich General Acc. & Liab. Ins. Co., Ltd. v. Kinsler* (1938) 12 C.2d 98, 100, 81 P.2d 913; *Echlin v. Superior Court* (1939) 13 C.2d 368, 375, 90 P.2d 63; *Jones v. Martin* (1953) 41 C.2d 23, 27, 256 P.2d 905; *Jones v. Brown* (1948) 84 C.A.2d 390, 393, 190 P.2d 956; *Hendricks v. Sefton* (1960) 180 C.A.2d 526, 532, 4 C.R. 218; *Fivey v. Chambers* (1962) 199 C.A.2d 457, 463, 19 C.R. 111; *Brown v. Connolly* (1969) 2 C.A.3d 867, 83 C.R. 158.)

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7. Attorney's Discharge.

b. Current Law: Recovery of Reasonable Value.

1 Witkin Cal. Proc. Attys § 216

[§ 216] Current Law: Recovery of Reasonable Value.

In *Fracasse v. Brent* (1972) 6 C.3d 784, 100 C.R. 385, 494 P.2d 9, California adopted the rule that whether the discharge of the attorney was with or without cause, the measure of damages should be the reasonable value of the attorney's services rendered to the time of discharge. Attorney F was retained by defendant client B to bring an action for personal injuries. In March, 1969, F and B entered into a written agreement providing for a contingent fee of 33 1/3% of any settlement made at least 30 days prior to the trial date and 40% of any recovery obtained thereafter by settlement or judgment. Before any recovery was obtained, B discharged F and retained another attorney. In January 1970, F brought this action for declaratory relief, alleging that the discharge was without cause and praying for a declaration that he had a one-third interest in any sum ultimately recovered in the personal injury action. *Held*, judgment for defendant on demurrer affirmed; the attorney may recover only the reasonable value of services performed.

(a) *Client's power to discharge attorney.* The client's power to discharge an attorney, with or without cause, is absolute. (6 C.3d 790, citing *Gage v. Atwater* (1902) 136 C. 170, 68 P. 581, *supra*, §75.) The language in *Gage* is irreconcilable with the view expressed in *Bartlett v. Odd Fellows' Savings Bank* (1889) 79 C. 218, 21 P. 743, and similar cases (*supra*, §215). "It should be sufficient that the client has, for whatever reason, lost faith in the attorney, to establish 'cause' for discharging him. Otherwise, a client may believe that he has legal cause for discharging an attorney, and subsequently discover that a trial court's contrary conclusion has cost him 73 1/3 percent of a recovered judgment." (6 C.3d 790.)

(b) *Discharge is not a breach.* "We have concluded that a client should have both the power and the right at any time to discharge his attorney with or without cause. Such a discharge does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate that contract at will. It would be anomalous and unjust to hold the client liable in damages for exercising that basic implied right." (6 C.3d 790.)

(c) *The new rule will not work unjustly.* There will be no wholesale discharges of attorneys to save fees; the client would have to pay the first attorney for the reasonable value of services rendered, and this will be a limiting factor. (6 C.3d 791.) Moreover, "[t]o the extent that such discharge occurs 'on the courthouse steps,' where the client executes a

settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services." (6 C.3d 791.)

(d) *No action until contingency occurs.* Because the cause of action is only for the reasonable value of services, the amount involved and the result obtained are significant factors in determining the proper recovery. (6 C.3d 792.) The amount involved is speculative, and the result is impossible to determine, until the main litigation is concluded. It is improper to impose on the client the obligation to pay regardless of the outcome of the litigation, even though the original attorney has been deprived of control over it. "Hence, we believe that the attorney's action for reasonable compensation accrues only when the contingency stated in the original agreement has occurred--i.e., the client has had a recovery by settlement or judgment. It follows that the attorney will be denied compensation in the event such recovery is not obtained." (6 C.3d 792, overruling cases to contrary, supra, §215.)

(e) *Declaratory relief action is also premature.* Framing the complaint as one for declaratory relief did not in the present case justify an action prior to determination of the main litigation. And "[w]hether there might be some circumstances in which a declaratory relief action might properly be brought by an attorney we need not decide." (6 C.3d 793.)

A powerful dissent by two justices attacked the opinion on all points. (6 C.3d 794.) (See *Abrams & Fox v. Briney* (1974) 39 C.A.3d 604, 609, 114 C.R. 328 [*Fracasse* does not preclude recovery of reasonable value of services in action against third party for inducing client's breach of contract]; *Spires v. American Bus Lines* (1984) 158 C.A.3d 211, 216, 204 C.R. 531 [where contingent fee is insufficient to meet quantum meruit claims of discharged and existing attorneys, *Fracasse* requires pro rata distribution]; *Joseph E. Di Loreto v. O'Neill* (1991) 1 C.A.4th 149, 156, 1 C.R.2d 636 [following *Fracasse*]; Rutter Group, 1 Professional Responsibility, §5:1033 et seq.; 56 A.L.R.5th 1 [limitation to quantum meruit recovery].)

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7. Attorney's Discharge.

c. Determining Reasonable Value.

1 Witkin Cal. Proc. Attys § 217

[§ 217] Determining Reasonable Value.

(1) *Hourly Rate.* If the agreed compensation is an hourly rate, a discharged attorney may recover at that rate for services rendered up to the discharge, provided the fee is not unconscionable. (*Oliver v. Campbell* (1954) 43 C.2d 298, 304, 306, 273 P.2d 15; *Countryman v. California Trona Co.* (1917) 35 C.A. 728, 736, 170 P. 1069; cf. *Newmire v. Ford* (1913) 22 C.A. 712, 716, 136 P. 504 [inexperienced attorney, no substantial services undertaken or performed; \$ 1,500 agreed fee was unconscionable and \$ 1,000 recovery was excessive].)

(2) *No Method of Determining Fee.* In *Cazares v. Saenz* (1989) 208 C.A.3d 279, 256 C.R. 209, supra, §214, S, an attorney of limited experience, associated the firm of which C was a partner. The firm subsequently dissolved and rather than work with another member of the dissolved partnership other than C, S associated new counsel. On completion of the case and on a claim by C, the trial court awarded the former partnership 50% of the recovery, the remainder going to replacement counsel. *Held*, reversed to determine reasonable value of service performed by C's former firm.

(a) It is sometimes assumed that the quantum meruit standard applied to legal services includes nothing more than a reasonable hourly rate multiplied by the amount of time spent. But "this is an overly narrow view" when applied to a contingent fee agreement that could not be performed. (208 C.A.3d 287.)

(b) There may be a significant difference in what is reasonable where there is a negotiated fee; "courts traditionally defer to the parties' agreement as the best measure of the value of the contract performance." (208 C.A.3d 287.) Where the contract provides for a contingent fee, there are economic considerations apart from the attorney's work on the case. "In addition to compensation for the legal services rendered, there is the *raison d'être* for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a noncontingent fee for the same case. Usually, the fee is contingent not only on the ultimate success of the case but also on the amount recovered. ... Thus, the lawyer runs the risk that even if successful, the amount recovered will yield a percentage fee which does not provide adequate compensation." (208 C.A.3d 288.)

(c) In addition to the contingent nature of the fee, the attorney agrees to delay receipt of the fee until the conclusion

of the case, which is often years in the future. The attorney in effect finances the case during its pendency, and the cost can be significant. (208 C.A.3d 288.)

(d) In this case, the parties agreed on a reasonable fee for the entire case, and the attorney performed; the reasonable value of the services may then be measured by the attorney's or firm's pro rata share of the contract price. (208 C.A.3d 289.) However, there may be a difference between the pro rata contract price and the reasonable value of partially performed legal services; and the pro rata contract price has always been viewed as an upper limit on a quantum meruit recovery. (208 C.A.3d 289.) "The formula we propose, however, indicates that the pro rata contract price should control even where it *exceeds* the reasonable value of the services adjusted for the contingency factors and delayed payment considerations." (208 C.A.3d 289.)

(e) This view is contrary to the position of the Contracts Restatement, but has the support of case law and commentators, and is a sound approach. "Because 'reasonable value' is such an amorphous concept, it makes no sense to ignore the best evidence of that value as expressed in the parties' agreement. Especially in this type of case, where the contract is between associated attorneys, an unforeseen event which renders complete performance by one party impossible should not result in a windfall to the other attorney. In essence, having contracted with the lawyer or firm to pay a particular fee, the associating attorney is estopped to deny that the pro rata contract price accurately measures the reasonable value of the services rendered." (208 C.A.3d 290.) (See C.E.B., 1 Civil Proc. Before Trial 4th, §5.45; supra, §199 et seq.)

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d. Recovery of Interest and Costs.

1 Witkin Cal. Proc. Attys § 218

[§ 218] Recovery of Interest and Costs.

(1) *Interest*. Interest is ordinarily recoverable from the date of discharge of the attorney, regardless of whether the principal sum awarded was liquidated or unliquidated. (See 29 A.L.R.3d 824, 835; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §276.)

(2) *Costs*. Costs are recoverable by a discharged attorney. However, in contingency agreements, the action may only be brought on the occurrence of the contingency, i.e., recovery by the client. In *Kroff v. Larson* (1985) 167 C.A.3d 857, 213 C.R. 526, plaintiff attorney was hired by defendants to represent them in a personal injury action. The agreement provided for a contingent fee and for reimbursement of costs out of recovery. After plaintiff filed the action, defendants discharged him and retained another attorney. In plaintiff's action to recover the costs advanced, a general demurrer was sustained on the ground that the action was premature. *Held*, judgment on demurrer affirmed.

(a) Plaintiff argued that *Fracasse v. Brent* (1972) 6 C.3d 784, 100 C.R. 385, 494 P.2d 9, *supra*, §216, was not controlling because that case involved the recovery of attorneys' fees, not costs advanced. "We do not read *Fracasse* so narrowly." (167 C.A.3d 860.) While the speculativeness of a fee dependent on the result obtained was one factor considered in *Fracasse*, the court also "was concerned that a client not be burdened with any financial obligation to his former attorney before the occurrence of the stated contingency." (167 C.A.3d 860.)

(b) The agreement here expressly provides for reimbursement of costs out of any recovery. "Recovery was therefore the contingency which had to occur before the client was obligated to reimburse the attorney for costs." (167 C.A.3d 860.) Because defendant's obligation to reimburse plaintiff will only mature, if at all, on the occurrence of the agreed contingency of recovery, plaintiff's action is premature. (167 C.A.3d 861.)

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7. Attorney's Discharge.

e. Discharge of Attorney-Employee.

1 Witkin Cal. Proc. Attys § 219

[§ 219] Discharge of Attorney-Employee.

In *General Dynamics Corp. v. Superior Court* (1994) 7 C.4th 1164, 32 C.R.2d 1, 876 P.2d 487, 3 Summary (10th), *Agency and Employment*, §§237, 246, plaintiff was discharged as in-house counsel for defendant corporation. He sued defendant for wrongful termination on two theories: violation of an implied contract that he would not be terminated without good cause, and retaliatory discharge in violation of public policy. *Held*, an attorney-employee can sue for wrongful discharge.

(a) Under *Fracasse v. Brent* (1972) 6 C.3d 784, 100 C.R. 385, 494 P.2d 9, *supra*, §216, a personal injury client can discharge an attorney with or without cause. However, it is not the rule that all legal clients may unilaterally terminate the attorney-client relationship under all circumstances without consequences. Thus, employers of in-house counsel are not immune from liability for wrongful termination. (7 C.4th 1174, 1175.) While the client's right to discharge an attorney at any time is an important value that should be upheld in most cases, the legal consequences of that act will vary, depending on the strength of competing interests that are present in a particular case. (7 C.4th 1176.)

(b) Although defendant had a right to discharge a member of its general counsel in whom it had lost confidence, it could not do so without honoring antecedent contractual obligations. Further, the implied-in-fact limitations on defendant's right to discharge plaintiff did not present issues implicating the distinctive values subserved by a relationship between a client and independent counsel. (7 C.4th 1178, 1179.)

(c) An in-house counsel may maintain a tort claim for retaliatory discharge of employment in violation of public policy. Attorneys owe a dual allegiance: to the client, but also, unlike nonattorneys, to professional and ethical norms, including norms that incorporate important public values. (7 C.4th 1181.) More than with outside counsel, corporate in-house counsel may be faced with a moral dilemma between ethical norms and the client's interest, because in-house counsel is dependent on one employer to provide a livelihood and career success. Therefore, an in-house counsel faced with a choice between the demands of an employer and the requirements of an ethical code has an even greater claim to judicial protection than a nonattorney employee. (7 C.4th 1182.)

(d) In determining whether an in-house attorney has a retaliatory discharge claim against the employer, a court must

first ask whether the attorney was discharged for following a mandatory ethical obligation prescribed by a professional rule or statute. If in-house counsel is asked to commit a crime or to engage in an act of moral turpitude that would subject him to disbarment and is discharged for refusing to do so, under most circumstances the attorney would have a retaliatory discharge cause of action against the employer. If, on the other hand, the conduct in which the attorney has engaged is merely ethically permissible, but not required by statute or ethical code, then the inquiry facing the court is more complex. The court must resolve two questions: (1) whether the employer's conduct is of the kind that would give rise to a retaliatory discharge action by a nonattorney employee; and (2) whether some statute or ethical rule specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the nonfiduciary conduct for which he was terminated. (7 C.4th 1188, 1189.)

(e) However, an in-house attorney's right to pursue an action for retaliatory discharge is limited by the following considerations:

(1) The values that underlie the professional relationship between an attorney and a client can be protected from the threat of damage by limiting judicial access to claims grounded in explicit and unequivocal ethical norms embodied in the Rules of Professional Conduct and statutes, and claims that are maintainable by a nonattorney employee. The in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts. (7 C.4th 1189, 1190.)

(2) The contours of the statutory attorney-client privilege should continue to be strictly observed. (7 C.4th 1190.) "[T]he trial courts can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege. The use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings, are but some of a number of measures that might usefully be explored by the trial courts as circumstances warrant." (7 C.4th 1191.)

(3) The plaintiff bears the burden of establishing the unequivocal requirements of the ethical norm at issue and that the employer's conduct was motivated by impermissible considerations under a "but for" standard of causation. (7 C.4th 1191.)

In *Chyten v. Lawrence & Howell Inv.* (1993) 23 C.A.4th 607, 612, 615, 46 C.R.2d 459, C, a salaried attorney-employee, brought an action against his former employer, claiming that he was discharged without cause despite a 5-year employment contract. C recovered damages under the contract, and the employer appealed, arguing that C was limited to the reasonable value of the services rendered prior to his discharge. *Held*, affirmed. The contract, which was freely negotiated between the employer and the attorney, permitted termination only for cause. Under these circumstances, *Fracasse v. Brent*, *supra*, does not apply, and a provision requiring payment of compensation on termination without cause was enforceable. (23 C.A.4th 612, 615.) (See *Fox Searchlight Pictures v. Paladino* (2001) 89 C.A.4th 294, 308, 106 C.R.2d 906, *supra*, §90 [in wrongful termination action, terminated in-house counsel was permitted to disclose confidential information to her attorney without disqualification of her attorney; following *General Dynamics Corp.*]; 30 U.C. Davis L. Rev. 483 [impact of duty to maintain client confidences on in-house attorney's ability to state claim for retaliatory discharge]; 16 A.L.R.5th 239 [in-house counsel's right to maintain action for wrongful discharge].)

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H. Arbitration or Mediation of Fee Disputes.

1. In General.

a. Methods Available.

1 Witkin Cal. Proc. Attys § 220

[§ 220] Methods Available.

(1) *Arbitration.* Arbitration of attorney-client fee disputes has been suggested as a preferable alternative to actions for the recovery of fees. Fee disputes are a proper subject of arbitration, and a written contract to arbitrate a present or future fee controversy is valid and enforceable. (*C.C.P. 1280, 1281*; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§517, 518; 26 *A.L.R.5th* 107 [validity and construction of agreement between attorney and client to arbitrate disputes between them]; C.E.B., *Civil Litigation Forms Manual* §§2.1, 2.2 [forms relating to agreements to arbitrate disputes]; A.B.A. *Model Rules of Professional Conduct*, Rule 1.5, Comment [9] [attorneys should consider submitting fee disputes to arbitration or mediation, where available]; on applicability of arbitration agreement to nonfee disputes, see *infra*, §331.) Arbitration of fee disputes is mandatory when requested by clients. (See *infra*, §221 et seq.)

(2) *Mediation.* Mediation of fee disputes is also authorized. The Board of Governors may establish and administer a system for mediation. (*B. & P.C. 6200(a)*.) The rules governing arbitration must also apply to mediation. (*B. & P.C. 6200(d), (f)*.) (On State Bar's alternative dispute resolution mediation program and minimum standards for mediation of attorney-client disputes, see *Rules of Procedure of the State Bar, Rule 4401* et seq.; *infra*, §574.)

Mediation is voluntary for both attorney and client. (*B. & P.C. 6200(c)*.) It is a voluntary consensual process, based on direct negotiations between attorney and client, and is an extension of the negotiated settlement process. "All discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration or other proceedings." (*B. & P.C. 6200(h)*.)

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1. In General.

b. Nature and Purpose of Arbitration Program.

1 Witkin Cal. Proc. Attys § 221

[§ 221] Nature and Purpose of Arbitration Program.

B. & P.C. 6200 et seq. provide for the arbitration of attorney-client fee disputes. Unless the client has agreed in writing to arbitration under the statute regarding disputes over fees, costs, or both, arbitration is voluntary for a client and "mandatory for an attorney if commenced by a client." (*B. & P.C. 6200(c)*.) The statute applies to services of members of the State Bar of California and of other bars. (*B. & P.C. 6200(a)*.) (See C.E.B., 1 Civil Proc. Before Trial 4th, Chap. 5; *17 A.L.R.4th* 993 [validity of statute or rule requiring arbitration of attorney-client fee disputes].) The fee arbitration statutes are commonly referred to as the Mandatory Fee Arbitration Act (MFAA). (See *Maynard v. Brandon* (2005) 36 *C.4th* 364, 30 *C.R.3d* 558, 114 *P.3d* 795, *infra*, §231; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 *C.A.4th* 1076, 1088, 29 *C.R.3d* 499, *infra*, §227.)

In *Alternative Systems v. Carey* (1998) 67 *C.A.4th* 1034, 79 *C.R.2d* 567, plaintiff client sought to vacate an arbitrator's award rendered pursuant to a written fee agreement with defendant attorney. The agreement called for binding arbitration with the American Arbitration Association. Plaintiff had sought an advisory arbitration under the mandatory fee arbitration statutes then in effect (*B. & P.C. 6200* et seq.), and at all times objected to the arbitration initiated by defendant. The trial judge confirmed the award for defendant. *Held*, reversed.

(a) *Fee agreement provision violates client's statutory rights.* The fee arbitration statutes afford clients important procedural protections. The procedure is voluntary for the client, unless the client has agreed in writing to a fee arbitration under *B. & P.C. 6200* et seq. The arbitration initiated by the client may be advisory. (67 *C.A.4th* 1041.) Moreover, *B. & P.C. 6204(a)* (*infra*, §231) ensures the client a trial after arbitration unless, after the fee dispute has arisen, the parties agree to be bound by the award. Prospective waivers of trial after arbitration are contrary to the intent and spirit of the fee arbitration statutes and are not allowed. Thus, giving finality to the award here would violate plaintiff's statutory rights. (67 *C.A.4th* 1042.)

(b) *Arbitrator exceeded powers.* The fee arbitration statutes in effect when plaintiff invoked its protection preempted the arbitration provision in the fee agreement. Thus, the arbitrator exceeded his powers by purporting to render a binding award under authority of the preempted provision. (67 *C.A.4th* 1044.)

In *Aguilar v. Lerner* (2004) 32 C.4th 974, 12 C.R.3d 287, 88 P.3d 24, plaintiff client signed a written retainer agreement with defendant attorney that included a provision calling for arbitration of all disagreements or claims relating to plaintiff's legal matters that might arise from defendant's representation, including fees. Following a dispute, plaintiff discharged defendant and sued for legal malpractice. On defendant's motion, the trial court compelled binding arbitration in which defendant prevailed and was awarded attorneys' fees and costs. Plaintiff's motion to vacate was denied, and the award was confirmed. In part, plaintiff argued that the agreement to arbitrate was invalid and unenforceable because it was contrary to the fee arbitration statutes (*B. & P.C. 6200 et seq.*), and that the statutes superseded the agreement. *Held*, judgment affirmed. The parties arbitrated their dispute according to California's arbitration law (*C.C.P. 1280 et seq.*; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §499 et seq.), properly invoked by defendant in response to plaintiff's action. Mandatory fee arbitration is a separate and distinct arbitration procedure that applies only to disputes concerning legal fees, costs, or both. Thus, *B. & P.C. 6200 et seq.* were potentially relevant only because defendant sought fees and costs in addition to resolution of the dispute. (32 C.4th 983.) However, under *B. & P.C. 6201(d)(2)* (*infra*, §227), a client's right to request or maintain arbitration is waived when the client seeks affirmative relief against the attorney for damage based on alleged malpractice or professional misconduct. Thus, when plaintiff filed his action, he waived all rights under the fee arbitration statutes, and the arbitration agreement with defendant was enforceable. (32 C.4th 987.)

A concurring justice argued that the agreement to arbitrate was enforceable under *C.C.P. 1280 et seq.* for the fundamental reason that an "agreement for binding arbitration between an attorney and a client is enforceable ... *whether or not* the client requests and receives nonbinding arbitration" under the fee arbitration statutes, and that the two arbitration acts coexist, neither one preempting or superseding the other. (32 C.4th 990.) The concurrence also questions the continuing validity of *Alternative Systems v. Carey*, *supra*; should *Alternative Systems* remain valid, "a client who agreed to binding arbitration could evade that agreement simply by requesting nonbinding arbitration." (32 C.4th 993.) (See *Ervin, Cohen & Jessup, LLP v. Kassel* (2007) 147 C.A.4th 821, 828, 54 C.R.3d 685 [binding arbitration provision in retainer agreement was enforceable where client, after notice and fair opportunity, failed to take advantage of statutory mandatory fee arbitration; following *Aguilar*].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Mandatory fee arbitration does not preclude enforcement of preexisting arbitration agreement:* In *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C.4th 557, 87 C.R.3d 700, 198 P.3d 1109, plaintiff retained defendant attorney regarding a partnership dispute. The signed agreement contained an arbitration provision extending to any dispute arising out of the representation including disputes over fees or costs. Later, without entering into another agreement, plaintiff retained defendant in another matter in which plaintiff made only partial payments. Defendant invoked the arbitration provision of the earlier agreement. Although there was disagreement as to whether the earlier agreement applied, the parties agreed to nonbinding arbitration under the Mandatory Fee Arbitration Act (MFAA). Defendant prevailed, and plaintiff sought a trial de novo. In response, defendant petitioned to compel binding arbitration under the preexisting agreement. In opposition, plaintiff argued that the MFAA, as construed by *Alternative Systems v. Carey* (1998) 67 C.A.4th 1034, 79 C.R.2d 567, text, p. 293, invalidated the binding arbitration agreement. Defendant argued that *Aguilar v. Lerner* (2004) 32 C.4th 974, 12 C.R.3d 287, 88 P.3d 24, text, p. 293, impliedly abrogated *Alternative Systems*, and that binding arbitration would satisfy the MFAA's de novo trial requirement. The trial court agreed with plaintiff and denied defendant's petition to compel arbitration. The Court of Appeal affirmed. *Held*, judgment of Court of Appeal reversed and case remanded.

(a) *Aguilar* expressly left open the question of whether, at the conclusion of the MFAA arbitration, a client could defeat a motion to compel arbitration pursuant to a preexisting attorney-client agreement. However, as the concurring opinion in *Aguilar* soundly argued, where the parties through a preexisting binding arbitration agreement have agreed to a proceeding other than judicial action to resolve their controversy, it is enforceable whether or not a client requests and receives nonbinding arbitration under the MFAA. (45 C.4th 569.)

(b) Once the fee arbitration process is validly completed under the MFAA, a dissatisfied party may proceed with an

action "or other proceeding" subject only to the provisions of *B. & P.C. 6204*. The "other proceeding" may be binding arbitration as nothing in *B. & P.C. 6200* et seq. forecloses the possibility that under a general agreement between the parties the nonbinding MFAA process may be followed by binding arbitration "rather than by a lawsuit." (*45 C.4th 572.*)

(c) The MFAA did not impliedly repeal California's arbitration act (CAA; *C.C.P. 1280* et seq.). The MFAA concerns nonbinding arbitration not agreed to in advance by the parties, while the CAA governs contractual binding arbitration. Thus, giving effect to both the MFAA and the CAA is "consistent with the distinct purposes behind both of those statutory schemes." (*45 C.4th 575.*)

(d) Whether the arbitration provisions in the parties' agreement for the first representation were applicable to this dispute was not addressed by the Court of Appeal because of the court's conclusion that contractual arbitration was categorically unavailable. Thus, the Court of Appeal is to address the issue on remand. (*45 C.4th 575*, footnote 4.)



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1. In General.

c. Administration by State Bar.

1 Witkin Cal. Proc. Attys § 222

[§ 222] Administration by State Bar.

(1) *Statutory Authorization.* *B. & P.C. 6200(a)* requires the Board of Governors of the State Bar to establish and administer a system for fee arbitrations. The system must allow for arbitration under programs sponsored by local bar associations, but local rules may be reviewed to ensure that they provide for a "fair, impartial, and speedy hearing and award." (*B. & P.C. 6200(d)*; see *B. & P.C. 6092.5(g)*, *infra*, §573 [State Bar disciplinary agency must provide information to prospective complainants regarding fee arbitration procedures].)

(2) *Governing Rules.* The State Bar has adopted rules for fee arbitration proceedings entitled "Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California," which are cited in this chapter as Rules of Procedure for Fee Arbitrations. The rules are organized as follows:

Article I. Definitions (Rule 1.0).

Article II. Arbitration Generally (Rules 2.0-9.0).

Article III. State Bar Program (Rules 10.0-14.0).

Article IV. Initiation of Arbitration Proceeding (Rules 15.0-20.0).

Article V. Panels (Rules 21.0-24.5).

Article VI. The Hearing (Rules 25.0-36.0).

Article VII. Award (Rules 37.0-38.0).

Article VIII. Enforcement of the Arbitration or Mediation Award (Rules 39.0-45.0).

Article IX. Service; Address (Rules 46.0-47.0).

The Rules of Procedure of the State Bar govern the enforcement of fee arbitration awards. (See *infra*, §232.)

Fee arbitration programs sponsored by local bar associations must meet Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, as approved by the State Bar.

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1. In General.

d. Exceptions to Arbitration Requirement.

1 Witkin Cal. Proc. Attys § 223

[§ 223] Exceptions to Arbitration Requirement.

The mandatory fee arbitration statutes do not apply to the following:

(1) Disputes with an attorney who is admitted to practice both in California and in another jurisdiction, or who is admitted to practice only in another jurisdiction, and who maintains no office in California, when "no material portion of the services" were rendered in California. (*B. & P.C. 6200(b)(1).*)

(2) Claims for affirmative relief "for damages or otherwise based upon alleged malpractice or professional misconduct," except as provided in *B. & P.C. 6203(a)*. (*B. & P.C. 6200(b)(2)*; see *infra*, §§228, 229.)

(3) Disputes concerning fees or costs determined under statute or court order. (*B. & P.C. 6200(b)(3).*)

(4) Arbitration sought when the time for filing a civil action requesting the same relief would be barred by the statute of limitations, unless the attorney has already filed a civil action. (*B. & P.C. 6206.*) (See Rules of Procedure for Fee Arbitrations, Rule 5.0 [restating exceptions contained in *B. & P.C. 6200(b)*], Rule 12.0 [power to decline jurisdiction in excluded cases].)

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1. In General.

e. Scope of Jurisdiction.

1 Witkin Cal. Proc. Attys § 224

[§ 224] Scope of Jurisdiction.

In *National Union Fire Ins. Co. v. Stites Professional Law Corp.* (1991) 235 C.A.3d 1718, 1 C.R.2d 570, N, the insurer of a bank, was obligated under its policy to indemnify the bank for defense costs incurred in actions against the bank's directors and officers. The FDIC sued the bank and various of its officers and directors, one of whom retained S to represent him. After settlement of the action, N disputed S's charges and initiated arbitration of the dispute under B. & P.C. 6200 et seq. *Held*, the arbitrators did not have subject matter jurisdiction of the dispute.

(a) B. & P.C. 6200 et seq. refer to arbitration of disputes between attorneys and their clients to whom they have rendered professional services, and the statute is limited to those disputes. (235 C.A.3d 1727.)

(b) N had no duty to defend but was merely obligated under its policy to indemnify the bank for costs incurred in the defense of the action. S was not hired by N and had no duty to N. "These facts do not coincide with the usual tripartite relationship of insurer-attorney-insured where the insurer, in fulfillment of its duty to defend, hires defense counsel and controls the prosecution of the defense." (235 C.A.3d 1728.) Hence, it was rational to conclude that N was not S's client and that the mandatory arbitration statute did not apply. (235 C.A.3d 1728.) (See Rules of Procedure for Fee Arbitrations, Rule 4.4 [fee disputes are not subject to arbitration at request of nonclient].)

Although *Stites* concluded that arbitrators under B. & P.C. 6200 et seq. lack subject matter jurisdiction regarding the existence of an attorney-client relationship, nothing in *Stites* or the statute precludes the parties from conferring that jurisdiction by agreement. (*Glassman v. McNab* (2003) 112 C.A.4th 1593, 1599, 6 C.R.3d 293.) In *Glassman*, G requested payment for services to M, who sought arbitration on the claim under B. & P.C. 6200 et seq. The parties executed a written stipulation for binding arbitration, and the stipulation noted that jurisdiction and the existence of an attorney-client relationship were pending issues. The arbitrators found in G's favor and issued a detailed award, concluding that an attorney-client relationship existed and that G was entitled to fees. The trial court confirmed the award. M contended that the arbitrators lacked jurisdiction to decide the attorney-client relationship issue. *Held*, affirmed.

(a) The statute must be viewed in the context of the general arbitration statutes (C.C.P. 1280 et seq., 6 Cal. Proc.

(5th), *Proceedings Without Trial*, §502 et seq.), under which written agreements to arbitrate are generally valid, enforceable, and irrevocable (*C.C.P. 1281*). Thus, *B. & P.C. 6200* et seq. permit the parties to agree that arbitrators may decide the existence of an attorney-client relationship. (*112 C.A.4th 1599*.)

(b) *B. & P.C. 6203(a)* requires that an award must determine all questions submitted to the arbitrators necessary in deciding the controversy. Here, the award stated that the parties had signed a written stipulation for binding arbitration as to all issues. Thus, the arbitrators understood the stipulation to mean that the "parties had not agreed that there was an attorney-client relationship for the purposes of section 6200 et seq., and that they had chosen the arbitration as the forum in which this threshold issue would be determined with finality." (*112 C.A.4th 1602*.)

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2. Procedure.

a. Arbitrators.

1 Witkin Cal. Proc. Attys § 225

[§ 225] Arbitrators.

(1) *Panels.* Fee disputes are arbitrated by one-person or three-person arbitration panels. At the client's request, the panel must include one attorney whose area of practice is either civil or criminal law, depending on whether the attorney's representation involved civil or criminal law. (*B. & P.C. 6200(e)*; Rules of Procedure for Fee Arbitrations, Rule 20.0.)

Panels are assigned from the State Bar's pool of arbitrators and consist of one attorney arbitrator for disputes involving \$ 10,000 or less, and three arbitrators for other disputes, unless the parties agree to a single arbitrator. (Rules of Procedure for Fee Arbitrations, Rule 20.1.) A three-member panel must include one lay member. (*B. & P.C. 6200(e)*; Rules of Procedure for Fee Arbitrations, Rule 20.1.)

(2) *Authority of Arbitrators.* An arbitrator may do all of the following:

(a) Take and hear evidence pertaining to the proceeding. (*B. & P.C. 6200(g)(1)*.)

(b) Administer oaths and affirmations. (*B. & P.C. 6200(g)(2)*.)

(c) By subpoena, compel the attendance of witnesses and the production of books, papers, and documents. (*B. & P.C. 6200(g)(3)*.)

(3) *Immunity of Arbitrators.* The same immunity that attaches in judicial proceedings is accorded to arbitrators, as well as to the arbitrating association and its directors, officers, and employees. (*B. & P.C. 6200(f)*.)

(4) *Disqualification of Arbitrators.* Either party may disqualify one arbitrator without cause and has unlimited challenges for cause. (*B. & P.C. 6204.5*; Rules of Procedure for Fee Arbitrations, Rule 22.0.)

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2. Procedure.

b. Notice, Request, and Stay.

1 Witkin Cal. Proc. Attys § 226

[§ 226] Notice, Request, and Stay.

(1) *Notice of Right to Arbitration.* Before or at the time of service of the summons or claim in an action by an attorney for the recovery of fees, the attorney must provide the client with a written notice that states the client's right to arbitration. Failure to give notice is grounds for dismissal of the action. (*B. & P.C. 6201(a)*; Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, Guideline II.) (See *Richards, Watson & Gershon v. King* (1995) 39 C.A.4th 1176, 1179, 1180, 46 C.R.2d 169 [under *B. & P.C. 6201(a)*, dismissal for failure to give required notice is discretionary rather than mandatory]; *Wager v. Mirzayance* (1998) 67 C.A.4th 1187, 1190, 79 C.R.2d 661 [attorney's action to recover fees was dismissed for failure to give required notice]; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 C.A.4th 1076, 1088, 29 C.R.3d 499, *infra*, §227 [in action by law firm to recover on promissory note, trial court erred in determining that it was compelled to dismiss for failure to give client notice of right to arbitrate; dismissal is discretionary and it was clear that there was no discretionary review by trial court; following *Richards*]; *Philipson & Simon v. Gulsvig* (2007) 154 C.A.4th 347, 366, 64 C.R.3d 504 [attorney's failure to comply with notice requirements did not require dismissal where client was already pursuing claim in court action and goal of judicial efficiency would be achieved by permitting attorney's cross-claims in same forum].)

The time frame in which the notice must be given is narrow. The notice is effective only after an actual fee dispute has arisen. (*Huang v. Cheng* (1998) 66 C.A.4th 1230, 1234, 78 C.R.2d 550 [notice mailed to client 2 days after bill for services was ineffective where attorney filed action for fees 2 years later].)

(2) *Request for Arbitration and Stay of Proceedings.* On receipt of the summons and notice and before filing an answer, the client may serve and file a request for arbitration. The filing fee is 5% of the disputed amount. (*B. & P.C. 6201(b)*; Rules of Procedure for Fee Arbitrations, Rule 14.0; on service and filing of documents, see Rules 46.0, 47.0; on request for waiver of filing fee, see Rule 15.0; for form, see State Bar website: www.calbar.ca.gov.) The attorney's action is then stayed until the issuance of the arbitration award, or until the arbitration is otherwise terminated, unless the court finds that "the matter is not appropriate for arbitration." (*B. & P.C. 6201(c)*; Rules of Procedure for Fee Arbitrations, Rule 8.0; see *Loeb & Loeb v. Beverly Glen Music* (1985) 166 C.A.3d 1110, 1117, 212 C.R. 830 [application for attachment was properly excluded from stay].)

A party who has requested or caused a stay for arbitration under *B. & P.C. 6201* must immediately file a notice of the stay and attach a copy of the document staying the proceedings. (C.R.C., Rule 3.650(a).) When a stay is terminated or modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification. If that party fails to do so, any other party having knowledge of the termination or modification must serve and file the notice. Once one party has done so, other parties are relieved of the service and filing obligations. (C.R.C., Rule 3.650(d).) (See Judicial Council Forms No. CM-180 [Notice of Stay of Proceedings]; Judicial Council Form No. CM-181 [Notice of Termination or Modification of Stay].)

(3) *Tolling of Limitations Period.* Initiation of arbitration tolls the time for filing a civil action until (a) 30 days after receipt of notice of the arbitrators' award, or (b) receipt of notice that the arbitration is otherwise terminated, whichever occurs first. (*B. & P.C. 6206.*)

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2. Procedure.

c. Waiver of Right to Arbitration.

1 Witkin Cal. Proc. Attys § 227

[§ 227] Waiver of Right to Arbitration.

(1) *Waiver by Filing Answer.* The client waives the right to arbitration by failing to request arbitration before filing an answer in an action brought by the attorney, if the required notice of the client's right to arbitration was given. (*B. & P.C. 6201(b)*; Rules of Procedure for Fee Arbitrations, Rule 7.1.)

(2) *Waiver by Failing To Request Arbitration.* The client waives the right to arbitration by failing to request arbitration within 30 days after receipt of the notice from the attorney, or within 15 days after the State Bar mails an arbitration packet in response to the client's request for arbitration, whichever is later. (*B. & P.C. 6201(a)*; Rules of Procedure for Fee Arbitrations, Rules 7.3.)

(3) *Waiver by Bringing Action.* The client waives the right to request or maintain arbitration by commencing an action or filing a pleading seeking either (a) judicial resolution of the dispute, or (b) affirmative relief against the attorney based on alleged malpractice or professional misconduct. (*B. & P.C. 6201(d)*; Rules of Procedure for Fee Arbitrations, Rule 7.2.) (See *Aguilar v. Lerner (2004) 32 C.4th 974, 987, 12 C.R.3d 287, 88 P.3d 24*, supra, §221 [client's action for malpractice waived all rights under fee arbitration statutes]; *Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 C.A.3d 1165, 1174, 199 C.R. 246* [clients' filing of cross-complaint seeking affirmative relief after two arbitrations was not waiver; clients' request for arbitration waived their right to return to court before end of arbitration]; *Juodakis v. Wolfrum (1986) 177 C.A.3d 587, 592, 223 C.R. 95* [arbitration panel's partial award to client was set aside where client filed malpractice action against attorney prior to announcement of award]; *Philipson & Simon v. Gulsvig (2007) 154 C.A.4th 347, 366, 64 C.R.3d 504* [client waived right to arbitration by filing cross-complaint seeking affirmative relief for attorney's breach of professional obligations notwithstanding attorney's failure to comply with arbitration notice requirements].)

(4) *Waiver by Delay.* In *Law Offices of Dixon R. Howell v. Valley (2005) 129 C.A.4th 1076, 29 C.R.3d 499*, plaintiff law firm sought recovery on defendant client's promissory note for unpaid fees. Defendant filed a general denial and included the affirmative defense that plaintiff was estopped from recovering fees because of plaintiff's failure to advise defendant of the right to arbitrate the dispute as required by *B. & P.C. 6201* (supra, §226). However, over the 15-month course of the action, defendant never sought arbitration. The case proceeded to court-ordered arbitration, with

an award for plaintiff, which defendant rejected. The trial court then denied plaintiff's motion for summary judgment on the ground that plaintiff failed to give the notice, and concluded that defendant did not waive the right to arbitration by answering the complaint. Six days before trial, the trial court granted defendant's motion to dismiss. *Held*, reversed; having waived arbitration, defendant also waived the defense of lack of notice, and summary judgment should have been granted.

(a) Although *B. & P.C. 6201* provides specific circumstances for waiver, these are not exclusive. Nothing in the statute suggests that the only way a client may waive arbitration when an attorney fails to give notice is by filing an action seeking either resolution of the fee dispute or affirmative relief for malpractice or professional misconduct. (129 *C.A.4th* 1099.)

(b) The mere assertion of the right to arbitrate does not permit subsequent conduct that amounts to waiver. It is not sufficient for the client to raise mandatory fee arbitration or the absence of notice as an affirmative defense, and then allow extensive litigation to proceed without a further assertion of the right to arbitrate. Here, defendant's lengthy delay in bringing a motion to dismiss and extensive participation in the litigation process were entirely inconsistent with the right to arbitrate. This conduct resulted in critical prejudice to plaintiff, and thus constituted waiver. (129 *C.A.4th* 1103.)

(5) *Setting Aside Waiver*. If the client has waived arbitration, the parties may stipulate to set aside the waiver and proceed to arbitration. (*B. & P.C. 6201(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Waiver by Bringing Action*. See *Fagelbaum & Heller LLP v. Smylie* (2009) 174 *C.A.4th* 1351, 1362, 95 *C.R.3d* 252 [client's cross-demand for arbitration with American Arbitration Association was deemed pleading seeking affirmative relief; hence, filing of cross-demand waived right to mandatory fee arbitration].



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2. Procedure.

d. Arbitration Hearing.

1 Witkin Cal. Proc. Attys § 228

[§ 228] Arbitration Hearing.

(1) *Venue*. A fee dispute is heard in the county in which substantial legal services were performed, except as ordered otherwise on a showing of good cause. A request for a change of venue must be served on the State Bar. If made by the client, the request must be served no later than 15 days after the request for arbitration is filed; if made by the attorney, the request must be mailed no later than 15 days after the request for arbitration is served. (Rules of Procedure for Fee Arbitrations, Rule 12.0.)

(2) *Time of Hearing*. The parties must be notified of the appointment of the panel within 60 days after the arbitration request and response have been received, or within 60 days after the time for a response has expired. (Rules of Procedure for Fee Arbitrations, Rule 21.0; on disqualification and challenge, see Rules of Procedure for Fee Arbitrations, Rule 22.0, *supra*, §225.) The hearing must begin within 45 days for a single arbitrator, and 90 days for a three-member panel, after the notice of assignment of a panel. The hearing may be continued 15 days because of a disqualification or challenge, or for a longer period by stipulation or application and on a showing of good cause; a continuance for 30 days or more must be decided by the presiding arbitrator. (Rules of Procedure for Fee Arbitrations, Rule 30.1.)

(3) *Counsel and Appearance*. Counsel may be employed by either party at his or her own expense. (Rules of Procedure for Fee Arbitrations, Rule 6.0.) Personal appearance may be waived. (Rules of Procedure for Fee Arbitrations, Rule 26.0.) Substitution of a personal representative, guardian, or conservator is authorized on the death or incompetency of a party. (Rules of Procedure for Fee Arbitrations, Rule 27.0.)

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2. Procedure.

e. Evidence and Privilege.

1 Witkin Cal. Proc. Attys § 229

[§ 229] Evidence and Privilege.

(1) *Evidence.* The panel determines the manner of proof. (Rules of Procedure for Fee Arbitrations, Rule 34.0.) Subpenas and subpenas duces tecum may be issued. (Rules of Procedure for Fee Arbitrations, Rule 29.0.) Testimony of witnesses must be under oath, administered by the panel chair (Rules of Procedure for Fee Arbitrations, Rule 32.0), unless testimony and exhibits by declarations are permitted (Rules of Procedure for Fee Arbitrations, Rule 26.1). Stipulations and the voluntary exchange of documents are encouraged. (Rules of Procedure for Fee Arbitrations, Rule 31.0.) Both reporters and interpreters may be provided at a party's personal expense. (Rules of Procedure for Fee Arbitrations, Rules 35.0, 36.0.)

All relevant evidence on which responsible persons might rely is admissible, regardless of any common law or statutory rule to the contrary. (Rules of Procedure for Fee Arbitrations, Rule 33.0.)

Evidence relating to claims of malpractice and professional misconduct may be received by the arbitrators only to the extent the claims bear on the fees or costs to which the attorney is entitled. (*B. & P.C. 6203(a)*; Rules of Procedure for Fee Arbitrations, Rule 37.6.)

(2) *Attorney-Client Privilege.* Relevant communications between the attorney and the client, and the work product for which the disputed fee has been demanded, may be disclosed at the arbitration hearing, at a trial after arbitration, or in connection with judicial review of an arbitration award. However, the disclosure is not a waiver of the confidential character of the matters for any other purpose. (*B. & P.C. 6202*; see Rules of Procedure for Fee Arbitrations, Rule 25.0 [confidentiality of proceedings].)

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2. Procedure.

f. Arbitration Award.

1 Witkin Cal. Proc. Attys § 230

[§ 230] Arbitration Award.

(1) *Issuance.* A sole arbitrator must make the award within 15 days of the close of the hearing; a three-member panel must do so within 25 days. (Rules of Procedure for Fee Arbitrations, Rule 37.1.) The award must be in writing and signed by the arbitrators concurring in it. It must determine all questions submitted, "the decision of which is necessary in order to determine the controversy." (*B. & P.C. 6203(a)*; Rules of Procedure for Fee Arbitrations, Rules 37.2, 37.3.) With the award, the State Bar, or a local bar association delegated by the State Bar to conduct the arbitration, must deliver an original declaration of service of the award to each party. (*B. & P.C. 6203(a)*.)

(2) *No Award for Malpractice or Professional Misconduct.* The arbitrators may not award affirmative relief in the form of damages, offset or otherwise, for injuries underlying a claim of malpractice or professional misconduct. (*B. & P.C. 6203(a)* [statute must not be construed to prevent arbitrators from awarding refund of unearned prepaid fees or costs]; Rules of Procedure for Fee Arbitrations, Rule 37.6.)

(3) *Confirmation, Correction, or Vacation.* The award becomes binding, even if the parties have not agreed in writing to be bound, 30 days after mailing of notice of the award, unless a party, within the 30 days, seeks a trial after arbitration under *B. & P.C. 6204*. (*B. & P.C. 6203(b)*; see *infra*, §231.) The award may be "confirmed, corrected, or vacated by petition to the court having jurisdiction over the amount of the arbitration award" if no action is pending in any court; if an action has previously been filed, the petition should be to the court in which the action is pending. (*B. & P.C. 6203(b)*.) Confirmation, correction, or vacation of the award is in the manner provided in *C.C.P. 1285* et seq. (*B. & P.C. 6203(b)*; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §612; Judicial Council Form No. ADR-103 [Petition to Confirm, Correct, or Vacate Attorney-Client Fee Dispute Arbitration Award]; on correction of award by arbitrators, see Rules of Procedure for Fee Arbitrations, Rule 38.0.)

The time within which a prevailing client may petition for correction and confirmation of an award is tolled while an action by the attorney after arbitration (see *infra*, §231) is pending. (*Shepherd v. Greene* (1986) 185 C.A.3d 989, 994, 230 C.R. 233.)

(4) *Attorneys' Fees in Arbitration Proceeding.* The arbitrators may not award to either party attorneys' fees incurred

in connection with the arbitration, even if the parties' contract provides for such an award, but may allocate the filing fee between the parties. (*B. & P.C. 6203(a)*; Rules of Procedure for Fee Arbitrations, Rule 37.8.)

The court confirming, correcting, or vacating an award may award reasonable fees and costs, including fees or costs on appeal, to the prevailing party (the "party obtaining judgment confirming, correcting, or vacating the award"). However, a party who did not appear at the arbitration hearing in the manner provided by the rules is not entitled to attorneys' fees or costs on confirmation, correction, or vacation of the award. (*B. & P.C. 6203(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Confirmation, Correction, or Vacation.* See *Loeb v. Record* (2008) 162 C.A.4th 431, 450, 75 C.R.3d 551 [attorney failed to follow proper procedure for confirming award in his favor where he filed motion for partial disbursement of judgment in underlying personal injury action rather than first filing petition to confirm award as required by *B. & P.C. 6203(b)*].

B. & P.C. 6203(b) was amended in 2009 to refer to *service* rather than *mailing* of notice of the award.



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2. Procedure.

g. Trial After Arbitration.

1 *Witkin Cal. Proc. Attys* § 231

[§ 231] Trial After Arbitration.

(1) *Right to Trial After Arbitration.* Unless the parties have agreed in writing to be bound by the award, either may obtain a trial after arbitration if sought within 30 days. (*B. & P.C. 6204(a)*; see *Liska v. The Arns Law Firm* (2004) 117 C.A.4th 275, 288, 12 C.R.3d 21 [where parties agreed to be bound by award under mandatory fee arbitration statutes, they were bound with respect to fees, but award did not foreclose client's subsequent action for claims unrelated to fees, and client was not bound by arbitrators' factual findings made in course of explaining their award].) The State Bar, or the local bar association conducting the arbitration, must deliver to the parties a notice advising them of their rights to judicial relief subsequent to the arbitration proceeding. (*B. & P.C. 6204.5(b)*; see Rules of Procedure for Fee Arbitrations, Rule 37.9.) (See Judicial Council Form No. ADR-104 [Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration]; Judicial Council Form No. ADR-105 [Information Regarding Rights After Attorney-Client Fee Arbitration].)

In *Corell v. Law Firm of Fox & Fox* (2005) 129 C.A.4th 531, 28 C.R.3d 310, the retainer agreement between firm F and client C contained extensive arbitration provisions and permitted F to obtain a lien for security for its fees by recording a deed of trust on C's home. After receiving an initial award in a fee dispute that was less than requested, F sought a trial de novo, but later dismissed it when C sought arbitration pursuant to the retainer agreement. Following an order to compel arbitration, F failed to proceed as ordered. C sought judicial relief from the lien; F opposed the motion and cross-complained for the original fee amount. The trial court dismissed all pleadings before it, concluding that the matter was under the jurisdiction of an arbitrator. *Held*, reversed as to C's complaint, and affirmed as to F's cross-complaint. F's dismissal of the trial de novo and fee action amounted to termination of the de novo proceedings, thus resulting in the finality of the mandatory fee arbitration award. Arbitrations under the mandatory fee arbitration statutes are similar to judicial arbitrations. Both systems serve a legislative and public purpose by providing a relatively informal and inexpensive process to resolve qualifying disputes. Further, both systems provide for a trial de novo after an award, and for finality of that award if further action is not promptly initiated. In both cases abandonment of the de novo proceedings by the party that has invoked them to supersede the award may be treated as a retraction of that rejection of the award. (129 C.A.4th 537; following *Herbert Hawkins Realtors v. Milheiser* (1983) 140 C.A.3d 334, 189 C.R.450, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §620.)

(2) *Right Waived by Wilful Failure To Appear.* A party who wilfully fails to appear for arbitration is not entitled to a trial after arbitration. Wilfulness is determined by the court, which may consider any findings of the arbitrators on the subject. The party who failed to appear has the burden of proof on the issue. (B. & P.C. 6204(a).)

(3) *Procedure for Initiating Trial.* If there is an action pending, the trial is initiated by filing a rejection of the arbitration award and a request for trial after arbitration in that action within 30 days after the mailing of notice of the award. If the plaintiff in the pending action files a rejection of the arbitration award, all defendants must file a responsive pleading within 30 days following service of the rejection and request for trial. If the defendant in the pending action files a rejection, all defendants must file a responsive pleading within 30 days after filing of the rejection and request for trial. Service may be made by mail on any party who has appeared, and otherwise must be made as provided in C.C.P. 413.10 et seq. A stay entered under B. & P.C. 6201 is vacated, without necessity of a court order, upon service and filing of the rejection of the award. (B. & P.C. 6204(b); see supra, §226.)

If no action is pending, the trial is initiated by commencing an action in the court having jurisdiction over the amount in controversy within 30 days after the mailing of notice of the award. The action then proceeds in the manner of civil actions generally. (B. & P.C. 6204(c); see *McAvoy v. Harvey L. Lerer* (1995) 35 C.A.4th 1128, 1129, 1132, 41 C.R.2d 803 [C.C.P.12a (computation of time where last day for performance is holiday; see 2 Cal. Proc. (5th), Courts, §§50, 51) applies to computation of 30-day period in which to file complaint after service of award].)

(4) *No Relief From Default.* Relief from default under C.C.P. 473(b) (see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144) is not available for failure to timely request a new trial. In *Maynard v. Brandon* (2005) 36 C.4th 364, 30 C.R.3d 558, 114 P.3d 795, plaintiff attorney brought an action to recover fees, defendants invoked their right under the Mandatory Fee Arbitration Act (MFAA) to compel arbitration, and the arbitration panel awarded fees. Defendants' new counsel mailed a rejection of the award to plaintiff, but the rejection was not filed with the court until after the 30-day period for seeking a trial de novo had expired. Defendants sought relief under C.C.P. 473(b). The trial court confirmed the award and denied defendants' motion for relief, concluding that the 30-day deadline was not subject to relief under C.C.P. 473(b). In reversing, the Court of Appeal likened the MFAA procedures for a new trial to a trial de novo following judicial arbitration and reasoned that relief under C.C.P. 473(b), available in connection with failure to timely seek trial a de novo in judicial arbitration, should also be available here. *Held*, Court of Appeal reversed with instructions to reinstate the trial court's judgment.

(a) Although having broad application, C.C.P. 473(b) does not offer relief from mandatory deadlines deemed to be jurisdictional, such as the time in which a party must move for a new trial. (36 C.4th 372.) Moreover, permitting relief under C.C.P. 473(b) would undermine the finality of binding fee awards, force clients into hiring counsel to pursue C.C.P. 473(b) litigation, and "worsen the disparity in bargaining power between clients and attorneys. These results would conflict with the Legislature's design in enacting the MFAA." (36 C.4th 377.)

(b) Mandatory fee arbitration and judicial arbitration are not analogous as reasoned by the Court of Appeal. Most importantly, where the judicial arbitration statutes expressly authorize relief under C.C.P. 473, the MFAA does not. In addition, judicial arbitration is an adjunct to litigation, but fee arbitration under the MFAA need not involve the courts and may take place without reference to the judicial system. The systems serve different policy goals, and fostering the public confidence in the attorney-client relationship significantly rests with the MFAA. Even if the unavailability of C.C.P. 473(b) relief might penalize clients who are untimely in requesting a new trial, clients ultimately benefit from an arbitration system that produces binding results when the parties are tardy in invoking the judicial process. Thus, C.C.P. 473(b) relief in connection with judicial arbitration "does not alter the inflexible nature of the 30-day time limit for seeking a trial following fee arbitration under the MFAA." (36 C.4th 382.)

(5) *Costs and Fees.* The prevailing party in the trial after arbitration is the party seeking trial "if that party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party." The court may allow the prevailing party costs and attorneys' fees "incurred in the trial after arbitration." In fixing attorneys' fees, "the court shall consider the award and determinations of the arbitrators, in

addition to any other relevant evidence." (*B. & P.C. 6204(d).*)

(6) *Effect of Award When Trial After Arbitration Is Sought.* Except for the determination of the prevailing party and the amount of attorneys' fees, "the award and determinations of the arbitrators shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding." (*B. & P.C. 6204(e).*)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Procedure for Initiating Trial.* As used in *B. & P.C. 6204(b)*, "action pending" refers to "a lawsuit in which the parties include both the attorney and the client who had their fee dispute arbitrated." (*Loeb v. Record* (2008) 162 C.A.4th 431, 445, 75 C.R.3d 551 [fee award in favor of attorney became binding where client's motion in pending personal injury action underlying fee dispute did not qualify as action in opposition to award and was not equivalent to initiating trial after arbitration].)

B. & P.C. 6204(b) and (c) were amended in 2009 to refer to *service* rather than *mailing* of notice of the award.(4a) (*New*) *Effect of Dismissal of Action.* In *Perez v. Grajales* (2008) 169 C.A.4th 580, 86 C.R.3d 784, plaintiff attorney brought an action following a mandatory fee arbitration award in favor of defendant client, and defendant brought a cross-complaint. Following protracted delays and pretrial motions, defendant sought dismissal for failure to timely bring the action to trial and also sought confirmation of the arbitration award; plaintiff sought dismissal of defendant's action on the same ground. The trial court granted the motions to dismiss the actions and denied defendant's motion to confirm the fee award. *Held*, affirmed as to the order dismissing defendant's cross-complaint; reversed as to the denial of defendant's motion to confirm the award with an order for the trial court to confirm the award and enter judgment for defendant.

(a) No decision has yet addressed the legal effect of an involuntary dismissal of an action following a party's rejection of a fee arbitration award under the Mandatory Fee Arbitration Act (MFAA). However, other decisions concerning judicial arbitration have followed the rule that a voluntary dismissal of a trial de novo may result in a repudiation of the party's prior rejection of the arbitration award. There is no reason the rule should not apply equally to MFAA arbitrations. (169 C.A.4th 601.)

(b) Although the other decisions concerned a party's voluntary dismissal of the action, there is no practical distinction between a voluntary dismissal and one that is involuntary based on a party's failure to diligently prosecute the action. "In either case, after the party has rejected the MFAA arbitration award by filing a de novo request, the party effectively repudiates that rejection by causing or permitting the action's dismissal, thereby divesting the court of jurisdiction to decide the controversy." (169 C.A.4th 602; following *Herbert Hawkins Realtors v. Milheiser* (1983) 140 C.A.3d 334, 189 C.R. 450, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §620.)

(c) Treating the involuntary dismissal as effectively reinstating the rejected MFAA award is consistent with the Supreme Court's view of the de novo process, i.e., that trial de novo under the MFAA incorporates a procedure analogous to a conventional appeal. Thus, because a dismissal of an appeal is the functional equivalent of affirmance, "there is logic to the conclusion that the dismissal of [defendant's] complaint resulted in the reinstatement or affirmance of the arbitration award." (169 C.A.4th 602, 603.)



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H. Arbitration or Mediation of Fee Disputes.

3. Enforcement of Award.

a. In General.

1 Witkin Cal. Proc. Attys § 232

[§ 232] In General.

(1) *Placement of Attorney on Inactive Status.* The State Bar is charged with enforcing unpaid arbitration fee awards by placing the attorney on involuntary inactive status. (*B. & P.C. 6203(d).*) *B. & P.C. 6203(d)* applies to any matter in which (a) the award includes a refund of fees, costs, or both, to the client; (b) the award is binding or has become binding by operation of law or has become a judgment after either confirmation under *B. & P.C. 6203(c)* (*supra*, §230) or trial under *B. & P.C. 6204* (*supra*, §231); and (c) the attorney has not complied with the award. (*B. & P.C. 6203(d)(1).*) The sanctions also apply to attorneys who fail to comply with mediation agreements (*supra*, §220). (*B. & P.C. 6203(d).*)

(2) *Grounds for Enforcement.* The award, judgment, or agreement must be enforced if either (a) the State Bar shows that the attorney has not complied with a binding award, judgment, or agreement rendered under *B. & P.C. 6200* et seq. or (b) the attorney has not proposed a payment plan acceptable to the client or the State Bar. Enforcement is barred if the attorney demonstrates that he or she is not personally responsible for making or ensuring payment or is unable to pay. (*B. & P.C. 6203(d)(2).*)

(3) *State Bar Rules.* Rules of Procedure for Fee Arbitrations, Rule 39.0 et seq., govern enforcement proceedings up to the filing of a motion to place the attorney on temporary inactive status. (Rules of Procedure for Fee Arbitrations, Rule 39.0.) *Rules of Procedure of the State Bar, Rule 700* et seq. govern proceedings to place the attorney on inactive status. (*Rules of Procedure of the State Bar, Rule 700.*)

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3. Enforcement of Award.

b. Proceedings To Enforce Award.

1 Witkin Cal. Proc. Attys § 233

[§ 233] Proceedings To Enforce Award.

(1) *Request for Enforcement.* A request for enforcement under *B. & P.C. 6203(d)* must be made within 4 years from the date the award is mailed, the judgment is entered, or the agreement is signed. The request may not be made prior to 100 days from either the date of service of a signed copy of the award or, if the award is appealed, the date the award becomes final. (*B. & P.C. 6203(d)(5)*; see Rules of Procedure for Fee Arbitrations, Rule 40.1.) Prior to making the request, the client must make reasonable efforts to contact the attorney to arrange for payment. (Rules of Procedure for Fee Arbitrations, Rule 40.2.) The request for enforcement is served on the attorney by the State Bar. (Rules of Procedure for Fee Arbitrations, Rule 40.3.)

(2) *Response and Payment Plan.* The attorney must respond within 30 days of the date of service of the request. The attorney may (a) provide satisfactory proof of compliance with the award, (b) agree to a satisfactory payment plan, or (c) provide acceptable reasons for noncompliance. (Rules of Procedure for Fee Arbitrations, Rule 41.1; on payment plans, see Rules of Procedure for Fee Arbitrations, Rule 42.0.) If the attorney does not respond, the presiding arbitrator must file a motion to place the attorney on temporary inactive status. (Rules of Procedure for Fee Arbitrations, Rule 41.2.)

An award may not be enforced if the attorney is not personally responsible for making or ensuring payment or is unable to pay the award. (*B. & P.C. 6203(d)(2)*.) An attorney claiming lack of responsibility or inability to pay should provide reasons for that belief in the response; the presiding arbitrator or designee may hold a hearing and decide the matter. (Rules of Procedure for Fee Arbitrations, Rule 43.0.)

(3) *Penalties and Costs.* An attorney who has failed to comply with a binding award, judgment, or agreement must pay administrative penalties or reasonable costs, or both, as directed by the State Bar. Penalties may not exceed 20% of the amount of the award or \$ 1,000, whichever is greater, and unpaid penalties or costs must be added to the attorney's membership fee for the next calendar year. (*B. & P.C. 6203(d)(3)*.)

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c. Proceedings for Inactive Enrollment.

1 Witkin Cal. Proc. Attys § 234

[§ 234] Proceedings for Inactive Enrollment.

(1) *Motion and Response.* If the attorney does not (a) agree to a payment plan, (b) prove an inability to pay or a lack of personal responsibility for the award, or (c) prove compliance with the payment plan, the presiding arbitrator or designee may petition the State Bar Court to place the attorney on temporary inactive status. The proceedings are governed by the State Bar's Rules of Procedure (see *infra*, §632 et seq.). (Rules of Procedure for Fee Arbitrations, Rule 44.0; see Rules of Procedure for Fee Arbitrations, Rule 41.2 [motion to be filed if attorney fails to respond to request for enforcement]; Rules of Procedure for Fee Arbitrations, Rule, 42.3 [motion to be filed if attorney ceases to comply with approved payment plan].)

The motion must be accompanied by a certified copy of the arbitration award and documents and exhibits that are necessary to establish that the requirements of *B. & P.C. 6203(d)* for involuntary enrollment are met. (*Rules of Procedure of the State Bar, Rule 701(a)*; on service of motion and subsequent proceedings, see *Rules of Procedure of the State Bar, Rule 701(b), (c).*)

The attorney's response must be filed within 10 days of service of the motion, and may be supported by declarations and exhibits. (*Rules of Procedure of the State Bar, Rule 702(a).*) If no response is filed, the court may file an order, effective 5 days after service, placing the attorney on involuntary inactive enrollment. (*Rules of Procedure of the State Bar, Rule 702(b).*)

(2) *Hearing.* If requested in the response, a hearing must be set on not less than 20 days' notice. (*Rules of Procedure of the State Bar, Rule 704.*) The presiding arbitrator has the burden of showing either (a) the attorney's noncompliance with the arbitration award and failure to propose an acceptable payment plan, or (b) the attorney's noncompliance with an agreed on payment plan. (*Rules of Procedure of the State Bar, Rule 705(a).*) The attorney has the burden of showing (a) lack of personal responsibility for the award, (b) inability to pay the award, or (c) proposal of a payment plan that the State Bar unreasonably rejected. (*Rules of Procedure of the State Bar, Rule 705(b).*) The hearing is limited to those issues (*Rules of Procedure of the State Bar, Rule 707(a)*), and the burden of proof is by clear and convincing evidence (*Rules of Procedure of the State Bar, Rule 705*). The declarations in support and response are admitted in evidence (*Rules of Procedure of the State Bar, Rule 707(b)*), but the declarants must be made available for

cross-examination if requested in writing (*Rules of Procedure of the State Bar, Rule 707(c)*).

(3) *Ruling and Review.* The court must issue a written order on the motion. (*Rules of Procedure of the State Bar, Rule 708(a)*.) If granted, the order is effective 5 days after service (*Rules of Procedure of the State Bar, Rule 708(b)(1)*), and the State Bar may recover reasonable costs under *B. & P.C. 6203(d)(3)* (*supra*, §233) (*Rules of Procedure of the State Bar, Rule 708(b)(2)*). If the court finds that the State Bar unreasonably rejected a proposed payment plan, it may deny the motion and order compliance with a plan satisfactory to the court. (*Rules of Procedure of the State Bar, Rule 708(c)*.) The ruling is subject to review under *Rules of Procedure of the State Bar, Rule 300* (*infra*, §594), but an order granting the motion is not stayed unless ordered by the court. (*Rules of Procedure of the State Bar, Rule 709*.)

(4) *Termination of Inactive Enrollment.* The board must terminate inactive enrollment on proof that the attorney has complied with the award, judgment, or agreement, and on payment of assessed costs or penalties. (*B. & P.C. 6203(d)(4)*.) The attorney may file a motion for termination, accompanied by declarations and proof of payment, with service on the presiding arbitrator. The presiding arbitrator has 10 court days after service to respond. On filing of the response or the expiration of time to do so, the court must promptly issue an order. If it finds that the award and any costs or penalties have been paid, it must terminate forthwith the involuntary inactive enrollment. (*Rules of Procedure of the State Bar, Rule 710*.)

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A. In General.

1. General Rules of Agency Apply.

1 Witkin Cal. Proc. Attys § 235

[§ 235] General Rules of Agency Apply.

Generally speaking, an attorney is the agent of the client (*supra*, §43), and the client as principal is bound by the attorney's acts within the scope of the attorney's actual (express or implied) or apparent or ostensible authority, or by unauthorized acts ratified by the client. As the court said in *Fidelity & Cas. Co. of New York v. Abraham* (1945) 70 C.A.2d 776, 161 P.2d 689: "But the rules governing the attorney-client relation are founded on the general rules governing the relation of principal and agent. In this respect the rule is universal that, notwithstanding the lack of express or apparent authority in the agent his act is binding on the principal if the latter ratifies it and accepts the benefits of the agent's act." (70 C.A.2d 783.) (See *Britschgi v. McCall* (1953) 41 C.2d 138, 142, 257 P.2d 977 [no implied authority to accept tender of performance due client]; *Redsted v. Weiss* (1945) 71 C.A.2d 660, 664, 163 P.2d 105 [implied authorization and ratification]; *Nellis v. Massey* (1952) 108 C.A.2d 724, 728, 239 P.2d 509 [ordinarily no implied authority to make binding contracts for client, authority to negotiate only]; *Yanchor v. Kagan* (1971) 22 C.A.3d 544, 549, 99 C.R. 367, *infra*, §248, citing the text [ostensible authority]; *Fresno v. Baboian* (1975) 52 C.A.3d 753, 757, 125 C.R. 332, *infra*, §249; *Rest.3d, The Law Governing Lawyers* §§26, 27; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §147 et seq.; 2C Am.Jur. P.P. Forms (2000 ed.), *Attorneys at Law*, Form 80 et seq.; 3 Am.Jur. Legal Forms 2d (2003 ed.), §30:76 et seq. [contract clauses granting express authority to perform various acts]; on authority to engage associates or assistants, see *supra*, §44.)

The authority of an attorney, like that of an agent, may be established by the testimony (or affidavit) of the attorney. Moreover, a client who challenges the attorney's act cannot object to that testimony on the theory that it involves privileged communications. (*Fleschler v. Strauss* (1936) 15 C.A.2d 735, 739, 60 P.2d 193; *Pacific Tel. & Tel. Co. v. Fink* (1956) 141 C.A.2d 332, 335, 296 P.2d 843; see 2 Cal. Evidence (4th), *Witnesses*, §161.)

C.C.P. 283 relates to the authority of an attorney (see *infra*, §§259, 266 et seq.) and at first glance appears to limit that authority to a few narrowly defined situations. However, the statute is not interpreted as a limitation; its chief effect is to prescribe the form of stipulations. (See *Preston v. Hill* (1875) 50 C. 43, 53; *Redsted v. Weiss*, *supra*, 71 C.A.2d 663; *infra*, §266.)

West's Key Number Digest, Attorney and Client 62 et seq.

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A. In General.

2. Distinctions.

1 Witkin Cal. Proc. Attys § 236

[§ 236] Distinctions.

The description of the attorney as an agent and of authority in terms of agency principles (*supra*, §235) is, nevertheless, not wholly reliable. The following should also be borne in mind in considering the effect of the attorney's acts:

(1) *Officer of the court.* The attorney is an officer of the court (*supra*, §4), and his or her duties and authority may be expanded or contracted by legal and ethical rules that regulate the practice of law. Hence, an attorney's status as a licensed attorney allows the attorney to do some things that cannot find support in the principles of agency, and some acts that might be within an attorney's authority and the scope of the attorney's duties as an agent are forbidden as an attorney at law. (See 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §§4, 5.)

(2) *Attorney of record.* An attorney, though actually *authorized*, may be unable to take effective action in a legal proceeding if he or she has not become formally the attorney of record; and, though actually *unauthorized*, may take some effective action if he or she is attorney of record. (See *supra*, §78 et seq.; *infra*, §239.)

(3) *Inquiry about scope of authority.* One should normally make inquiry of the principal concerning the scope of the authority of the agent (see 3 *Summary* (10th), *Agency and Employment*, §133), but ethical rules preclude inquiry of the client directly by the adverse party's attorney. (See *Rules of Professional Conduct*, Rule 2-100, *infra*, §§422, 423; A.B.A. Model Rules of Professional Conduct, Rule 4.2; *Burns v. McCain* (1930) 107 C.A. 291, 297, 290 P. 623.)

(4) *Status as independent contractor.* The attorney is called an agent for the purpose of indicating the nature and extent of the attorney's authority. For other purposes, such as liability of the principal in tort or for workers' compensation, the attorney is usually considered an independent contractor. (See *supra*, §43.)

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A. In General.

3. Presumption of Authority.

1 Witkin Cal. Proc. Attys § 237

[§ 237] Presumption of Authority.

The attorney's status as an officer of the court, and his or her sole power to act in legal proceedings, which distinguish an attorney from an ordinary agent, are the bases for a strong presumption of authority. (See *Security Loan & Trust Co. v. Estudillo* (1901) 134 C. 166, 169, 66 P. 257 ["An attorney is an officer of the court, and the presumption is that he acted within the scope of his employment"]; *Gagnon Co. v. Nevada Desert Inn* (1955) 45 C.2d 448, 460, 289 P.2d 466 [presumption was invoked to sustain trial court's determination that attorney had authority to dismiss action with prejudice]; *Dale v. City Court of Merced* (1951) 105 C.A.2d 602, 607, 234 P.2d 110 [presumption was invoked to sustain inferior court's determination, on conflicting evidence, that counsel in misdemeanor case had authority to change plea from not guilty to guilty]; *Pacific Tel. & Tel. Co. v. Fink* (1956) 141 C.A.2d 332, 338, 296 P.2d 843 [attorney's authority to enter into stipulation]; *Fresno v. Baboian* (1975) 52 C.A.3d 753, 757, 125 C.R. 332, *infra*, §249 [ratification by clients]; *Phelps v. Kozakar* (1983) 146 C.A.3d 1078, 1082, 194 C.R. 872 [presumption and attorney's representation of authority were sufficient to establish authority, where clients presented no evidence in opposition].)

The presumption may be overcome. (See *Knowlton v. Mackenzie* (1895) 110 C. 183, 188, 42 P. 580 [presumption was explained but was overcome by evidence of adverse party's knowledge of excess of authority]; *Burns v. McCain* (1930) 107 C.A. 291, 297, 290 P. 623 [presumption was overcome by showing of express limitations on authority]; *Corcoran v. Arouh* (1994) 24 C.A.4th 310, 315, 316, 29 C.R.2d 326 [presumption was overcome by uncontradicted evidence that attorney had no authority to act on litigant's behalf].)

One of the most useful applications of the presumption is where an attorney appears in an action on behalf of the client. In the absence of a strong showing of no authority, the client is deemed to have submitted to the jurisdiction of the court, and the adverse party or opposing counsel may safely deal with the appearing attorney. In *Pacific Paving Co. v. Vizelich* (1903) 141 C. 4, 74 P. 352, the court quoted with approval the following dictum from an earlier case: "It is always presumed ... that an attorney is duly authorized to appear for and represent any parties for whom he assumes to act. This confidence, which underlies all judicial action in this country, rests not only upon a belief in the honor and integrity of the attorney, but upon the fact that he is a sworn officer of the court." (141 C. 8.) (See *Milrot v. Stamper Med. Corp.* (1996) 44 C.A.4th 182, 187, 51 C.R.2d 424, citing the text [presumption does not apply in absence of evidence that party was client of attorney who appeared]; on effect of appearance, and challenge of unauthorized appearance, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §192 et seq.)

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A. In General.

4. Duty To Inform Client of Settlement Offer.

1 Witkin Cal. Proc. Attys § 238

[§ 238] Duty To Inform Client of Settlement Offer.

An attorney's authority to unilaterally reject settlement offers is restricted by both statute and rule.

In *civil* cases, the attorney must promptly communicate to the client all amounts, terms, and conditions of a *written* settlement offer. The term "client" includes any person employing the attorney who possesses the authority to accept an offer of settlement, or, in a class action, who is a representative of the class. (*B. & P.C. 6103.5(a); Rules of Professional Conduct, Rule 3-510(A)(2)*, *infra*, §445; see *C.E.B., 3 Civil Proc. Before Trial 4th*, §46.23.)

In *criminal* cases, the attorney must communicate the terms and conditions of *any* offer. (*Rules of Professional Conduct, Rule 3-510(A)(1)*, *infra*, §445.)

Written settlement offers and required communications of settlement offers are discoverable in actions in which the existence or communication of the settlement offer is a factual issue. (*B. & P.C. 6103.5(b)*.)

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B. Client With Attorney of Record.

1. Attorney Must Take Legal Steps.

1 Witkin Cal. Proc. Attys § 239

[§ 239] Attorney Must Take Legal Steps.

A party may, of course, appear in pro. per. and conduct his or her own case without counsel. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §193.) However, if a party is represented by counsel in the particular proceeding, i.e., if an attorney has made an authorized appearance for the party and has become an attorney of record, the client has no direct control over the proceeding. All legal steps must ordinarily be taken by the attorney. (*Daley v. Butte* (1964) 27 *C.A.2d* 380, 391, 38 *C.R.* 693.)

In the early leading case of *Board of Commrs. of Funded Dept. of San Jose v. Younger* (1865) 29 *C.* 147, the court held that a stipulation for dismissal of the action, signed by plaintiffs personally and not by their attorney of record, was ineffectual, saying: "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney he must be heard through him, and it is indispensable to the decorum of the Court, and the due and orderly conduct of a cause that such attorney shall have the management and control of the action and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record the Court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney the law points out a remedy. He may move the Court for leave to change his attorney. ... Until that has been done, the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the Court unless the same is signed or assented to by such attorney. ... Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary. Moreover ... it is proper to add, that to entirely ignore the attorney of record and enter, without his consent, into secret negotiation with his client touching the management of his case, is unbecoming the dignity of the legal profession, and destructive of that courtesy which is due from one member to another." (29 *C.* 149.)

Subsequent cases involving the same procedural step--attempted dismissal of the action by the party--have reaffirmed the rule, pointing out that statutory terms referring to "the plaintiff" or "either party" are not to be taken literally. The terms merely state the right of dismissal by one party without the consent of the other; they do not change the rule that the procedural step must be taken for the party by the party's attorney of record. (*Toy v. Haskell* (1900) 128 *C.* 558, 560, 61 *P.* 89; *Boca & Loyalton R. Co. v. Superior Court* (1907) 150 *C.* 153, 157, 88 *P.* 718.)

Decisions involving other procedural steps reach the same conclusion. Hence, a party alone cannot effectively

extend time. (*Wylie v. Sierra Gold Co.* (1898) 120 C. 485, 487, 52 P. 809; *Koehler v. D. Ferrari & Co.* (1916) 29 C.A. 487, 156 P. 69.) A party cannot set a cause for trial and make a demand for a jury. (*Anglo Calif. Trust Co. v. Kelly* (1928) 95 C.A. 390, 393, 272 P. 1080.) A party with an attorney of record cannot file a brief in pro. per. (*Electric Util. Co. v. Smallpage* (1934) 137 C.A. 640, 642, 31 P.2d 412.)

An unusual and questionable application of this rule appears in *People v. Merkouris* (1956) 46 C.2d 540, 297 P.2d 999. Defendant, accused of murder, personally withdrew his plea of not guilty by reason of insanity. Held, it was an abuse of discretion to allow this in view of his counsel's "implied objection." (46 C.2d 554.)

A distinguishable situation, but involving the same principle, was involved in *Goetz v. Superior Court* (1958) 49 C.2d 784, 322 P.2d 217. The court said that the required statutory notice to a losing adverse party must be signed and served by the prevailing party's attorney. Hence, a notice of a court commissioner's order denying a husband's application for modification of an alimony award, served on the husband's attorney by the deputy clerk, did not start the statutory time running. (49 C.2d 786.)

The fact that one of several codefendants is an attorney does not give that defendant authority to act for the codefendants who have attorneys of record. (*Epley v. Califro* (1958) 49 C.2d 849, 854, 323 P.2d 91.)

One of the few exceptions to the rule is made in the Appellate Rules, which expressly allow either the party or the attorney to sign a notice of appeal. (C.R.C., Rule 8.100; see *supra*, §79; 9 Cal. Proc. (5th), *Appeal*, §573.)

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2. Adverse Party Must Deal With Attorney.

1 Witkin Cal. Proc. Attys § 240

[§ 240] Adverse Party Must Deal With Attorney.

Those on the adverse side of the litigation must deal with a party's attorney of record and not with the party personally. Thus, where a statute prescribes service of notices or other papers on a party, the service must be on the party's attorney of record. (*McMunn v. Lehrke* (1915) 29 C.A. 298, 307, 155 P. 473 [notice that case was set for trial, mailed to defendant personally, was ineffective]; *Lydykainen v. Industrial Acc. Com.* (1939) 36 C.A.2d 298, 301, 97 P.2d 993 [notice of hearing was mailed to petitioner personally; order against him, without representation by counsel, was void for failure to serve attorney].)

The Rules of Professional Conduct prohibit direct negotiations with a party represented by counsel without the attorney's consent. (See *Rules of Professional Conduct, Rule 2-100*, *infra*, §§422, 423; A.B.A. Model Rules of Professional Conduct, Rule 4.2.)

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B. Client With Attorney of Record.

3. Client May Take Legally Effective Acts.

a. In General.

1 Witkin Cal. Proc. Attys § 241

[§ 241] In General.

A person represented by an attorney of record is not precluded from taking effective action with respect to the subject matter of the proceeding. The person has the same power to contract or to deal with property that the person normally has, and may perform any legally effective act except those that relate to procedural steps in the action.

The distinction is well presented in *Ferreira v. Tubbs* (1899) 125 C. 687, 58 P. 308, where plaintiff received judgment but, deeming it inadequate, appealed. Defendants, to stop the running of interest, tendered the amount of the judgment, with costs and interest to date, to plaintiff personally. *Held*, this was a valid tender. "While it may be assumed that the attorney has sole control of his client's case, as far as any question of practice and procedure is concerned, yet there can be no question but that a tender of money pending the litigation may be made to the client. The statute expressly authorizes the judgment creditor to satisfy the judgment, and ... declares that an offer of performance must be made to the creditor, or one authorized by him to receive the amount due. It primarily rests with the plaintiff, and not his attorneys, to decide whether or not an amount tendered should be accepted in full satisfaction of a claim for money due, and this tender was made to the proper party." (125 C. 690.)

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3. Client May Take Legally Effective Acts.

b. Settlement or Compromise of Claim.

1 Witkin Cal. Proc. Attys § 242

[§ 242] Settlement or Compromise of Claim.

(1) *In General.* Only the attorney of record may sign a stipulation for dismissal or file a request for dismissal with the clerk; but the client personally may enter into a compromise agreement and settle or release the claim on which the action is based. The compromise or release will then be a defense to the action, even though the action has not been formally dismissed and cannot be so dismissed except by the existing attorney of record or a substituted attorney of record. (*Toy v. Haskell* (1900) 128 C. 558, 560, 61 P. 89.)

(2) *Marital Property Settlement Agreement.* *In re Marriage of Hasso* (1991) 229 C.A.3d 1174, 280 C.R. 919, involved a marital settlement agreement executed by the spouses and disposing of large amounts of property in and out of state. The agreement was negotiated without attorneys; soon after it was signed, husband renounced it, contending that approval of the parties' attorneys was a condition precedent to enforceability. *Held*, the agreement was enforceable.

(a) Although it contained signature lines at the bottom under the caption "Approved As to Form," the agreement also contained acknowledgments that the parties had been advised by their own counsel as to all rights and liabilities and had entered into the agreement voluntarily, without fraud, undue influence, or duress. Also, both had reviewed the agreement together before executing it. (229 C.A.3d 1178.)

(b) The agreement nowhere suggests that it was subject to review or content approval by the attorneys; and if the reference to approval could be considered ambiguous, the evidence surrounding execution negated an inference that attorney approval was a condition to enforceability. (229 C.A.3d 1181.)

(c) There is no support for husband's argument that, even if the contract itself did not require attorney approval, public policy compels a court to refrain from enforcing agreements entered into without the consent of retained counsel. "It is unquestionably in society's best interest for persons to resolve their disputes among themselves before the outbreak of costly and often bitter litigation. This interest does not cease upon the filing of a lawsuit. Once litigation commences, the presence of lawyers unfortunately sometimes tends to inhibit rather than foster an atmosphere conducive to settlement, as may well have been the case here. A rule which absolutely forbids litigants from entering into an out-of-court resolution of their case without the assent of their attorneys would countervail this state's strong policy in

favor of settlement. Moreover, its implicit assumption that litigants are per se incompetent to resolve their dispute without the intervention of attorneys smacks of an elitism which may have been prevalent in days past but is no longer appropriate today. Where there are no elements of fraud, coercion, or overreaching and both parties, freely and with full understanding of their rights to advice of counsel, wish to negotiate a settlement without the involvement of their attorneys, there is no reason why the law should not permit them to do so." (229 C.A.3d 1184.) (On invalidity of provision preventing settlement without consent of attorney, see *supra*, §179.)

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C. Control Over Conduct of Litigation.

1. In General.

1 Witkin Cal. Proc. Attys § 243

[§ 243] In General.

A party with an attorney of record may take steps in the litigation only through that attorney; but the party may discharge the attorney and take action in pro. per., or may give the attorney binding instructions as to the action desired. Thus, the requirement that legal steps be taken by the attorney of record is to a large extent a rule of form, and is consistent with effective control by the client over those steps.

The substantive problem involves two basic questions not always kept distinct in the decisions: (1) *Attorney's apparent authority* (client v. adverse party): What steps are within the apparent authority of the attorney, so that, while undischarged, the attorney may take them effectively without instructions and even contrary to limitations of which the adverse party has no notice? (2) *Client's control* (client v. attorney): In what situations may the client properly object to the attorney's course of action or instruct the attorney as to that action?

The law of agency does not furnish an answer to the second question. There are some matters over which the attorney, by virtue of his or her status, has control, and as to these matters the attorney may disregard the objections or instructions of the client. (See 7 Am.Jur.2d (2007 ed.), Attorneys at Law §147et seq. [authority of attorney]; *Rest.3d, The Law Governing Lawyers* §21 et seq.; *infra*, §244 et seq.)

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2. Ordinary Procedural Steps.

a. Attorney's Apparent Authority.

1 *Witkin Cal. Proc. Attys* § 244

[§ 244] Attorney's Apparent Authority.

The attorney's apparent authority covers all the ordinary procedural steps in the prosecution of a legal proceeding, such as pleadings, remedies, trial, etc., and the attorney's actions in these matters will bind the client.

A typical statement of the rule appears in *Redsted v. Weiss* (1945) 71 C.A.2d 660, 163 P.2d 105: An attorney has "the general implied or apparent authority to enter into or make such agreements or stipulations, with respect to procedural or remedial matters, as appear, in the progress of the cause, to be necessary or expedient for the advancement of his client's interests or to accomplishment of the purpose for which the attorney was employed." (71 C.A.2d 663.)

A similar statement is made in *Armstrong v. Brown* (1936) 12 C.A.2d 22, 54 P.2d 1118: "In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client." (12 C.A.2d 28.)

The following cases illustrate matters held to be within the attorney's apparent authority:

Smith v. Whittier (1892) 95 C. 279, 289, 30 P. 529 [stipulation that transcribed testimony of witness in previous action might be read into evidence in present action].

Johnson v. Johnson (1931) 117 C.A. 145, 3 P.2d 587 [stipulation by defendant's attorney in divorce action waiving findings; however, client was present in court and made no protest (ratification)].

People v. Hanna (1939) 36 C.A.2d 333, 336, 97 P.2d 847 [stipulation in criminal trial that prosecution has used due diligence to locate absent witness before reading his testimony taken at preliminary examination].

Bemer v. Bemer (1957) 152 C.A.2d 766, 771, 314 P.2d 114 [stipulation on issues or defenses].

Duffy v. Griffith Co. (1962) 206 C.A.2d 780, 788, 24 C.R. 161, *infra*, §271 [stipulation on issue of scope of employment].

Diamond Springs Lime Co. v. American River Constructors (1971) 16 C.A.3d 581, 607, 94 C.R. 200, citing the text [plaintiff counsel's tactical maneuver, inviting exoneration of codefendant, was a permissible exercise of best discretion in aid of client's interests, "sacrificing potential recovery from one adversary to fortify potential recovery from the other"].

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2. Ordinary Procedural Steps.

b. Freedom From Client's Control.

1 *Witkin Cal. Proc. Attys* § 245

[§ 245] Freedom From Client's Control.

The attorney is relatively free from control by the client in ordinary procedural matters, and this paramount authority is probably explainable on two theories:

(1) The attorney is an independent contractor, pursuing a highly skilled independent calling, and is therefore not subject to control over the details of his performance. (See *Associated Indem. Corp. v. Industrial Acc. Com.* (1943) 56 C.A.2d 804, 808, 133 P.2d 698 [attorney was not employee within Workers' Compensation Act]; *Zurich General Acc. & Liab. Ins. Co., Ltd. v. Kinsler* (1938) 12 C.2d 98, 105, 81 P.2d 913 [dictum that attorney may insist on jury rather than court trial, contrary to wishes of client]; *Channel Lumber Co. v. Porter Simon* (2000) 78 C.A.4th 1222, 1228, 93 C.R.2d 482, citing the text [outside trial attorney retained by corporate client was independent contractor and not corporate agent]; *supra*, §43 and *infra*, §271 et seq.)

(2) The attorney is an officer of the court, with a duty to follow the traditions and ethics of the legal profession even if this calls for overriding objections of the client and to forgo certain actions. (See California Rules of Professional Conduct, see Rule 3-200, *infra*, §434 [prohibited objectives of employment]; A.B.A. Model Rules of Professional Conduct, Rule 1.2 [limitations on attorney's representation of client].)

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3. Steps Involving Major Questions of Policy.

a. Compromise and Consent Judgments.

1 Witkin Cal. Proc. Attys § 246

[§ 246] Compromise and Consent Judgments.

The compromise of a case and entry of a judgment by consent against the client are serious steps, and it is thoroughly established that the attorney cannot act against the client's objections, and also that the attorney has no authority to act without the client's knowledge and express consent.

In *Preston v. Hill* (1875) 50 C. 43, the clients were defendants in a foreclosure action. Their chief counsel entered into a stipulation compromising the action and consenting to a decree, against the protests of associate counsel who said that the clients were opposed to it. *Held*, the decree should be set aside. The court expressly left open the question of apparent authority, pointing out that here the clients' objection was made through their other counsel in open court, and said: "Whatever presumptions the court or the adverse party might ordinarily be authorized to make, as to the authority of an attorney who proposes to compromise his client's cause of action, all such presumptions must cease, when the client, before the transaction is consummated, notifies the court and his adversary, in the most formal manner, that his attorney has acted without authority, and that he repudiates the bargain. The attorney is but the agent of the client for the management and conduct of the cause; but his retainer does not give him an unlimited power to dispose of his client's estate, by way of compromise, against which the latter protests in the presence of his adversary, before the transaction is consummated." (50 C. 54.) (See 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §167 et seq.; 90 *A.L.R.4th* 326 [authority of attorney to compromise action].)

The following cases affirm the rule:

Trope v. Kerns (1890) 83 C. 553, 556, 23 P. 691 [lack of consent known to adverse party].

Levy v. Superior Court (1995) 10 C.4th 578, 580, 586, 41 C.R.2d 878, 896 P.2d 171 [under C.C.P. 664.6 (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §115), settlement agreement must be signed by litigants personally].

Jones v. Noble (1934) 3 C.A.2d 316, 320, 39 P.2d 486 [when authority is challenged, compromise cannot be enforced in absence of authorization or ratification by client].

Hoagland v. Chargin (1955) 134 C.A.2d 466, 474, 286 P.2d 931 [default entered in prior action was without client's consent].

Bice v. Stevens (1958) 160 C.A.2d 222, 231, 325 P.2d 244 [attorney did not have plaintiff's authorization to dismiss with prejudice].

Roscoe Moss Co. v. Roggero (1966) 246 C.A.2d 781, 786, 54 C.R. 911 [stipulation to permit summary judgment against clients].

Williams v. Saunders (1997) 55 C.A.4th 1158, 1163, 64 C.R.2d 571 [under C.C.P. 664.6, settlement agreement signed by defendant's husband/code defendant and by their attorney, but not by defendant, was not enforceable against defendant].

In a few cases authority was found in the special circumstances. (See *Gagnon Co. v. Nevada Desert Inn* (1955) 45 C.2d 448, 460, 289 P.2d 466 [res judicata effect of dismissal with prejudice of earlier action in Nevada; rebuttable presumption that attorney has authority to compromise action and dismiss case]; *Pacific Tel. & Tel. Co. v. Fink* (1956) 141 C.A.2d 332, 339, 296 P.2d 843 ["where two actions, each pending, involve the same disputed issue raised between the same adverse parties represented, respectively, by the same attorneys in each proceeding, the attorneys of record have apparent or implied authority to enter into a stipulation that disposition of the issue in one proceeding shall be determinative in the other"]; *Ford v. California* (1981) 116 C.A.3d 507, 516, 172 C.R. 162, citing the text [no evidence of objection from head of state agency regarding deputy attorney general's authority to settle; citing *Gagnon Co.* for rebuttable presumption].)

In other cases the rule was recognized but the evidence was held to show authorization or ratification by the client. (See *Security Loan & Trust Co. v. Estudillo* (1901) 134 C. 166, 168, 66 P. 257; *Clemens v. Gregg* (1917) 34 C.A. 245, 253, 167 P. 294; 5 A.L.R.5th 56 [ratification of attorney's unauthorized compromise of action].)

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b. Giving Up Substantive Right.

1. In General.

1 Witkin Cal. Proc. Attys § 247

[§ 247] In General.

In *Price v. McComish* (1937) 22 C.A.2d 92, 70 P.2d 978, an action for assault and battery, plaintiff alleged and proved actual damages in a large sum, but was awarded only \$ 200 in a court trial. On plaintiff's appeal, defendant contended that the inadequate judgment was in accord with oral suggestions of plaintiff's counsel to the trial judge that all plaintiff wanted was "a nominal amount" by way of "a moral victory." *Held*, if the remarks could be construed as consent to nominal or otherwise inadequate damages, they were beyond the authority of the attorney. "The cause of action, the claim or demand sued upon, and the subject matter of the litigation are all within the exclusive control of a client; and an attorney may not impair, compromise, settle, surrender or destroy them without his client's consent." (22 C.A.2d 97.) The argument that the act was authorized because it took place in open court in the presence of the client, fails. "It would be rude, indecorous, disorderly, and confusing if the client should interpose to correct his counsel, and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. And, for the like reason, the client, if examined as a witness, is not required to disclaim such admissions of his attorney, unless he shall be examined by the opposing party for that purpose." (22 C.A.2d 99.)

The following cases illustrate this fundamental limitation on the attorney's authority:

Borkheim v. North British & Mercantile Ins. Co. (1869) 38 C. 623, 628 [client did not fully understand effect of agreement under which his attorney stipulated that plaintiff's separate actions against several insurers would abide by result of another case involving plaintiff that was being tried where counsel and issues were same].

Woerner v. Woerner (1915) 171 C. 298, 299, 152 P. 919 [no authority to stipulate for conveyance or other disposition of client's property].

Broecker v. Moxley (1934) 136 C.A. 248, 253, 28 P.2d 409 [no implied authority to release one group of tortfeasors for small sum thus risking danger of releasing others].

Harness v. Pacific Curtainwall Co. (1965) 235 C.A.2d 485, 491, 45 C.R. 454 [attorney had no authority to make

stipulation permitting court to find negligence irrespective of record].

Bowden v. Green (1982) 128 C.A.3d 65, 73, 180 C.R. 90, 7 Cal. Proc. (5th), Judgment, §73 [no authority to make stipulation to dismiss cross-complaint].

Romadka v. Hoge (1991) 232 C.A.3d 1231, 1237, 283 C.R. 878 [no authority to enter voluntary dismissal of plaintiff's action with prejudice instead of without prejudice].

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b. Giving Up Substantive Right.

2. Ostensible Authority.

1 *Witkin Cal. Proc. Attys* § 248

[§ 248] Ostensible Authority.

Giving up the right to enforce a judgment is clearly beyond the actual authority of an attorney, but it may be within the attorney's ostensible authority.

In *Yanchor v. Kagan* (1971) 22 C.A.3d 544, 99 C.R. 367, plaintiff had a claim against parties for fraud, and engaged attorney R to sue on it. Plaintiff told K that his testimony would be needed, and plaintiff and R both assured K that he would not be sued if he cooperated. At K's insistence R sent him a writing, stating that, for consideration, it was agreed that plaintiff would not "enforce any judgment" against K in the action. On K's inquiry why it was phrased in terms of nonenforcement rather than no suit, R stated that K was named only as a necessary party and that no judgment would be obtained against him. K engaged an attorney, who filed an answer, but K put on no defense and testified for plaintiff, as agreed. Judgment was later entered against K, and plaintiff attempted collection. *Held*, K was entitled to entry of satisfaction of the judgment (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §387 et seq.). The facts clearly established ostensible authority. Plaintiff brought K to R's office to discuss the case, both plaintiff and R requested K's help, and both assured him that no recovery against him would be sought. (22 C.A.3d 550.)

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b. Giving Up Substantive Right.

3. Ratification.

1 *Witkin Cal. Proc. Attys* § 249

[§ 249] Ratification.

The client may ratify an attorney's unauthorized acts and thus be precluded from denying the attorney's authority. (See *Fidelity & Cas. Co. of New York v. Abraham* (1945) 70 C.A.2d 776, 782, 161 P.2d 689 [attorney's agreement to press claim against one party but not against another was beyond authority, but supported by evidence of client's ratification]; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §152; 5 A.L.R.5th 56 [ratification of attorney's unauthorized compromise of action].)

In *Fresno v. Baboian* (1975) 52 C.A.3d 753, 125 C.R. 332, plaintiff city brought a condemnation action. J was employed as attorney for defendants. Under the attorney-client agreement, J had no authority to enter into stipulations without the clients' consent, and the clients' instructions were that J should try to stop the condemnation or to obtain more money than the city offered. Nevertheless, without informing defendants, J entered into a written stipulation with plaintiff's attorneys to give the city immediate possession on payment of \$ 15,000. The deposit was made by check to J on December 17, 1971, and J endorsed and cashed it and misappropriated the proceeds. Plaintiff took possession on December 18, 1971, and J continued to represent defendants until March 1972, when an answer to interrogatories prepared by J was signed by one of the defendants. At the trial in July 1973, with new counsel representing defendants, the parties stipulated for an award of \$ 20,000. The result was that all issues were resolved except the right of plaintiff city to a credit for the \$ 15,000 previously paid pursuant to the earlier stipulation. *Held*, the city was entitled to the credit.

(a) J had no actual authority to enter into the stipulation; and, because allowing the city to take possession prior to judgment was obviously the giving up of a substantial right, J had no implied authority. "That possession of real property is a substantial right requires no citation of authority." (52 C.A.3d 758.)

(b) However, the city's taking of possession gave defendants actual notice of its claim of right to do so pursuant to the stipulation; and defendants did nothing to challenge that claim. They did not bring an action for possession, and at the trial they did not object to the taking but merely sought credit for the amount paid as consideration for it. This conduct amounted to a ratification of the stipulation. (52 C.A.3d 759, 760.)

(c) Because the stipulation was binding by ratification, the authority of the attorney to receive the money and discharge the claim necessarily followed under *C.C.P.* 283(2), as construed and applied in *Navrides v. Zurich Ins. Co.* (1971) 5 C.3d 698, 97 C.R. 309, 488 P.2d 637, *infra*, §259. (52 C.A.3d 760.)

In *Alvarado Community Hosp. v. Superior Court* (1985) 173 C.A.3d 476, 219 C.R. 52, plaintiff's attorney, without plaintiff's consent, settled her wrongful death action against defendant for \$ 15,000, forged plaintiff's name on the release and the settlement draft, obtained a dismissal of the action, and absconded with the money. Plaintiff obtained reimbursement from the Client Security Fund (CSF; *supra*, §17) of \$ 9,000, representing her share of the settlement amount, and then moved to set aside the dismissal. *Held*, plaintiff must choose between seeking reimbursement and pursuing her action.

(a) By seeking reimbursement from the CSF, plaintiff ratified the settlement negotiated by her attorney. (173 C.A.3d 482.) Ordinarily, this would require dismissal of the action against defendant. (173 C.A.3d 483.)

(b) The comment in *Whittier Union High School Dist. v. Superior Court* (1977) 66 C.A.3d 504, 136 C.R. 86, *infra*, §262, that reimbursement could be sought from the CSF was a suggestion as to how the defendant there might recover a loss by applying to the CSF derivative of plaintiff's primary right; *Whittier* does not indicate that the plaintiff could recover from the CSF while simultaneously pursuing the action against defendant. (173 C.A.3d 483.)

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c. Giving Up Substantive Defense.

1 Witkin Cal. Proc. Attys § 250

[§ 250] Giving Up Substantive Defense.

In *Merritt v. Wilcox* (1877) 52 C. 238, plaintiff had judgment against defendant for over \$ 70,000. Afterwards he had it modified to make it payable in United States gold coin (instead of legal tender), offering evidence (disputed) of an oral stipulation of defendant's counsel that any judgment recovered should be so payable. *Held*, if the stipulation was made, it was beyond the authority of the attorney. It conceded to plaintiff a more favorable judgment than he was entitled to under the pleadings and proof, and deprived the defendant of the benefit of an important defense. (52 C. 242.)

Merritt and Price v. McComish (1937) 22 C.A.2d 92, 70 P.2d 978, *supra*, §247, were followed in *Fresno City High School Dist. v. Dillon* (1939) 34 C.A.2d 636, 94 P.2d 86. Plaintiff school district brought an action to discharge defendant teacher for violation of rules, and defendant's answer denied the violations. The trial judge gave judgment on the pleadings for plaintiff, relying on a purported stipulation of defendant at oral argument that the only issue was whether the rules were valid. *Held*, judgment reversed; the agreement was unauthorized, for it "stipulated away the very essence of the defense which on the face of the record appears valid." (34 C.A.2d 647.) (See *Los Angeles v. Harper* (1935) 8 C.A.2d 552, 555, 48 P.2d 75, *infra*, §261 [condemnation case; stipulation by deputy city attorney that landowner suffered severance damages of \$ 25,000 was not binding where there was no evidence of any severance damage]; *Ross v. Ross* (1953) 120 C.A.2d 70, 74, 260 P.2d 652 [attorney had no authority to stipulate to default divorce in favor of husband, thereby giving up wife's right to defend and obtain alimony]; cf. *Duffy v. Griffith Co.* (1962) 206 C.A.2d 780, 789, 24 C.R. 161, *infra*, §271 [attorney may select some issues over others and make admissions during trial].)

The principle does not apply where no adversary is involved; e.g., where a liability insurer's attorney represents to the insured that the insurer is liable and will defend a claim. (*Tomerlin v. Canadian Indem. Co.* (1964) 61 C.2d 638, 646, 39 C.R. 731, 394 P.2d 571.)

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d. Giving Up Right to Hearing.

1 *Witkin Cal. Proc. Attys* § 251

[§ 251] Giving Up Right to Hearing.

Although procedural matters are normally within the attorney's control (see *supra*, §245, and *infra*, §271 et seq.), some involve substantial rights of the client that cannot be relinquished against the client's objections. This principle, with its difficult distinctions, was explored in *Linsk v. Linsk* (1969) 70 C.2d 272, 74 C.R. 544, 449 P.2d 760. Plaintiff wife sued for divorce (under former law) and defendant husband cross-complained. After an 11-day contested trial the case was submitted. Then the judge, incapacitated by an accident, vacated the submission and declared a mistrial. In a meeting with the presiding judge the attorneys offered a stipulation to submit on the record already made. Plaintiff refused to sign it. The presiding judge nevertheless assigned the case to Judge R, to decide on the record unless he desired additional testimony. Judge R took no additional testimony, denied a divorce to plaintiff for lack of corroboration, and granted a divorce to defendant. *Held*, reversed.

(a) *Reconciliation of conflicting expressions.* The courts have held that an attorney may bind the client on procedural matters, but may not stipulate to impair the client's substantial rights or cause of action. (70 C.2d 277, 278.) "The dichotomy in the foregoing cases appears to relate to whether the attorney has relinquished a substantial right of his client in entering into a stipulation on his behalf. If counsel merely employs his best discretion in protecting the client's rights and achieving the client's fundamental goals, his authority to proceed in any appropriate manner has been unquestioned. On the other hand, if counsel abdicates a substantial right of the client contrary to express instructions, he exceeds his authority." (70 C.2d 278.)

(b) *Client's right to insist on hearing.* The right to a trial contemplates presence and participation by the party, and the judge's personal observation of witnesses may be a significant factor in the judge's decision. Hence, "[i]t seems incontrovertible that the right of a party to have the trier of fact observe his demeanor, and that of his adversary and other witnesses, during examination and cross-examination is so crucial to a party's cause of action that an attorney cannot be permitted to waive by stipulation such right as to all the testimony in a trial when the stipulation is contrary to the express wishes of his client." (70 C.2d 278.)

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e. Stipulating to Binding Arbitration.

1 *Witkin Cal. Proc. Attys* § 252

[§ 252] Stipulating to Binding Arbitration.

An attorney lacks authority to stipulate to binding arbitration of an action against the client's wishes. In *Blanton v. Womancare* (1985) 38 C.3d 396, 212 C.R. 151, 696 P.2d 645, plaintiff sued defendants for medical malpractice. Plaintiff's attorney, without her consent, stipulated with defendants to submit the case to binding arbitration under C.C.P. 1141.10 et seq. (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §579 et seq.). The stipulation permitted defendants' attorney to unilaterally choose the arbitrator from among attorneys whose primary practice was the defense of medical malpractice actions and limited the award to a maximum of \$ 15,000. On learning of the stipulation, plaintiff immediately objected, fired her attorney and retained new counsel, and moved to invalidate the stipulation. The trial judge denied the motion, and, after the arbitrator ruled for the defense, entered judgment on the award. *Held*, judgment reversed.

(a) The attorney-client relationship, insofar as it concerns the attorney's authority to bind the client by agreement or stipulation, is generally governed by the principles of agency. The client is bound by the acts of the attorney within the scope of the attorney's actual (express or implied) or apparent authority. (38 C.3d 403, quoting the text.) Here, the agreement was signed contrary to plaintiff's express instructions, so she is bound by it only if her attorney had implied actual authority or apparent authority to enter into the agreement. (38 C.3d 403.)

(b) By virtue of the attorney-client relationship, an attorney has authority to bind the client in procedural or tactical matters, but not to impair the client's substantial rights or the cause of action itself. (38 C.3d 403, 404, citing the text and *Linsk v. Linsk* (1969) 70 C.2d 272, 74 C.R. 544, 449 P.2d 760, supra, §251.) Thus, e.g., an attorney cannot compromise an action without the client's consent, and a person dealing with an attorney on such a substantial matter must ascertain the attorney's authority to act or assume the risk of lack of authority. (38 C.3d 406, 407.)

(c) Whether actual or apparent authority is involved here need not be decided, because defense counsel's lack of justifiable reliance is clear. (38 C.3d 406, 407.) The legal effect of the stipulation to binding arbitration was to relinquish the right to a judicial trial and to waive all but minimal judicial review. The agreement permitted defense counsel to choose the arbitrator from attorneys primarily engaged in defending medical malpractice actions and limited the amount recoverable. (38 C.3d 402, 407.) "By any test, these are consequences which affected substantial rights of

the client." (38 C.3d 407.)

(d) Absent express authority, an attorney may not bind a client to a contract to arbitrate, even if no litigation is pending. (38 C.3d 407.) "We find no reason in logic, or policy, for holding his apparent authority in that respect is enlarged by reason of the fact that he has been retained to engage in litigation. When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and his consent obtained, before the dispute is shifted to another, and quite different, forum, particularly where the transfer entails the sort of substantial consequences present here." (38 C.3d 407, 408.)

(e) This case is distinguishable from *Madden v. Kaiser Foundation Hosp.* (1976) 17 C.3d 699, 131 C.R. 882, 550 P.2d 1178, 3 Summary (10th), *Agency and Employment*, §135, which upheld the power of a general agent to stipulate to binding arbitration. An attorney is not a general agent and lacks general authority to enter contracts on behalf of the client. (38 C.3d 408.)

A concurring justice criticized the majority for failing to set forth guidelines as to when an attorney may act without the client's express consent and argued that "the decision to waive the constitutional right to a trial by jury must always rest with the client, not the attorney." (38 C.3d 409.) (See *Sanker v. Brown* (1985) 167 C.A.3d 1144, 1146, 1147, 213 C.R. 768 [following *Blanton* and suggesting that party's signature to stipulation to binding arbitration be obtained to prevent spurious claims of nonconsent]; *Lazarus v. Titmus* (1998) 64 C.A.4th 1242, 1247, 75 C.R.2d 676 [stipulation to binding arbitration in personal injury action signed only by parties' attorneys was unenforceable; because substantial rights were potentially impacted, actual consent or ratification by parties was required; following *Blanton*]; *CPI Builders v. Impco Technologies* (2001) 94 C.A.4th 1167, 1172, 114 C.R.2d 851 [binding contract existed where plaintiff expressly authorized attorney to stipulate to arbitration, defendant's attorney accepted offer, and plaintiff's attorney later failed to convey plaintiff's revocation; distinguishing *Blanton*]; 48 A.L.R.4th 127 [validity of attorney's stipulation to arbitration, or amendment of arbitration agreement, without client's knowledge or consent].)

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f. Stipulation in Family Law Case.

1 Witkin Cal. Proc. Attys § 253

[§ 253] Stipulation in Family Law Case.

In re Marriage of Helsel (1988) 198 C.A.3d 332, 243 C.R. 657, involved a wife's request for modification and collection of accrued child and spousal support. At the hearing on the order to show cause, she appeared with her attorney, but the husband appeared only through his attorney. The two attorneys, after considerable negotiation, orally stipulated to some matters and to a continuance on unresolved issues. After the husband's attorney stated that his client had agreed to the stipulation, the judge approved it, and a written order was signed and filed. One month later the husband, through new counsel, moved to set aside parts of the order on the ground that his attorney was not authorized to stipulate to (1) an increase in child support from \$ 200 to \$ 500, (2) paying \$ 750 in attorneys' fees to the wife's attorney, and (3) the manner of disbursing a trust fund. The judge denied the motion, explaining that in family law cases, it was essential for the court and opposing counsel to be able to rely on counsel's apparent authority, and that without this reliance, the judge would be obligated to insist on the parties being present before accepting a stipulation. *Held*, order reversed.

(a) *Blanton v. Womancare* (1985) 38 C.3d 396, 212 C.R. 151, 696 P.2d 645, *supra*, §252, discussed the extent to which an attorney can bind a client to the terms of a stipulation entered into without the client's authorization. At one extreme are cases in which the attorney "must act as the captain of the litigation ship," making tactical decisions on which the court and opposing counsel may rely; the attorney's authority is implied in law. At the other end of the spectrum are cases in which the attorney's action impairs so substantial a portion of the case or so fundamental a right of the client that it justifies setting aside a stipulation at the expense of an opposing party with no knowledge or reason to know of the lawyer's lack of authority. (198 C.A.3d 337.)

(b) In between these extremes are cases in which "the substantive rule is that the lawyer must be authorized by the client to act but in which the nature of the agreement or stipulation is not so substantial that the remedy for breach of the rule should be the setting aside of the agreement." In these cases, the opposing party may enforce the agreement against the client, but the client then has recourse against the attorney for acting in excess of authority. (198 C.A.3d 338.)

(c) "[W]e reject the suggestion that a client cannot be bound by any unauthorized agreement entered into by a lawyer." Considering the fact that the client retains remedies against the lawyer (malpractice action and State Bar

disciplinary action), the benefits of such a rule do not outweigh its costs. (198 C.A.3d 338.)

(d) Application of these principles to family law cases presents a special problem:

(1) "When a lawyer agrees to settle the typical civil case, the case ends as far as the client is concerned. In the typical family law case, however, quite the opposite is true. Frequently at least some issues in family law cases are resolved by way of a stipulation between the parties. As the facts of this case illustrate, most parties can agree on certain matters but leave other matters to be resolved by the court. In this family law context, a stipulation in a given case may be tantamount to settling the entire dispute or may represent merely the flea on the back of the elephant. For example, many stipulations agreeing to dispose of certain issues in a family law case have less an impact on the client's 'substantial rights' than the lawyer's 'selection of issues to be pursued and the abandonment of those deemed ... to be untenable.' " (198 C.A.3d 339.)

(2) If the dispute is substantially resolved by the stipulation, it is tantamount to the settlement and dismissal of a civil case, and cannot stand if unauthorized. However, if a substantial portion of the case remains to be litigated, the stipulation represents largely a winnowing of the issues. "Under such circumstances, we do not believe the system is best served--especially in the often emotionally charged family law environs--if clients may routinely set aside stipulations entered into by their lawyers as to matters which are insubstantial and collateral to the heart of the dispute." (198 C.A.3d 339.)

(3) In making its determination, "the court may compare the extent to which the stipulation differs from resolution argued by the client to be justified by the facts. The court may also evaluate the economic value of the stipulation, both in absolute terms and in relation to the total value of the disputed issues in the case." (198 C.A.3d 339, 340.)

(4) In the present case, it is appropriate for the trial court to make the determination because it is in the best position to understand the relationship of the stipulated issues to those unresolved, and also to resolve the factual issue of whether the husband's counsel acted without express or implied authorization. (198 C.A.3d 340.) In deciding whether to set aside parts of the stipulated order, the trial judge can properly consider whether fairness requires relieving the wife from other parts. (198 C.A.3d 340.)

(5) The administrative disruption can be minimized by exercising the power under C.C.P. 473 to impose conditions on setting aside the order; in this case, it would be proper to require the husband to pay a reasonable sum for attorneys' fees incurred in the negotiations and the hearing to resist the motion. (198 C.A.3d 340.)

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g. Stipulation for Temporary Judge.

1 *Witkin Cal. Proc. Attys* § 254

[§ 254] Stipulation for Temporary Judge.

In re Samkirtana S. (1990) 222 C.A.3d 1475, 272 C.R. 489, a dependency proceeding, involved the placement of three children in their mother's home. On the date of the review hearing, the county department of social services filed a supplemental petition based on the mother's excessive use of alcohol and her failure to supervise the children. Prior to the hearing, the attorney for the minors and the attorney for the mother had signed a written stipulation for the appointment of W, a referee, as temporary judge. The juvenile court judge approved the selection, and the temporary judge ordered that the children be continued as dependents and placed in a foster home. The mother appealed, contending that the stipulation signed by her counsel without her express agreement was invalid and the order was consequently an order of a referee rather than a temporary judge. On this basis she challenged the order for noncompliance with former C.R.C., Rule 1416(a)(2) (now C.R.C., Rule 5.538), requiring that the referee inform a party of the right to seek review by a juvenile court judge. *Held*, order affirmed; the rule does not apply to a referee sitting as a temporary judge, and the stipulation for appointment was valid.

(a) The procedure for appointment of a temporary judge is set forth in former C.R.C., Rule 244 (now C.R.C., Rule 2.831; see 2 *Cal. Proc.* (5th), *Courts*, §350). *In re Lamonica H.* (1990) 220 C.A.3d 634, 270 C.R. 60, held that the requirements of the rule are intended to serve strictly administrative purposes and are therefore directory only. (222 C.A.3d 1481; see 2 *Cal. Proc.* (5th), *Courts*, §352.) However, unlike the father in *Lamonica*, the mother here does not attack the orders of the temporary judge as void; she asserts that the stipulation signed by her attorney allowing W to sit as a temporary judge was not binding on her, and consequently that W acted only as a referee and was required to give the notice specified in the *Rules of Court*. (222 C.A.3d 1482.)

(b) The analysis of an attorney's authority in *Blanton v. Womancare* (1985) 38 C.3d 396, 212 C.R. 151, 696 P.2d 645, *supra*, §252, and *In re Marriage of Helsel* (1988) 198 C.A.3d 332, 243 C.R. 657, *supra*, §253, suggests the proper determination in this case. (222 C.A.3d 1482, 1483, 1484.) "[W]hile the stipulation does not involve a tactical or procedural decision it also does not involve the waiver or compromise of so fundamental a right that justifies setting aside the stipulation entered into without the client's express concurrence. It appears to be within the third category of cases discussed in *Helsel*. There is no elimination of an essential defense, no agreement to the entry of a default judgment, no compromise of a claim; nor is there any waiver of the right to a trial. Rather, here the effect of the

stipulation was simply to bypass judicial review of the findings and orders of a juvenile court referee. When this review is afforded, there is no trial de novo; the court simply reviews the record to decide whether or not to approve the orders." (222 C.A.3d 1484.)

(c) "The stipulation here that the referee act as a temporary judge may be contrasted with a stipulation that an attorney may sit as a judge in a civil case. In that instance, unlike a section 300 dependency proceeding, the attorney is not empowered to conduct the trial without a valid stipulation. In that case, undoubtedly, the express consent of the client would be required. Since the stipulation here only affects the right to review ... and not the right to conduct the hearing, it is reasonable to conclude that the right to review falls into the third category of rights enunciated in *Helse* where the stipulation of the attorney, without the express consent of the client, will not be set aside." (222 C.A.3d 1484, 1485.)

(d) Moreover, there was no evidence that the mother objected to the stipulation (as in *Blanton*), or even that the action was unauthorized (as in *Helse*). "When there is no evidence whether the client understood his or her rights or consented to the attorney's action, and the right involved is not fundamental or substantial, the better rule is to assume that the attorney has fulfilled his obligation to fully advise his client and that the client has agreed to the action." (222 C.A.3d 1485.) (See *In re Marriage of Crook* (1991) 235 C.A.3d 30, 33, 286 C.R. 537 [following *Samkirtana S.*]; *In re Horton* (1991) 54 C.3d 82, 93, 284 C.R. 305, 813 P.2d 1335, 2 Cal. Proc. (5th), Courts, §353 [stipulation may arise from conduct of parties or their attorneys].)

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h. Steps After Judgment.

1. In General.

1 Witkin Cal. Proc. Attys § 255

[§ 255] In General.

At the conclusion of the trial the attorney's control over procedural matters is sharply curtailed; steps after judgment often involve more serious consequences than those in the course of trial and call for a decision by the client.

The general principle is stated in *Knowlton v. Mackenzie* (1895) 110 C. 183, 42 P. 580, where the court held that defendant's attorney had no authority to agree to a modification increasing plaintiff's judgment by nearly \$ 2,000: "The attorney is only the agent of the client for the management and conduct of the cause while it is pending before the court for determination, and, as such agent, he has authority to bind his client in all matters pertaining to the conduct and management of the suit. ... For the purpose of prosecuting or defending an action the authority of an attorney ordinarily terminates with the entry of judgment ... except for the purpose of sustaining and enforcing the judgment, or seeking to have it set aside or reversed. When a judgment in the cause has once been entered under the direction of the court the rights of the client have been finally determined, and the attorney ceases to have any authority to consent to its modification to the prejudice of the client without his consent." (110 C. 188.) (See *Spencer v. Barnes* (1935) 6 C.A.2d 35, 38, 43 P.2d 847 [fact that attorney may have represented party in other matters did not authorize service on attorney in present matter; thus, defendant was without notice]; *Davis v. Robinson* (1942) 50 C.A.2d 700, 702, 123 P.2d 894 [attorney's stipulation in one action cannot affect rights of client in subsequent action]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §172 et seq.)

Nevertheless, the attorney continues to have some authority over the *enforcement* of the judgment. In *Ely v. Liscomb* (1914) 24 C.A. 224, 140 P. 1086, plaintiff sued for the specific recovery of personal property. After judgment for plaintiff, defendant gave plaintiff's attorneys a written offer to deliver the property in satisfaction. *Held*, this was a valid tender, though the attorneys did not communicate the offer to plaintiff himself. They were authorized to sue for possession, and were therefore authorized to receive possession, either by judgment and execution or by voluntary satisfaction. The court rejected the argument that C.C.P. 283 (attorney may receive money claimed by client) was intended to limit the authority of the attorney in this respect to actions for recovery of money. (24 C.A. 228.) (See *Wherry v. Rambo* (1950) 97 C.A.2d 569, 571, 218 P.2d 142 [under C.C.P. 283 and former C.C.P. 675 (now C.C.P. 724.010 et seq.), attorney may receive payment and enter satisfaction of judgment].)

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h. Steps After Judgment.

2. Taking or Defending Against Appeal.

1 *Witkin Cal. Proc. Attys* § 256

[§ 256] Taking or Defending Against Appeal.

(1) *Taking Appeal*. An appeal is not a routine procedural step committed primarily to the good judgment of the attorney, and an attorney cannot prosecute an appeal without the client's consent. (See *Guardianship of Gilman* (1944) 23 C.2d 862, 864, 147 P.2d 530 [unauthorized appeal of guardianship order]; *McClure v. Donovan* (1947) 82 C.A.2d 664, 667, 186 P.2d 718 [incompetent could not confer authority on attorney to appeal order appointing guardian]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §175.) There is no dispute on this proposition but, as in other situations, the authority of the attorney of record is presumed and may be successfully challenged by the adverse party only on a strong showing. (See *United States of Mexico v. Rask* (1930) 109 C.A. 497, 501, 293 P. 108 [conflicting affidavits and hearsay were insufficient to overcome presumption].)

Public attorneys, representing public officers, may be vested with broader authority. Thus, where a board of supervisors by resolution required the public administrator to be represented by the county counsel, the county counsel had authority to take an appeal despite the public administrator's decision not to appeal. "The county counsel who was also an agent of the same public entity and its exclusive legal representative had a right to proceed." (*Mize v. Crail* (1973) 29 C.A.3d 797, 803, 106 C.R. 34.)

(2) *Defending Against Adverse Party's Appeal*. The presumption of the attorney's authority to take steps after judgment may lead to a duty to do so in the absence of an objection by the client. In *People v. Bouchard* (1957) 49 C.2d 438, 317 P.2d 971, defendant's attorney was successful in having an information set aside. The prosecution appealed and served the opening brief on the attorney, who contended that she had no arrangements to represent defendant on the appeal. *Held*, the presumption of authority to appeal justifies a similar presumption of authority to defend against the adverse party's appeal. "There would seem to be just as much reason to presume that an attorney who has obtained a favorable judgment has authority to protect it and to take any necessary steps to insure that it is not set aside or reversed." (49 C.2d 440.)

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h. Steps After Judgment.

3. Waiving Right To Appeal.

1 Witkin Cal. Proc. Attys § 257

[§ 257] Waiving Right To Appeal.

If taking an appeal is a matter calling for the client's decision (see *supra*, §256), the abandonment or surrender of the right would seem even more clearly beyond the authority of the attorney. An attorney may think an appeal useless or too expensive, or may deem the compensation inadequate, and therefore decide against the step. In that situation the attorney should consult the client and, if overruled, may choose to withdraw; it is scarcely proper to allow the time to lapse without advising the client of the danger of loss of the right. But even if it is conceded that, under some circumstances, an attorney in good faith and in accordance with his or her best judgment may decide alone not to appeal and allow the time to lapse, it does not follow that the attorney may expressly waive the right in advance. In *Wuest v. Wuest* (1942) 53 C.A.2d 339, 127 P.2d 934, the court declared that the right to appeal was "as sacred and inviolable as the right to a trial," and held that a stipulation of plaintiff's attorney waiving findings and precluding an appeal was void. "It is a cardinal rule that an attorney cannot by virtue of his general authority bind his client by any act which amounts to a surrender in whole or in part of any substantial right." (53 C.A.2d 345.)

Unfortunately *Wuest* was complicated by the fact that the trial judge had coerced plaintiff's counsel into acting as he did by threatening to deny a divorce to his client if he failed to stipulate; hence, one ground of the reversal was gross misconduct of the trial judge amounting to an excess of jurisdiction. In *Fowlkes v. Ingraham* (1947) 81 C.A.2d 745, 185 P.2d 379, the statements in *Wuest* on lack of authority to waive the right of appeal were characterized as dictum, and the question was treated as one of first impression. The court then declared that "the great weight of authority" supported its holding that an attorney of record, without special authorization, may bind the client by a stipulation waiving the right of appeal. (81 C.A.2d 747.) However, only a few cases make up the "weight of authority" relied on by the court (see 21 So. Cal. L. Rev. 272) and, on principle, the decision seems unsound.

First, the stipulation in these situations is made before judgment and superficially appears to relate to an ordinary procedural step during the trial. But the act is to take effect after judgment. If an attorney, after judgment is rendered, loses his former broad authority to determine future legal steps (see *supra*, §255), how does the attorney gain that missing authority merely by exercising it prematurely?

Second, an appeal from an adverse decision is a statutory right equal in importance to the right to sue and the right to defend, and an attorney who waives it is undeniably giving up a substantial right. (See *supra*, §251.)

The brief opinion in *Fowlkes* apparently assumes that the basic right to appeal is of the same minor importance as the choice of methods of preparing a transcript or arguing the case before the appellate court. It places an undesirable and undesired power in the hands of an attorney to destroy the client's case. The "dictum" (or alternative ground) of *Wuest* seems to be the more reasonable view and a safer guide for the attorney and trial court. (See *Linsk v. Linsk* (1969) 70 C.2d 272, 278, 74 C.R. 544, 449 P.2d 760, *supra*, §251 [citing *Wuest* with approval and mentioning criticism of *Fowlkes* in the text]; 9 Cal. Proc. (5th), *Appeal*, §63 et seq.)

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 a. In General.

1 Witkin Cal. Proc. Attys § 258

[§ 258] In General.

Where an attorney's act is not directly related to the conduct of litigation and thus, not within the broad scope of the attorney's actual or apparent authority, the attorney's authority should be no more than that of any attorney consulted or retained in the absence of litigation, i.e., major decisions should have the client's approval. "Commonly, attorneys are employed by principals in all manner of business transactions and negotiations not involving lawsuits, but it is not the rule that in such situations an attorney has, merely by virtue of his employment as such, plenary authority to enter into contracts on behalf of his client. His function in such matters is that of negotiating for and advising his client." (*Nellis v. Massey* (1952) 108 C.A.2d 724, 728, 239 P.2d 509.)

This principle is illustrated in *Redsted v. Weiss* (1945) 71 C.A.2d 660, 163 P.2d 105, although the case was actually decided in favor of the attorney's authority on the ground of ratification by the client. Plaintiff sued to quiet title, and the attorneys for both parties stipulated that rents from the property should be impounded until final judgment. Defendants, successful in the trial court, sought relief from the stipulation, demanding rents while plaintiff's appeal was pending. The court conceded that the rents were not the "subject matter" of the litigation (the subject matter was quieting of title), and that the stipulation was not concerned with one of the "steps of the action," but related to a "collateral matter" and surrendered a substantial right of the client. However, defendant was nevertheless held bound on a showing of full knowledge and consent to its terms. (71 C.A.2d 664.)

Another example, in which the unauthorized act was also a breach of fiduciary duty, is furnished by *Overell v. Overell* (1937) 18 C.A.2d 499, 64 P.2d 483. After judgment for cross-complainant, his attorney, to secure payment of his 25% contingent fee, stipulated with opposing counsel to modify the judgment so as to award the attorney a one-fourth interest in the properties to be conveyed to the client. *Held*, the client was not bound by a stipulation "related to matters wholly outside of the scope of his employment and, in fact, to matters as to which he held an interest adverse to that of his client." (18 C.A.2d 504.) (See *Britschgi v. McCall* (1953) 41 C.2d 138, 142, 257 P.2d 977 [attorney's lack of authority to accept tender by adverse party of sum in full satisfaction of claim for money due].)

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4. Matters Collateral to Litigation.

b. Receipt of Money in Settlement.

1 *Witkin Cal. Proc. Attys* § 259

[§ 259] Receipt of Money in Settlement.

An attorney has authority "[t]o receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment." (*C.C.P.* 283(2).)

This provision received an authoritative construction on peculiar facts in *Navrides v. Zurich Ins. Co.* (1971) 5 *C.3d* 698, 97 *C.R.* 309, 488 *P.2d* 637. Plaintiff was injured on the premises of an owner insured by defendant. She engaged attorney F, who filed an action and negotiated a compromise settlement for \$ 9,000. Plaintiff rejected the compromise, but F represented to defendant that plaintiff had accepted. Defendant delivered a release, a request for dismissal, and a draft payable to plaintiff and F. F forged plaintiff's name, cashed the draft, and absconded. Defendant had the action dismissed. About a year later, plaintiff discovered the facts and filed this action against defendant, on the theory that defendant owed her \$ 9,000 under the settlement agreement, which it had not paid. The trial judge agreed. *Held*, judgment for plaintiff reversed.

(a) Plaintiff, by bringing the action for the amount fixed by the settlement agreement, ratified that agreement; but she did not ratify the forgery of her signature on the draft. However, F had implied authority to collect the money under *C.C.P.* 283(2). (5 *C.3d* 703, 705.)

(b) Although *C.C.P.* 283(2) refers to "payment," it has been interpreted to cover payment by check, where the check is cashed. This follows the general rule where an agent authorized to collect a debt accepts a check payable to the agent. (5 *C.3d* 705, 706.)

(c) The problem here is whether the same rule applies where the attorney receives a check payable to the client or to the client and attorney jointly. Applying *negotiable instruments principles*, if the check is paid on a forged indorsement, the underlying obligation is not discharged and the obligor must pay again. (5 *C.3d* 707.) However, *agency principles* call for a different result. As Rest.2d, Agency §178, Comment (c) points out: "If a debtor having an account at a solvent bank sufficient to pay a check, gives to an authorized agent a check payable to the principal in accordance with business customs as conditional payment, he has performed his obligation, and any loss caused by

delay because of the conduct of the agent is at the creditor's risk. Thus, if the drawee bank cashes the check after a forgery and embezzlement by the agent and charges the amount to the debtor, the latter is relieved of his debt. The creditor then would be subrogated to the right of the debtor against the bank. If, in the meantime, the bank becomes insolvent, it is the creditor and not the debtor who loses." (5 C.3d 711.) In other words, the principal having authorized the agent to receive the check takes the risk of the acts of that agent, and the transaction as between debtor and creditor is treated as if cash had been paid. (5 C.3d 709.)

The problem identified in *Navrides* was ameliorated somewhat by the enactment in 1994 of B. & P.C. 6149.5. The statute requires an insurer to provide written notice to the claimant upon payment of \$ 100 or more in settlement of a third-party liability claim, if the claimant is a natural person and the payment is delivered to the claimant's lawyer or other representative. (B. & P.C. 6149.5(a).) For purposes of the statute, "written notice" includes a copy of the cover letter accompanying the payment. (B. & P.C. 6149.5(b).) B. & P.C. 6149.5 does not create a cause of action against the insurer or a defense to any cause of action based on the insurer's failure to provide the notice. (B. & P.C. 6149.5(c).)

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5. Acts Contrary to Law, Court Rule, or Public Policy.

a. In General.

1 Witkin Cal. Proc. Attys § 260

[§ 260] In General.

Some acts or agreements are held void not because of excess of the attorney's authority to represent the client, but on more fundamental grounds that would invalidate the client's own act or agreement. The principles involved are mainly those of illegality of contract, but a few important illustrations in the field of attorneys' stipulations deserve mention. Thus, a stipulation attempting to confer subject matter jurisdiction on a court that lacks it is void. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §13.) Similarly, a stipulation that attempts to fix venue where it would not ordinarily be is invalid. (See 3 *Cal. Proc.* (5th), *Actions*, §785.)

In *Mary R. v. B. & R. Corp.* (1983) 149 C.A.3d 308, 196 C.R. 871, a 14-year-old minor alleged that defendant physician had sexually molested her. As part of a settlement, the parties agreed to a stipulated dismissal under which the court records were ordered sealed and the parties, their agents, and representatives were ordered never to discuss the case with anyone. The effect of the stipulation was to prevent the Board of Medical Quality Assurance from discharging its statutory responsibility to investigate possible misconduct by licensed physicians. *Held*, the provision for confidentiality was contrary to public policy and should be stricken from the order. (149 C.A.3d 316, 317, 318.)

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b. Stipulations as to Law or Facts.

1 *Witkin Cal. Proc. Attys* § 261

[§ 261] Stipulations as to Law or Facts.

The most difficult problems are raised by stipulations that go beyond mere procedural matters and are said to interfere with the "paramount power of the court" to decide the issues of law and fact. The cases reveal no consistent principle or test.

In *Los Angeles v. Harper* (1935) 8 C.A.2d 552, 48 P.2d 75, a deputy city attorney in a condemnation action stipulated that the landowner had suffered severance damages of \$ 25,000. The evidence showed no severance damages, and the trial judge's rejection of the stipulation was upheld, mainly on the following ground: "The responsibility of awarding public money for property taken for public uses is that of the court, and it is for the court to say what evidence of values or damages should be presented for the court's consideration and guidance in giving judgment. Neither the responsibility nor the duty of the court to render a just judgment should be shifted to counsel in the case. While it is entirely proper for the court to accept stipulations of counsel which appear to have been made advisedly, and after due consideration of the facts, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (8 C.A.2d 555.) Thus, protection of the public interest is one reason for denying enforcement.

In *Berry v. Chaplin* (1946) 74 C.A.2d 652, 169 P.2d 442, a filiation proceeding, a stipulation that the action would be dismissed if a blood test showed nonparentage was held void. The agreement was made by the child's guardian ad litem as well as the attorneys and was approved by the superior court judge. Nothing further could have been done to strengthen the attorneys' authority; the decision rests on the holding that the guardian and attorneys lacked the power to consent to a determination of the minor's rights without a jury trial on all available evidence. (74 C.A.2d 657, 658.) Thus, protection of the rights of a minor is another reason for rejecting a stipulation which, though it might appear to have speculative advantages, places those rights in jeopardy. (For rule on blood test as conclusive evidence of nonpaternity, see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §73 et seq.)

Unfortunately *Berry* adds this astonishing declaration: "A stipulation that only such evidence as shall be agreed upon by the parties shall be admissible will not be allowed to control the action of the court in the reception of other evidence or to determine the effect to be given to it. Courts will not permit the course of justice to be controlled or the

conduct of an action to be circumscribed in such manner as to defeat the ends of justice. Parties cannot arrogate judicial functions to themselves nor can they agree to oust the court of the jurisdiction given to it by law to admit all evidence applicable to a cause and to render judgment accordingly." (74 C.A.2d 658.) This broad pronouncement says in effect: Even where the interest of the public or minors or incompetents is not involved, and the litigants are of full capacity and are represented by attorneys acting with full authority, they cannot make a binding stipulation on evidence or facts; or, what is worse, they may make such a stipulation binding on themselves, but the trial court may and perhaps should disregard it whenever it believes that the case would be better tried without it. A long line of cases upholding these stipulations (infra, §271 et seq.), and the statutory and case law permitting trial or other hearing and determination on agreed statements of fact or on demurrer (essentially an agreed statement of the facts alleged in the complaint), demonstrate that the court's language cannot be accepted unless confined to its background, i.e., a situation calling for the trial judge's exercise of its paramount powers to prevent a miscarriage of justice.

A similar notion is that the parties cannot stipulate as to the *issues*. In *San Francisco Lumber Co. v. Bibb* (1903) 139 C. 325, 73 P. 864, plaintiff materialman sued defendant sureties on a contractor's bond. A prior decision held this form of bond void for technical reasons; hence, normally plaintiff could not have recovered. But in this case the parties stipulated in an agreed statement of facts in the trial court "that the sole question for determination should be, whether the failure of the plaintiff, as materialman, to file a lien relieved the sureties on the bond." *Held*: (a) the sureties were not liable, irrespective of the failure to file a lien, because the bond was void; and, (b) the stipulation purporting to preclude consideration of the invalidity of the bond was ineffective. Counsel, said the court, "may agree as to the facts, but they cannot control this court by stipulation as to the sole, or any, question of law to be determined under them." (139 C. 326.)

San Francisco Lumber Co. also illustrates the dangers of broad declarations. Stipulations of counsel defining the issues, though not as common as counsel's pleadings defining the issues, have about the same purpose and effect, and, in the absence of special circumstances of lack of authority, fraud, or injury to a protected interest, ought to be binding. (See infra, §272.) A different problem would be presented if the bond were an illegal contract and the objection of illegality were raised by the court. (See 1 *Summary* (10th), *Contracts*, §430.) The stipulation here for trial on the merits of the claim, waiving an attack on its validity, was as proper as the filing of an answer without pleading special defenses of statute of limitations, statute of frauds, mistake, or other excuse.

Despite these difficulties in analysis, the courts frequently declare that the parties cannot by stipulation bind the court to decide rights, liabilities, or damages in accordance with an erroneous rule of law. (See *Valdez v. Taylor Auto. Co.* (1954) 129 C.A.2d 810, 818, 278 P.2d 91 [stipulation that in event jury found tort liability, judgment should be in specified amount computed under wrong measure of damages; but see infra, §274]; *Robinson v. Sacramento City Unified School Dist.* (1966) 245 C.A.2d 278, 287, 53 C.R. 781 [ambiguous stipulation, contrary to statutory definition, which would have controlled major issue in action]; *Burrows v. California* (1968) 260 C.A.2d 29, 33, 66 C.R. 868 [ambiguous stipulation based on erroneous legal assumptions that would have destroyed plaintiffs' case].)

In *Oakland Raiders v. Berkeley* (1976) 65 C.A.3d 623, 137 C.R. 648, the principal issue was whether a city tax on professional sports events was a valid revenue-raising measure or was an improper regulation of property controlled by the Regents of the University of California. The taxpayer asserted that the city's counsel had stipulated that the tax was regulatory. *Held*, any such stipulation was ineffective. "The interpretation of the Constitution, statutes, and ordinances is a subject within the authority of the courts, not the parties." (65 C.A.3d 629, citing the text.)

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c. Dismissal Entered by Fraudulent Attorney.

1 *Witkin Cal. Proc. Attys* § 262

[§ 262] Dismissal Entered by Fraudulent Attorney.

Whittier Union High School Dist. v. Superior Court (1977) 66 C.A.3d 504, 136 C.R. 86, deals with several substantive and procedural issues arising out of the fraud of an attorney. In 1973 plaintiffs filed a personal injury action against defendant District. Plaintiffs' attorney P, without plaintiffs' knowledge, purported to settle the action for \$ 30,000, forging plaintiffs' signatures on a release and on an indorsement of the draft and taking the proceeds. P then entered a dismissal with prejudice. In 1976, plaintiffs, discovering that P had been convicted of fraud and forgery in a similar case, employed a new attorney who moved to vacate the judgment of dismissal. The superior court granted the motion and ordered the complaint reinstated. Defendant sought mandamus to compel vacation of the order. *Held*, writ denied.

(a) *No equitable relief against judgment.* Because defendant was a wholly innocent party, plaintiffs' theory of equitable relief was not extrinsic fraud but "extrinsic mistake." "The doctrine of 'extrinsic mistake' has been used to grant relief to a client who has relied to his detriment on a dishonest or incompetent lawyer to handle his legal business. The 'mistake' involved is a species of legal fiction used to justify court action, in that the real mistake involved is either that of the client in employing unsatisfactory counsel or that of the attorney in failing to meet his professional obligations. ... In recent years courts of equity have struggled with the problem of incompetency or dishonesty of a party's own counsel and have attempted to reconcile relief based on these grounds with the principle of finality of judgment. These attempts have not been uniformly successful, nor have they produced any consistent and uniform body of doctrine that can be disinterestedly and impartially applied. ... The tenor of professional comment suggests that the doctrine of extrinsic mistake, when used to provide remedial relief for misconduct or neglect of a party's own counsel, produces law that is forced and contrived and creates the hard cases that make bad law. We do not believe equitable relief based on either extrinsic fraud or extrinsic mistake is appropriate in the cause at bench." (66 C.A.3d 507, citing the text.)

(b) *Purported dismissal is void.* Plaintiffs were entitled to have the judgment vacated without regard to extrinsic fraud or mistake. An attorney has no implied authority to compromise and settle the client's cause of action (see *supra*, §246), and P had no express authority to enter the dismissal with prejudice. Hence, P's act was void and the judgment could be vacated at any time. (66 C.A.3d 508, 509.)

(c) *Rights of District and insurer.* Defendant, as an innocent party defrauded of \$ 30,000 by plaintiffs' attorney, is entitled to recover from plaintiffs. (1) If judgment is rendered against defendant in plaintiffs' reinstated action, defendant is entitled to an offset in this amount. (2) Defendant may, in the alternative, bring an action against plaintiffs, negotiating banks, and others who may be liable for that loss. Plaintiffs may be liable under the agency doctrine that a principal is liable for the fraud of his agent acting under actual or ostensible authority; i.e., having placed the agent in a position to deceive third persons, the principal is not relieved from liability by reason of the fact that the agent acted for his own purposes. (66 C.A.3d 510; see 3 Summary (10th), *Agency and Employment*, §193.) In this case P, the attorney-agent, had implied authority to receive money for his client. (66 C.A.3d 510; see 3 Summary (10th), *Agency and Employment*, §137.)

(d) *Reimbursement from Client Security Fund.* Plaintiffs, defendant, and defendant's insurer may be entitled to reimbursement from the Client Security Fund pursuant to B. & P.C. 6140.5 (supra, §17). (66 C.A.3d 510.) (See *Alvarado Community Hosp. v. Superior Court* (1985) 173 C.A.3d 476, 483, 219 C.R. 52, supra, §249 [plaintiff may not simultaneously seek reimbursement from Client Security Fund and pursue action against defendant].)

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D. Stipulations.

1. Nature.

1 Witkin Cal. Proc. Attys § 263

[§ 263] Nature.

A stipulation is an agreement between the attorneys for adverse parties, relating to a matter involved in a judicial proceeding, and entered into in the manner prescribed by law. (See *Palmer v. Long Beach* (1948) 33 C.2d 134, 142, 199 P.2d 952 ["A stipulation is an agreement between counsel respecting business before the court"]; *First Nat. Bank of San Pedro v. Stansbury* (1931) 118 C.A. 80, 84, 5 P.2d 13 [contract, supported by consideration, and binding on parties]; *Morgenstern v. Bailey* (1938) 29 C.A.2d 321, 84 P.2d 159 [analyzing stipulation for elements of contract]; *Los Angeles City School Dist. of Los Angeles v. Landier Inv. Co.* (1960) 177 C.A.2d 744, 2 C.R. 662, *infra*, §282; *Harris v. Spinali Auto Sales* (1966) 240 C.A.2d 447, 452, 49 C.R. 610; 73 Am.Jur.2d (2001 ed.), *Stipulations* §1; 23 Am.Jur. P.P. Forms (2001 Rev.), *Stipulations* §1 et seq.)

Compliance with the formal requisites for validity (see *infra*, §266) is generally regarded as a sufficient basis for enforcement, and the element of consideration is either ignored or treated as nonessential. (See *Rest.2d, Contracts* §94 [enforceable despite lack of consideration].) Several California cases, without extended discussion, take the opposite position; i.e., they assume the necessity of consideration (see *Morgenstern v. Bailey*, *supra*, 29 C.A.2d 323), and treat failure of consideration as an excuse for performance (see *Raymond v. McMullen* (1891) 90 C. 122, 125, 27 P. 21). Doubtless the California rule is no more restrictive as to stipulations than as to other kinds of contracts; hence, justifiable reliance should result in an enforceable stipulation, despite lack of consideration, under the doctrine of promissory estoppel. (See 1 *Summary* (10th), *Contracts*, §254.)

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2. Effect in Present Proceeding.

1 *Witkin Cal. Proc. Attys* § 264

[§ 264] Effect in Present Proceeding.

(1) *Binding on Parties.* A stipulation in proper form is binding on the parties if it is within the authority of the attorneys. (*Palmer v. Long Beach* (1948) 33 C.2d 134, 141, 144, 199 P.2d 952; *Estate of Stickelbaut* (1960) 54 C.2d 390, 394, 6 C.R. 7, 353 P.2d 719; *Fran-Well Heater Co. v. Robinson* (1960) 182 C.A.2d 125, 128, 5 C.R. 900; *Harris v. Spinali Auto Sales* (1966) 240 C.A.2d 447, 453, 49 C.R. 610; *In re Marriage of Carter* (1971) 19 C.A.3d 479, 488, 97 C.R. 274; *Leonard v. Los Angeles* (1973) 31 C.A.3d 473, 476, 107 C.R. 378, *infra*, §265; *Japan Food Corp. v. Sacramento* (1976) 58 C.A.3d 891, 897, 130 C.R. 392, citing the text; *Sacramento v. Work. Comp. App. Bd. (Weatherall)* (2000) 77 C.A.4th 1114, 1121, 92 C.R.2d 290 ["a poor outcome is not a principled reason to set aside a stipulation by counsel"]; cf. *Palmer v. Oakland* (1978) 86 C.A.3d 39, 43, 44, 150 C.R. 41 [stipulation is binding on persons in privity with parties]; on attorney's authority, see *supra*, §235 et seq.)

(2) *Binding on Court.* An authorized stipulation in proper form, unless contrary to law, court rule, or public policy, is binding on the court. In *Capital Nat. Bank of Sacramento v. Smith* (1944) 62 C.A.2d 328, 144 P.2d 665, a stipulation of facts and consent to judgment was in part rejected by the trial judge. *Held*, this was improper, and the judgment should be modified to conform to the agreement. "A stipulation of counsel at the trial of a case, agreeing that specified material facts upon essential issues may be considered as evidence, and that a judgment shall be rendered accordingly, is binding upon the respective parties thereto and upon the court." (62 C.A.2d 343.) (See *Henning v. Wuest* (1920) 48 C.A. 147, 150, 191 P. 713 [finding contrary to stipulated fact on material issue was prejudicial error]; *Estate of Howe* (1948) 88 C.A.2d 454, 458, 199 P.2d 59 ["So long as the stipulation was not illegal nor contrary to public policy, it was the duty of the probate court to consider as finally settled all matters therein agreed to"]; *Green v. Linn* (1962) 210 C.A.2d 762, 768, 26 C.R. 889, citing the text; *Estate of Schmelz* (1968) 259 C.A.2d 440, 446, 66 C.R. 480; *People v. Busick* (1968) 259 C.A.2d 744, 748, 66 C.R. 532, *infra*, §275; *Estate of Burson* (1975) 51 C.A.3d 300, 306, 124 C.R. 105 [error for probate court to disregard parties' stipulation interpreting will]; cf. *Robinson v. Work. Comp. App. Bd.* (1987) 194 C.A.3d 784, 790, 239 C.R. 841, 2 *Summary* (10th), *Workers' Compensation*, §391 [under *Lab.C.* 5702, stipulations in workers' compensation proceedings, though admissible, are not binding on appeals board and are treated as evidence in nature of admission].) (On stipulations contrary to law, court rule, or public policy, see *supra*, §260 et seq.)

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D. Stipulations.

3. Effect in Subsequent Proceeding.

1 Witkin Cal. Proc. Attys § 265

[§ 265] Effect in Subsequent Proceeding.

An unusual stipulation, involving several aspects of the law, was the subject of extended consideration by a divided court in *Leonard v. Los Angeles* (1973) 31 C.A.3d 473, 107 C.R. 378. L, charged with the misdemeanor of appropriating lost property (P.C. 485; 2 Cal. Crim. Law (3d), *Crimes Against Property*, §19), had a possible defense of illegal arrest and search. At the courtroom awaiting trial, L, after consulting his attorney, entered into a stipulation with the city, through the city prosecutor, that the arrest "was made with probable cause." The criminal complaint was then dismissed. Subsequently L brought this tort action against the city for false imprisonment. The trial judge found that the officers did not have probable cause, and that the stipulation in the criminal proceeding was a conclusion of law and not binding on the court in the civil action. Accordingly, judgment was given for plaintiff L. *Held*, reversed.

(a) A stipulation cannot bind the court on legal conclusions, but it can be binding on evidentiary matters and the existence or nonexistence of facts. (31 C.A.3d 476; see *supra*, §264, *infra*, §273.)

(b) The stipulation made by L was not as to facts, but only to the legal conclusion that the arrest was made with probable cause. Nevertheless, it should be binding for the following reasons:

(1) If the case had gone to trial the prosecution would have presented evidence to show probable cause. The defendant, in stipulating to it, could avoid evidence that might be deemed disadvantageous; and he had a right to use this tactic. (31 C.A.3d 476.)

(2) The stipulation was not illegal; in the event of a trial its only effect would have been to allow the seized items to be admitted in evidence. (31 C.A.3d 477.) If it had been made in consideration of dismissal of the criminal charge, it might have been illegal (although the prosecutor could not bind the court but could only promise to move for dismissal). (31 C.A.3d 478.) And, although it was undoubtedly solicited in order to foreclose the very type of civil action brought here, the purpose is not relevant to its binding effect. (31 C.A.3d 477.)

(3) L made no attempt to be relieved of the stipulation, and there was no suggestion of coercion; rather, L consulted with his attorney and was informed of the consequences. (31 C.A.3d 479.)

A vigorous dissent attacks this reasoning and conclusion:

(a) The stipulation, followed by immediate dismissal, served no purpose in the criminal case; its only effect was to bar a civil action for false arrest; thus the pendency of the criminal prosecution was used to obtain from L a surrender of his property (the cause of action against the city). Hence, it was as contrary to public policy as it would have been if L had paid the prosecutor money: "No matter what legalism may be invoked to classify the transaction, the unvarnished truth is that in claiming the benefit of the stipulation, the city is using a criminal prosecution as means of obtaining property to which the city is not entitled." (31 C.A.3d 481.)

(b) A valid plea bargain, reported to and approved by the judge, is entirely different; none was shown here, and it is doubtful that a negotiated plea could properly include a disposition of civil litigation unrelated to guilt or innocence of the criminal charge. (31 C.A.3d 481.) (See *Salazar v. Upland Police Dept.* (2004) 116 C.A.4th 934, 944, 11 C.R.3d 22 [plaintiff's stipulation in criminal matter that there was probable cause for her arrest was valid, admissible, and binding in her civil action for false arrest and related allegations; following *Leonard*].)

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D. Stipulations.

4. Form.

a. In General.

1 Witkin Cal. Proc. Attys § 266

[§ 266] In General.

An attorney has authority to bind a client in any of the steps of an action or proceeding "by his agreement filed with the Clerk, or entered upon the minutes of the Court, and not otherwise." (*C.C.P. 283(1)*.) This seems to be the only general statutory provision relating to stipulations, and it is settled that it does not purport to cover the authority of the attorney but rather to prescribe the *form* of its exercise. The provision is, in a sense, a statute of frauds, which renders a stipulation between counsel unenforceable unless it becomes part of the record of the court by a written agreement being filed, or by a written minute entry of its terms.

In the leading case of *Smith v. Whittier* (1892) 95 C. 279, 287, 30 P. 529, the court said: "The evident object of this section is that whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be such a record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record,—if oral, that it shall be entered in the minutes, and if written, that it shall be filed with the clerk." (See *Beckett v. City of Paris Dry Goods Co.* (1938) 26 C.A.2d 295, 79 P.2d 178 [oral statement waiving right to appeal, not entered in minutes, was not binding]; *Fresno City High School Dist. v. Dillon* (1939) 34 C.A.2d 636, 644, 94 P.2d 86 ["where the making of an oral stipulation, executory in effect, which has neither been reduced to writing and filed with the clerk, nor entered in the minutes, is denied by one of the parties, the courts will not inquire into the matter but will apply the rule of section 283"]; *Harrold v. Harrold* (1950) 100 C.A.2d 601, 605, 224 P.2d 66 [counsel's oral agreement to dismiss appeal, not entered in minutes, was not binding].)

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4. Form.

b. Written Stipulation Filed.

1 *Witkin Cal. Proc. Attys* § 267

[§ 267] Written Stipulation Filed.

The most desirable method of evidencing the agreement is by a carefully prepared written stipulation, setting forth the terms with detail and precision. This will help avoid the danger of an unfavorable construction, or the delay and effort involved in proceedings to obtain relief from an unwarranted or unauthorized concession. (See *infra*, §278 et seq.) (For examples of formal written stipulations, see *Clemens v. Gregg* (1917) 34 C.A. 245, 247, 167 P. 294; *Redsted v. Weiss* (1945) 71 C.A.2d 660, 662, 163 P.2d 105; 23 Am.Jur. P.P. Forms (2001 ed.), Stipulations §1 et seq.)

Although it would seem appropriate to file the stipulation as soon as it is signed, C.C.P. 283(1) imposes no requirement of timely filing. Hence, if no injury results from the delay, it is effective even though filed long after it is prepared. (*Smith v. Whittier* (1892) 95 C. 279, 290, 30 P. 529, *supra*, §266 [stipulation made by original attorneys, filed after new attorneys had been substituted]; *Clemens v. Gregg*, *supra*, 34 C.A. 253 [stipulation settling rights, authorizing entry of decree, and waiving right of appeal; valid though not filed for over 3 years].)

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4. Form.

c. Oral Stipulation in Minutes.

1 *Witkin Cal. Proc. Attys* § 268

[§ 268] Oral Stipulation in Minutes.

The alternative form permitted by *C.C.P. 283(1)*--a minute entry--is equally effective but certainly not as desirable when the subject matter of the stipulation is important. The separate oral statements of counsel often lack the clarity of a single writing; the minute entry may be an abbreviated version of the matters stated orally; and there is the danger that, for some reason, the agreement will not actually be entered in the minutes. (See, e.g., *Fresno City High School Dist. v. Dillon* (1939) 34 *C.A.2d* 636, 643, 94 *P.2d* 86 [no minute entry and no reporter's transcript, hence no evidence of stipulation]; cf. *Webster v. Webster* (1932) 216 C. 485, 14 *P.2d* 522, *infra*, §270.)

For these reasons the safer practice would seem to be to confine oral stipulations to simple procedural matters, such as the sufficiency of a pleading, the admissibility of evidence, or admissions of fact in lieu of evidence. (See *infra*, §§272, 273.) Nevertheless, important substantive matters are sometimes the subject of oral stipulation. (See *infra*, §§269, 270.)

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d. Sufficiency of Informal Stipulations.

1. In General.

1 Witkin Cal. Proc. Attys § 269

[§ 269] In General.

Despite the mandatory language of *C.C.P. 283(1)*, many stipulations that fail to comply with either of the alternative forms prescribed in the statute are enforced. "To give section 283 a literal construction would greatly retard the business of the court and lead to absurd consequences. Every admission, consent or agreement made in the course of the trial would either have to be reduced to writing or filed with the clerk or by the clerk entered in his minutes. It was never intended that the section should receive such a construction." (*Continental Bldg. & Loan Assn. v. Woolf* (1910) 12 C.A. 725, 730, 108 P. 729.)

The discussion of estoppel and ratification in the cases sometimes appears to confuse two distinct problems: the authority of the attorney and the form of the agreement. The decisions will be better understood, perhaps, when analyzed as follows: If the problem is one of the *authority* of the attorney, the lack of that authority is cured by the client's express or implied *ratification*. (See *supra*, §235.) Nevertheless, the defect of *form* remains: The stipulation, though authorized or ratified, is unenforceable for lack of compliance with *C.C.P. 283(1)*. But the statute of frauds cannot be invoked to attack an executed (fully performed) contract; and one party may, through conduct, be estopped to set up the statute as a defense to an executory contract. (See 1 *Summary* (10th), *Contracts*, §406 et seq.; 7 *A.L.R.3d* 1394, 1415 [effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements].)

These two concepts--executed contract and estoppel by conduct--are the fundamental bases for enforcement of stipulations that fail to comply with the statutory requirements of form. Illustrations of this approach, classified according to the nature of the defect, are as follows:

(1) *Written Stipulation Not Filed*. (See *Smith v. Whittier* (1892) 95 C. 279, 288, 30 P. 529 [dictum; stipulation was subsequently filed, after substitution of attorneys].)

(2) *Oral Stipulation Outside of Court*. (See *Waybright v. Anderson* (1927) 200 C. 374, 378, 253 P. 148 [stipulation over telephone permitting filing of amended pleading]; *Fidelity & Cas. Co. of New York v. Abraham* (1945) 70 C.A.2d 776, 783, 161 P.2d 689 [oral indemnity agreement for release of attachment against defendant in another action].)

(3) *Oral Stipulation in Chambers.* (See *Witaschek v. Witaschek* (1942) 56 C.A.2d 277, 283, 132 P.2d 600 [conference between attorneys in chambers and agreement on form of order in divorce case].)

(4) *Oral Stipulation in Open Court but Not Entered in Minutes.* (See *infra*, §270.)

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d. Sufficiency of Informal Stipulations.

2. Oral Stipulation Not Entered.

1 *Witkin Cal. Proc. Attys* § 270

[§ 270] Oral Stipulation Not Entered.

In *Webster v. Webster* (1932) 216 C. 485, 14 P.2d 522, an action for separate maintenance, the parties stipulated in open court that plaintiff might file a supplemental complaint for divorce and that its allegations would be deemed denied thus obviating the need of filing an answer. The supplemental complaint was filed, the action was tried, and judgment was rendered for defendant. On appeal on the judgment roll alone, plaintiff contended that the allegations of the supplemental complaint were admitted because the record showed no denial. Defendant, by augmentation of the record, brought up a transcript of the stipulation as taken down by the reporter, which the clerk had never entered in the minutes. *Held*, after trial and judgment, the defective stipulation was safe from attack; plaintiff had received its benefit, and defendant in reliance on it had been induced to forgo his right to file an answer. (216 C. 489.)

In *Cathcart v. Gregory* (1941) 45 C.A.2d 179, 113 P.2d 894, an action for a declaration of rights under a contract, a settlement was reached during the trial. With both clients present in court, counsel recited at length the terms of a stipulation for judgment in favor of defendant, subject to certain rights of plaintiff, and the court ordered judgment as stipulated. The minutes merely referred to the order for stipulated judgment but did not contain the terms of the stipulation; and attempts by counsel for defendants to obtain the signature of plaintiff to a written version were unavailing. Subsequently, plaintiff engaged new attorneys and moved for relief from the stipulation. *Held*, the motion was properly denied. The making of the stipulation was undisputed; its exact terms were available in the transcript of the reporter's notes; it was acted on by court and parties and thus became an executed contract. (45 C.A.2d 186.)

In *Morrow v. Learned* (1926) 76 C.A. 538, 245 P. 442, the attorneys reached a compromise, and in open court stated the terms on which judgment should be entered for plaintiff on a condition favorable to defendant. The court approved the agreement and asked the attorneys to put it in writing so that the exact terms would be understood, but plaintiff subsequently refused to sign the writing. *Held*, this was a binding stipulation for a consent judgment, and the trial judge properly entered judgment in accordance with the agreement. (76 C.A. 540.)

In *Johnston, Baker & Palmer v. Record Machine & Tool Co.* (1960) 183 C.A.2d 200, 6 C.R. 847, the attorneys orally stipulated for judgment, the parties orally acquiesced, and, although they undertook to have the stipulation

reduced to writing and signed, they expressly agreed that "this is a stipulation in open court." *Held*, it was binding despite the subsequent refusal of defendant to sign the writing. (183 C.A.2d 206.)

Additional decisions are illustrative. (See *Ward v. Goetz* (1917) 33 C.A. 595, 597, 165 P. 1022 [oral colloquy between counsel agreeing on issue]; *Collins v. Welsh* (1934) 2 C.A.2d 103, 107, 37 P.2d 505 [oral stipulation admitting fact, repeated by court]; *Exley v. Exley* (1951) 101 C.A.2d 831, 836, 226 P.2d 662 [oral stipulation before judge to receive probation officer's report as testimonial evidence and so ordered]; *Harris v. Spinali Auto Sales* (1966) 240 C.A.2d 447, 455, 49 C.R. 610 [oral stipulation as to division of corporate assets and dismissals of actions dictated to reporter in open court]; *In re Marriage of Carter* (1971) 19 C.A.3d 479, 488, 97 C.R. 274 [property agreement thoroughly discussed by parties and attorneys and all present in court with no exception taken]; *Harding v. Collazo* (1986) 177 C.A.3d 1044, 1052, 223 C.R. 329, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §477 [plaintiff, having received benefit of oral stipulation to take off calendar hearing on defendant's demurrer and motion to strike, was bound; following *Webster*, supra, and *Smith v. Whittier* (1892) 95 C. 279, 288, 30 P. 529, supra, §266].)

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5. Matters Subject to Stipulation.

a. In General.

1 Witkin Cal. Proc. Attys § 271

[§ 271] In General.

An attorney has broad control over the conduct of litigation (*supra*, §243 et seq.), and the attorney's authority includes the power to stipulate to a wide variety of matters.

In *Duffy v. Griffith Co.* (1962) 206 C.A.2d 780, 24 C.R. 161, plaintiff sued G, a special employer, for wrongful death due to the negligence of S, G's employee. At the trial G's attorney expressly conceded that S was acting in the scope of his employment, and relied solely on the defense of contributory negligence. The judge instructed the jury accordingly and the verdict was for plaintiff. On a motion for a new trial, executives of G stated that the attorney had no authority to make the concession. *Held*, judgment affirmed. Although an attorney cannot give up the substantive rights of a client, an attorney may select issues and abandon others and make admissions during trial.

"The trial attorney is in full charge of his client's cause or defense. When representing the defendant he must determine in the first instance what defenses shall be averred and what potential ones shall be omitted. At the trial he must have and exercise discretion to make such tactical decisions as the exigencies of the combat may dictate. His is the legal knowledge and skill that must be consulted in that connection, not the views of a layman; often the decision must be made with celerity and precision. Specifically his is the prerogative of withdrawing one of two defenses when he concludes that it cannot be sustained and that its fruitless pursuit may prejudice the other sound defense. Perhaps it may develop that he was mistaken in his judgment but that does not condemn him or retroactively sweep away his authority. If it appears that the attorney was negligent in the matter the client's remedy is against him personally. The trial judge and opposing counsel are justified in relying upon the apparent and presumptive authority of the attorney and in acting upon that basis." (206 C.A.2d 787.)

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b. Pleadings and Issues.

1 Witkin Cal. Proc. Attys § 272

[§ 272] Pleadings and Issues.

(1) *Pleadings*. Stipulations remedying defects in pleadings are common. (See *Michelin Tire Co. of Calif. v. Coleman & Bentel Co.* (1919) 179 C. 598, 603, 178 P. 507 [action was filed before claim was assigned to plaintiff; stipulation that amended complaint on assigned claim be filed, waiving objection of premature action]; *Murphy v. Stelling* (1908) 8 C.A. 702, 706, 97 P. 672 [stipulation that complaint, lacking prayer, be deemed amended to include particular prayer]; *Collins v. Welsh* (1934) 2 C.A.2d 103, 107, 37 P.2d 505 [assignment of claim was inadvertently omitted from one count; stipulation that plaintiff was owner of claim]; *Abalian v. Townsend Social Center* (1952) 112 C.A.2d 441, 446, 246 P.2d 965 [stipulation that parties plaintiff were sufficient in number to bring statutory action]; *Duffy v. Griffith Co.* (1962) 206 C.A.2d 780, 24 C.R. 161, supra, §271; *Hehr v. Swendseid* (1966) 243 C.A.2d 142, 148, 52 C.R. 107 [stipulation that small claims court action, when transferred to superior court, was counterclaim].)

(2) *Issues*. Stipulations regarding issues are also common. (See *Williams v. General Ins. Co. of America* (1936) 8 C.2d 1, 4, 63 P.2d 289 [stipulation as to issues, determining theory on which case was tried]; *Estate of Stickelbaut* (1960) 54 C.2d 390, 394, 6 C.R. 7, 353 P.2d 719 [appointment of administrator; stipulation that son was pretermitted heir eliminating questions of advancement or effect of general disinheritance clause]; *Spahn v. Spahn* (1945) 70 C.A.2d 791, 795, 162 P.2d 53 [divorce; stipulation that disposition of all property of parties, community or separate, be considered in issue and determined by court]; *Steele v. Steele* (1955) 132 C.A.2d 301, 303, 282 P.2d 171 [stipulation that one-half of property was plaintiff's separate property, character of other half to be determined by court]; *Bemer v. Bemer* (1957) 152 C.A.2d 766, 771, 314 P.2d 114 ["A stipulation may lawfully include or limit issues or defenses to be tried, whether or not such issues or defenses are pleaded"]; *Fran-Well Heater Co. v. Robinson* (1960) 182 C.A.2d 125, 128, 5 C.R. 900 [action for repossession of personal property; stipulation that plaintiff was owner and entitled to possession or reasonable value]; *In re Marriage of Mahone* (1981) 123 C.A.3d 17, 21, 176 C.R. 274 [dissolution proceeding; stipulation in 1978 that husband's military retirement benefits were community property was binding despite United States Supreme Court decision in 1981 changing law].)

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c. Evidence and Facts.

1 *Witkin Cal. Proc. Attys* § 273

[§ 273] Evidence and Facts.

Stipulations may overcome objections of competency of evidence or may be a substitute for proof. The following cases are illustrative:

Haese v. Heitzeg (1911) 159 C. 569, 574, 114 P. 816 [stipulation that irrigation district was performing functions in good faith, held to establish as fact that it was de facto corporation].

McGuire v. Baird (1937) 9 C.2d 353, 70 P.2d 915 [qualifications of expert witness].

Grunsky v. Field (1905) 1 C.A. 623, 82 P. 979 [in retrial of case, submission for decision on transcribed record of former trial].

Lawson v. Steinbeck (1919) 44 C.A. 685, 689, 186 P. 842 [deposition used as though legal notice had been given].

Wilson v. Mattei (1927) 84 C.A. 567, 572, 258 P. 453 [admission of correctness of items in account].

Asher v. Johnson (1938) 26 C.A.2d 403, 408, 79 P.2d 457 [action to recover sales taxes paid under protest; stipulation that plaintiff was not engaged in business of selling tangible personal property].

Exley v. Exley (1951) 101 C.A.2d 831, 836, 226 P.2d 662 [probation officer's report to be treated as testimonial evidence].

Hart v. Richardson (1955) 134 C.A.2d 242, 246, 285 P.2d 685 [stipulation that there was no community property].

Warburton v. Kieferle (1955) 135 C.A.2d 278, 285, 287 P.2d 1 [stipulation as to property interests to which county liens should attach].

Estate of Schmelz (1968) 259 C.A.2d 440, 446, 66 C.R. 480 [setting aside probate homestead; stipulation that property--two houses and six-unit apartment building on one lot--was incapable of physical partition].

Estate of Burson (1975) 51 C.A.3d 300, 306, 124 C.R. 105 [stipulation on meaning of ambiguous clause in will was one of ultimate fact, substituting for extrinsic evidence of meaning].

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5. Matters Subject to Stipulation.

d. Liability and Damages.

1 *Witkin Cal. Proc. Attys* § 274

[§ 274] Liability and Damages.

Parties may stipulate to either liability or damages. (See *Los Angeles v. Oliver* (1929) 102 C.A. 299, 331, 283 P. 298 [eminent domain action, stipulation on value of property and amount of compensation for item of loss]; *Corbett v. Benioff* (1932) 126 C.A. 772, 777, 14 P.2d 1028 [measure of damages in event of judgment stipulated, leaving only issue of liability]; *McGee v. Los Angeles* (1936) 6 C.2d 390, 393, 57 P.2d 925 [same]; *Gonzales v. Pacific Greyhound Lines* (1950) 34 C.2d 749, 754, 214 P.2d 809 [wrongful death; liability stipulated, leaving only issue of damages].) (On cases holding that stipulation cannot bind court if based on erroneous rule of law, see *supra*, §261.)

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e. Other Matters Relating to Trial.

1 Witkin Cal. Proc. Attys § 275

[§ 275] Other Matters Relating to Trial.

Procedural steps at trial are frequently the subject of stipulation. (See *Meagher v. Gagliardo* (1868) 35 C. 602 [agreement on trial date, in consideration of continuance]; *Estate of Kent* (1936) 6 C.2d 154, 163, 57 P.2d 901 [stipulation for judge pro tempore]; *Los Angeles v. Cole* (1946) 28 C.2d 509, 515, 170 P.2d 928 [retrial of partially tried cause]; *Johnson v. Johnson* (1931) 117 C.A. 145, 147, 3 P.2d 587 [waiver of findings]; *First Nat. Bank of San Pedro v. Stansbury* (1931) 118 C.A. 80, 84, 5 P.2d 13 [submission of issue--account between parties--to referee]; *Gordon v. Kifer* (1938) 26 C.A.2d 252, 255, 79 P.2d 164 [waiving ground for mistrial on condition that court instruct jury properly on misconduct involved]; *Estate of Doran* (1956) 138 C.A.2d 541, 545, 292 P.2d 655 [authorizing reference under C.C.P. 638]; *Phillips v. Beilsten* (1958) 164 C.A.2d 450, 455, 330 P.2d 912 [stipulation to consolidate actions pending in different counties for trial in the county].)

In *People v. Busick* (1968) 259 C.A.2d 744, 66 C.R. 532, a signed stipulation, made at the pretrial conference, that the trial date could be set on 12 hours' notice by the court, and that "[n]otice of time of trial is hereby waived," was held both proper and binding. These stipulations "are important working tools for the court, and a great aid in the orderly and efficient disposition of its trial work. They are widely used in superior courts in many areas of the state and serve the convenience of litigants and counsel alike. Their great advantage lies in the knowledge the parties have that their case will proceed to trial on the date set, or soon thereafter, if they genuinely wish to proceed to trial. It is common knowledge among judges that, where such a stipulation is signed, and the case is allowed to trail for a short time, some trial department will open up and the case may then be assigned for disposition." (259 C.A.2d 748.)

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f. Judgment.

1 *Witkin Cal. Proc. Attys* § 276

[§ 276] Judgment.

Parties may stipulate to entry of judgment or to the content of the judgment, as the following cases illustrate:

McCord Co. v. Martin (1920) 47 C.A. 717, 726, 191 P. 89 [stipulation to enter judgment of dismissal on merits, each party to pay own costs].

Morrow v. Learned (1926) 76 C.A. 538, 540, 245 P. 442 [stipulation to judgment for plaintiff on condition favorable to defendant, each party to pay own costs].

Faulkner v. Brooks (1932) 125 C.A. 137, 140, 13 P.2d 748 [unlawful detainer; stipulation for entry of judgment, allowing defendant possession for 2 months and not requiring him to pay costs or treble damages].

Morrow v. Morrow (1940) 40 C.A.2d 474, 485, 105 P.2d 129 [divorce action, stipulation by husband to pay alimony of \$ 75 per month].

Witaschek v. Witaschek (1942) 56 C.A.2d 277, 283, 132 P.2d 600 [divorce action, stipulation by husband to pay for wife's new furniture].

Capital Nat. Bank of Sacramento v. Smith (1944) 62 C.A.2d 328, 334, 343, 144 P.2d 665 [stipulation settling rights of many parties to consolidated actions, calling for findings and decree accordingly].

Faye v. Feldman (1954) 128 C.A.2d 319, 328, 275 P.2d 121 [stipulation to settlement agreement providing for order of court].

Pacific Tel. & Tel. Co. v. Fink (1956) 141 C.A.2d 332, 338, 296 P.2d 843 [consent to enter judgment in specified amount if defendant should fail to obtain relief from Public Utilities Commission].

ITT Diversified Credit Corp. v. Highlands Ins. Co. (1987) 191 C.A.3d 301, 308, 236 C.R. 433 [judgment creditor and judgment debtor entered into stipulated judgment without approval of defendant's surety; *held*, surety was not

exonerated from liability pursuant to C.C. 2819, because stipulated judgment did not materially alter original obligation as it related to surety].

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g. Subsequent Proceedings.

1 *Witkin Cal. Proc. Attys* § 277

[§ 277] Subsequent Proceedings.

Stipulations occasionally deal with proceedings to review or enforce the judgment. (See *Gibson v. Berryman* (1910) 14 C.A. 330, 332, 111 P. 926 [stipulation for order granting new trial]; *Armstrong v. Brown* (1936) 12 C.A.2d 22, 26, 54 P.2d 1118 [stipulation allowing filing of certificate of deposit in lieu of bond to stay execution]; *Pacific States Savings & Loan Co. v. Roselli* (1936) 17 C.A.2d 527, 62 P.2d 441 [judgment should be reversed in part and affirmed in part]; *Clay v. Clay* (1937) 19 C.A.2d 589, 65 P.2d 1363 [judgment should be reversed]; *Estate of Cohn* (1940) 36 C.A.2d 676, 677, 98 P.2d 521 [decision should be same as in related case]; *Fowlkes v. Ingraham* (1947) 81 C.A.2d 745, 747, 185 P.2d 379, *supra*, §257 [waiver of right of appeal]; on stipulations relating to appeal, see 9 *Cal. Proc.* (5th), *Appeal*, §§664, 681, 731; on presumption in favor of stipulation to reverse judgment, see *Neary v. Regents of Univ. of Calif.* (1992) 3 C.4th 273, 10 C.R.2d 859, 834 P.2d 119, 9 *Cal. Proc.* (5th), *Appeal*, §893.)

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D. Stipulations.

6. Construction and Relief.

a. Construction.

1. Ordinary Contract Rules Apply.

1 Witkin Cal. Proc. Attys § 278

[§ 278] Ordinary Contract Rules Apply.

A stipulation is a contract (*supra*, §263), and is sometimes said to be governed by the usual rules of construction of other contracts. (See *Jackson v. Puget Sound Lumber Co.* (1898) 123 C. 97, 100, 55 P. 788 [construction to make stipulation operative and effective, rejecting literal language involving absurdity or inconsistent with object]; *People v. Nolan* (1917) 33 C.A. 493, 495, 165 P. 715 [reasonable construction, in light of surrounding circumstances, to make stipulation effective]; *Los Angeles City School Dist. of Los Angeles v. Landier Inv. Co.* (1960) 177 C.A.2d 744, 750, 2 C.R. 662, *infra*, §282; *Harris v. Spinali Auto Sales* (1962) 202 C.A.2d 215, 219, 20 C.R. 586.)

The application of ordinary rules is illustrated in *Estate of Howe* (1948) 88 C.A.2d 454, 199 P.2d 59. A widow stipulated with the executor and devisee of her husband's estate that the community property was \$ 50,000, that her share was \$ 25,000, and that her family allowance should terminate on distribution of that share. Subsequently the devisee contended that, under the law, the community property should be charged with the amount of family allowance previously paid (\$ 14,000), which would cut her share to \$ 18,000. *Held*, the contention was unsound, and the court erred in so ordering. The reference in the stipulation to family allowance showed that the parties had it in mind; hence, in failing to make any express provision for a deduction of past payments, it could reasonably be assumed that they did not intend any. (88 C.A.2d 458.)

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a. Construction.

2. Special Rules Applicable to Stipulations.

1 Witkin Cal. Proc. Attys § 279

[§ 279] Special Rules Applicable to Stipulations.

The common declaration that contract rules govern (see *supra*, §278) does not fully disclose the practice in construing this peculiar type of contract. The cases tend to apply, as the occasion seems to warrant, two inconsistent theories:

(1) A theory of liberal construction to make a stipulation effective, and thus to encourage and facilitate the settlement of the controversy or of procedural disputes. (See *Jackson v. Puget Sound Lumber Co.* (1898) 123 C. 97, 100, 55 P. 788; *People v. Nolan* (1917) 33 C.A. 493, 495, 165 P. 715.)

(2) A theory of strict construction to protect the client against the improvident surrender of substantial rights by the client's attorney. (See *Ukiah v. Fones* (1966) 64 C.2d 104, 107, 48 C.R. 865, 410 P.2d 369; *Burrows v. California* (1968) 260 C.A.2d 29, 33, 66 C.R. 868; *Western Pioneer Ins. Co. v. Estate of Taira* (1982) 136 C.A.3d 174, 182, 185 C.R. 887, citing the text; *infra*, §§283, 284.)

The second theory is sometimes undermined by sympathy for the cause of one party; i.e., an excessively "liberal" construction will be indulged and an improvident surrender of rights upheld, where the recipient of the benefits is a "favored" litigant. Thus, in *Buckley v. Roche* (1931) 214 C. 241, 4 P.2d 929, a police officer died of a heart attack while at work and his widow was denied a pension by defendant police commission on the ground that the death did not occur as a result of the performance of his duties. The case was tried on stipulated facts, one of the recitals being, "Said heart spasm resulted from the exertion incident to the stairway ascension." *Held*, this was a conclusive admission that the conditions of a pension had been fulfilled. (214 C. 243, 244.) In other words the commission, after having rendered a written decision that the death was not causally connected with his employment, was held to have contradicted itself and abandoned its entire legal defense, when it stipulated to the simple, conceded facts, namely, that the officer died of a heart attack, and that the death occurred while the officer was walking upstairs.

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b. Withdrawal or Rescission.

1. Grounds and Court's Discretion.

1 Witkin Cal. Proc. Attys § 280

[§ 280] Grounds and Court's Discretion.

A party seeking relief from the burdensome effects of a stipulation may, in some cases, be fully protected by interpretation, i.e., by enforcement of the stipulation in a reasonable and nonburdensome manner. (See *People v. Dyer* (1988) 45 C.3d 26, 57, 246 C.R. 209, 753 P.2d 1, quoting the text; supra, §§278, 279; infra, §§283, 284.) Sometimes, however, the aggrieved party seeks to nullify the stipulation entirely, and this attempt to "withdraw" or "vacate" or "set aside" the stipulation is in effect an attempt to rescind the agreement.

The typical grounds for withdrawal or rescission are lack of authority of the attorney to enter into the agreement (see supra, §235 et seq.) and excusable inadvertence, mistake, or neglect of the attorney or party (see infra, §§283, 284). Failure of consideration or breach may also justify relief from a stipulation originally valid and binding. (*Raymond v. McMullen* (1891) 90 C. 122, 125, 27 P. 21; *Loomis v. Loomis* (1948) 89 C.A.2d 232, 239, 201 P.2d 33.)

As in other situations in which a party seeks relief from the consequences of his or her own act, the trial judge's discretion is broad, and the order granting or denying relief will usually be upheld. (See *Moffitt v. Jordan* (1900) 127 C. 628, 60 P. 175 [denying]; *Brown v. Superior Court* (1935) 10 C.A.2d 365, 367, 368, 52 P.2d 256 [granting]; *Los Angeles City School Dist. of Los Angeles v. Landier Inv. Co.* (1960) 177 C.A.2d 744, 750, 2 C.R. 662, infra, §282 [denying].)

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b. Withdrawal or Rescission.

2. Procedure.

1 *Witkin Cal. Proc. Attys* § 281

[§ 281] Procedure.

The procedure for relief usually entails a noticed motion with affidavits, followed by a hearing. (*Redsted v. Weiss* (1945) 71 C.A.2d 660, 662, 665, 163 P.2d 105; *Los Angeles City School Dist. of Los Angeles v. Landier Inv. Co.* (1960) 177 C.A.2d 744, 750, 2 C.R. 662, *infra*, §308.)

Sometimes the attack on the stipulation is incidental to a motion to vacate the judgment or order entered pursuant to it. (See *Troxell v. Troxell* (1965) 237 C.A.2d 147, 151, 46 C.R. 723; *supra*, §246.) The attack may also be defensive; e.g., in response to a motion by the other party for judgment pursuant to the stipulation (*Brown v. Superior Court* (1935) 10 C.A.2d 365, 368, 52 P.2d 256), or by an objection to the introduction of the stipulation into evidence (*Palmer v. Long Beach* (1948) 33 C.2d 134, 199 P.2d 952).

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D. Stipulations.

6. Construction and Relief.

b. Withdrawal or Rescission.

3. Conditions for Rescission.

1 Witkin Cal. Proc. Attys § 282

[§ 282] Conditions for Rescission.

In *Los Angeles City School Dist. of Los Angeles v. Landier Inv. Co.* (1960) 177 C.A.2d 744, 2 C.R. 662, plaintiff district made contracts with defendant company for 1948 and 1950 to provide transportation of school pupils. In 1951, on discovery that three of its board members were illegally interested in the contracts, plaintiff filed an action for declaratory relief and to recover the entire contract payments, \$ 1,548,852.74. Extended negotiations for settlement, in which the possibility of defendants' bankruptcy was considered, resulted in a compromise providing for recovery of all profits made (\$ 264,776.86), payable in yearly installments, with a provision, in the event of default in the payment, for entry of judgment for twice the unpaid balance. This compromise was embodied in a stipulation for settlement signed by the parties and their attorneys and filed with the court, following which the action was dismissed. After three payments totaling \$ 99,291.33, new counsel for defendants moved to be relieved of the stipulation made 4 years before, contending that the double payment was an illegal penalty under former C.C. 1670 (now C.C. 1671), and that subsequent amendments to the Education Code eliminated the legal objections to the kind of interest involved. The trial judge denied the motion and, defendants being in default, entered judgment for \$ 300,971.06--the penalty. *Held*, affirmed.

The court found it unnecessary to consider defendants' contentions. The decision was that the rules of rescission govern relief from a stipulation, and that there was no compliance with the condition of promptness. (177 C.A.2d 750, 751, citing the text.) The agreement was made 4 years before relief was sought, the mistake of law or change in the law occurred 3 years before relief was sought, and defendants offered no explanation for the delay. (177 C.A.2d 750.) The opinion seems sound so far as ordinary grounds for rescission are concerned (e.g., mistake, failure of consideration), but the defense of illegality can be raised without the necessity of rescission. (See 1 *Summary* (10th), *Contracts*, §§442, 932.)

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D. Stipulations.

6. Construction and Relief.

c. Illustrations of Relief by Interpretation or Rescission.

1. Casual or Inadvertent Oral Statements.

1 Witkin Cal. Proc. Attys § 283

[§ 283] Casual or Inadvertent Oral Statements.

A recurrent situation involves giving up substantial rights by a casual, hasty, or improvident oral concession of counsel. Relief is usually granted on either of the following theories: (1) The remarks did not amount to a stipulation; or (2) if they did, it should not be held binding in view of the circumstances under which the agreement was made, and its manifest unfairness to the aggrieved party. (See *People v. Dyer* (1988) 45 C.3d 26, 57, 246 C.R. 209, 753 P.2d 1, quoting the text; *Orr v. Forde* (1929) 101 C.A. 694, 699, 282 P. 429 [stipulation by defendant's counsel, probably intended to mean that if plaintiff had fully performed, certain sum was due; held not to amount to positive stipulation that sum was due]; *People v. Church* (1943) 57 C.A.2d Supp. 1032, 1038, 136 P.2d 139 [remarks regarding nature of fixtures]; cf. *Theatrical Enterprises v. Ferron* (1932) 119 C.A. 671, 7 P.2d 351, *infra*, §284.)

Often cited in this connection is *Back v. Farnsworth* (1938) 25 C.A.2d 212, 77 P.2d 295. Plaintiff purchaser sought to establish a trust in land bought from decedent, which the evidence showed was decedent's separate property. Plaintiff's counsel "unwittingly" asked counsel for defendant administrator if he would stipulate that the property was community. The court held that the "colloquy" did not actually result in a stipulation, but if it did, this rule applied: "[W]hen the stipulation is clearly inadvertently made in conflict with a party's theory of his case and opposed to his absolute rights, the stipulation may be disregarded when there is substantial proof to the contrary." (25 C.A.2d 220.)

Bare v. Parker (1921) 51 C.A. 106, 196 P. 280, is similar. Plaintiff sued to quiet title to community property, title to which stood in the names of himself and decedent wife. Counsel for decedent's heir proposed an oral stipulation that the property "was at the date of the deeds, and thereafter, held by them as tenants in common." Held, plaintiff's assent to this stipulation, negating the theory of his case, was given unwittingly and was properly ignored by the trial judge. (51 C.A. 108.)

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D. Stipulations.

6. Construction and Relief.

c. Illustrations of Relief by Interpretation or Rescission.

2. Formal Stipulations.

1 *Witkin Cal. Proc. Attys* § 284

[§ 284] Formal Stipulations.

If the stipulation is formally made, e.g., written, signed, and filed, or drafted in writing, read in open court, and entered in the minutes, it is a little more difficult to dismiss it as "casual" or "inadvertent," or as not actually amounting to an agreement on definite terms. In these cases the courts appear to be exercising a broad power to grant equitable relief from an apparently binding agreement on the general ground of unfairness. Implicit in these decisions is the notion of the limited authority of an attorney, leading to the conclusion that a stipulation that unnecessarily or unwisely surrenders substantial rights of the client should be set aside and the cause tried on the merits. The holding, however, is seldom as bald as that. In most cases some additional element is present, e.g., absence of clear proof of mutual assent, lack of certainty in the terms of the stipulation, or some infirmity in the agreement or policy reason for disregarding it.

In *Palmer v. Long Beach* (1948) 33 C.2d 134, 199 P.2d 952, plaintiff recovered judgment against a city for injuries resulting from a fall on an allegedly defective sidewalk. A purported stipulation, which practically conceded the dangerous condition and duty to repair, had been made under circumstances not clearly disclosed, and was dictated into the record by the court over objections by counsel for defendant city. *Held*, this was reversible error. There was no evidence that defendant's counsel ever agreed to the terms; he did not remain silent at the time of dictation but promptly objected; and "[i]n view of an attorney's duty to his client it should not lightly be assumed that he stipulated away his case." (33 C.2d 144.) "[T]he language used will not be so construed as to give it the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished." (33 C.2d 144.) (Cf. contrary approach and result in *Buckley v. Roche* (1931) 214 C. 241, 4 P.2d 929, *supra*, §279.)

In *Theatrical Enterprises v. Ferron* (1932) 119 C.A. 671, 7 P.2d 351, plaintiff sued to rescind an agreement to buy a theatre, alleging fraud in the vendor's statement of average gross income. Counsel for the parties, after much discussion, made some stipulation as to what was shown in the vendor's book of receipts during the period, and the trial judge construed this as an admission of the correctness of the entries. *Held*, no genuine understanding, and hence no binding stipulation, was ever reached; but the court added this strong and questionable dictum: "If appellant had gone further and had expressly and unequivocally agreed that the book in question was kept by respondents, and that the figures therein represented the amounts actually received by them, we know of no rule of law or evidence that would

have precluded him from showing that the entries were false or incorrect. In its first analysis a stipulated fact is of no greater value than a fact found after controversy, and in the absence of stipulation, the finding could easily follow that the book was kept by respondent, and that the amounts did, according to the book, represent receipts. This could not conclude the present inquiry, nor could it foreclose appellant's right to impeach the integrity of the book." (119 C.A. 676.)

This quotation would imply that the court takes the same unsound position as that declared in *Berry v. Chaplin* (1946) 74 C.A.2d 652, 169 P.2d 442, supra, §261; namely, that the trial court may in its discretion disregard stipulated facts and decide the case on other evidence. A better explanation of the decision, however, is that the appellant merely intended to stipulate to the totals reached by addition of figures on the pages, and not to concede what his whole complaint challenged--the honesty of defendant's representations of income. Thus the case is the usual one of reasonable interpretation of, or relief from, an improvident stipulation. This is consistent with the court's observation: "It may be conceded that stipulations of fact, where no real controversy of fact appears, should be encouraged, and when entered into, should be strictly enforced. But there should be no sacrifice of substantial rights merely to subserve the constant importuning to speed up trials." (119 C.A. 676.)

Relief cannot be granted on the basis of a later change in the law. *In re Marriage of Mahone* (1981) 123 C.A.3d 17, 176 C.R. 274, involved a stipulation by the husband in 1978 that his military retirement benefits were community property, and the trial judge ruled accordingly. *Held*, the husband could not challenge the ruling on appeal on the basis of a 1981 United States Supreme Court decision changing the law. (123 C.A.3d 22.) A dissenting opinion argued that, because the judgment had to be reversed and remanded for recomputation of the division of property, a general reversal, with a division based on the current law, would be proper. (123 C.A.3d 26.)

The following cases further illustrate interpretation and relief:

Ward v. Clay (1890) 82 C. 502, 507, 23 P. 227 [mistaken admission of truth of facts alleged in answer].

Brown v. Superior Court (1935) 10 C.A.2d 365, 367, 52 P.2d 256 [stipulation for judgment, set aside on showing that counsel for defendant entered into it in reliance on false testimony, and that plaintiffs had not changed position].

Sinnock v. Young (1943) 61 C.A.2d 130, 131, 142 P.2d 85 ["Certainly a court of justice should be permitted to relieve a party from a stipulation which incorrectly sets forth material facts some of which are contradicted by undisputed evidence"].

Petroleum Midway Co. v. Zahn (1944) 62 C.A.2d 645, 649, 145 P.2d 371 [stipulation to appoint appraiser to ascertain value of property and enter judgment accordingly was held not to mean that appraiser's opinion was equal to referee's report, and judgment was reversed for failure of court to make finding on issue of value].

Burrows v. California (1968) 260 C.A.2d 29, 33, 66 C.R. 868 [parties, misconceiving law, stipulated that complaint did not state cause of action "in tort, for negligence or nuisance"; stipulation was held meaningless and insufficient to support judgment on pleadings: "Obviously, plaintiffs did not intend to stipulate away their case while urging it"].

Roth v. Morton's Chefs Services (1985) 173 C.A.3d 380, 385, 386, 387, 218 C.R. 684 [no abuse of discretion in setting aside stipulation where use of surprisingly high appraisal as required by stipulation would be "grossly unfair" to plaintiff].

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Witkin Summary of California Law VI. LIABILITY FOR NEGLIGENCE A. In General.

1. Nature and Scope of Liability.

1 Witkin Cal. Proc. Attys § 285

[§ 285] Nature and Scope of Liability.

(1) *Elements of Cause of Action.* An attorney is liable for malpractice, i.e., negligence in the performance of his or her duties, in accordance with general principles of tort liability. Thus, the attorney must owe a legal duty to the plaintiff, the act or omission must be below the standard of care and skill of members of the profession, and it must be the proximate or legal cause of injury and damage to the plaintiff. (See *Ishmael v. Millington* (1966) 241 C.A.2d 520, 523, 50 C.R. 592, citing the text [elements are same as in other kinds of actionable negligence--duty, breach, proximate cause, damage]; *Jackson v. Johnson* (1992) 5 C.A.4th 1350, 1355, 7 C.R.2d 482 [elements of action for legal malpractice]; *Schultz v. Harney* (1994) 27 C.A.4th 1611, 1621, 33 C.R.2d 276, citing the text [same]; *Rest.3d, The Law Governing Lawyers* §48 et seq.; 6 *Summary* (10th), *Torts*, §831 et seq.; CACI, No. 4106 [essential factual elements of breach of fiduciary duty by attorney].)

(2) *Assignment and Subrogation.* Legal malpractice claims may not be assigned; hence, they may not be subrogated. (See *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 C.A.4th 1373, 1384, 36 C.R.2d 424 [liability insurer may not assert legal malpractice claim as subrogee]; *Musser v. Provencher* (2002) 28 C.4th 274, 285, 121 C.R.2d 373, 48 P.3d 408 [policy considerations prohibiting assignment and subrogation of legal malpractice claims may not apply where subrogor is not client but is defendant attorney held liable to client for negligence that is at least partially attributable to concurrent counsel; distinguishing *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*]; 1 *Summary* (10th) *Contracts*, §729; 13 *Summary* (10th), *Equity*, §188.)

(3) *Illustrations.* The following cases are instructive:

Gambert v. Hart (1872) 44 C. 542, 552 [applying standard of ordinary care and skill].

Gutierrez v. Mofid (1985) 39 C.3d 892, 900, 218 C.R. 313, 705 P.2d 886, 3 *Cal. Proc.* (5th), *Actions*, §580 ["A legal malpractice suit is the traditional means of resolving allegations that an attorney's misconduct caused a claim to become barred by the statute of limitations. ... By this means, the attorney who caused the delay, rather than the 'innocent' defendant, is charged with its consequences"].

Armstrong v. Adams (1929) 102 C.A. 677, 684, 283 P. 871 [failure to properly prepare findings in action for

damages].

Pete v. Henderson (1954) 124 C.A.2d 487, 489, 269 P.2d 78 [failure to file notice of appeal; attorney's liability "as in other negligence cases, is for all damages directly and proximately caused by his negligence"].

Lysick v. Walcom (1968) 258 C.A.2d 136, 65 C.R. 406, supra, §120 [negligence in representing conflicting interests].

Martin v. Hall (1971) 20 C.A.3d 414, 420, 97 C.R. 730 [negligence in criminal case]; see infra, §314 et seq.

Starr v. Mooslin (1971) 14 C.A.3d 988, 998, 92 C.R. 583 [attorney handling sale of property of elderly client failed to provide adequate protection in escrow instructions].

Wright v. Williams (1975) 47 C.A.3d 802, 121 C.R. 194, infra, §§288, 290 [liability of attorney offering specialized services].

Edmunds v. Superior Court (1994) 24 C.A.4th 221, 232, 233, 235, 29 C.R.2d 281, 2 Cal. Proc. (5th), *Jurisdiction*, §152 [no jurisdiction over out-of-state attorney who represented California client in out-of-state action, where there was no substantial evidence that attorney engaged in tortious conduct while in California].

Assurance Co. of America v. Haven (1995) 32 C.A.4th 78, 92, 38 C.R. 2d 25 [action by insurer against independent *Cumis* counsel (supra, §122 et seq.) for negligent breach of statutory duty].

T & R Foods v. Rose (1996) 47 C.A.4th Supp. 1, 8, 56 C.R.2d 41 [failure to segregate client's funds, in violation of *Rules of Professional Conduct*, Rule 4-100 (infra, §453), constitutes breach of fiduciary duty and professional negligence].

Younan v. Caruso (1996) 51 C.A.4th 401, 408, 59 C.R.2d 103, citing the text ["habeas standard for gauging the effectiveness of trial counsel is the same as in a legal malpractice action--whether counsel performed as a reasonable lawyer would have under prevailing professional norms or standards"].

(4) *Treated Elsewhere*. Several aspects of this subject are treated elsewhere. (On statute of limitations, see 3 Cal. Proc. (5th), *Actions*, §626 et seq.; on survival of action, see 3 Cal. Proc. (5th), *Actions*, §15; on negligence as affecting right to recover compensation, see supra, §202; on negligence as basis for disciplinary action, see infra, §§492, 493; on negligence of attorney as permitting relief to client from default or equitable relief against judgment, see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §§170 et seq., 233.)

West's Key Number Digest, Attorney and Client 105 et seq.

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VI. LIABILITY FOR NEGLIGENCE

A. In General.

2. Liability for Intentional Tort.

1 Witkin Cal. Proc. Attys § 286

[§ 286] Liability for Intentional Tort.

Actions for malpractice are normally based on the claim that the attorney was negligent in the performance of his or her duties. However, an attorney may also be liable to a client for intentional wrongs committed in the course of representation. If so, the client may seek recovery for the commission of an intentional tort, malpractice, or both. (See *McDaniel v. Gile* (1991) 230 C.A.3d 363, 373, 375, 281 C.R. 242, 5 Summary (10th), *Torts*, §461 [claim that attorney abandoned client after she refused to have sexual relations with him supported causes of action for intentional infliction of emotional distress and for malpractice]; cf. *Schneider v. Friedman, Collard, Poswall & Virga* (1991) 232 C.A.3d 1276, 1281, 283 C.R. 882, 7 Cal. Proc. (5th), *Judgment*, §157 [client may not maintain action for recovery of attorneys' fees and costs incurred in defending against attorney's bad faith attempt to collect unreasonable fee].) (On attorney's liability for conversion based on disbursement of settlement proceeds in knowing disregard of third party's lien, see *Kaiser Foundation Health Plan v. Aguiluz* (1996) 47 C.A.4th 302, 54 C.R.2d 665, *infra*, §306.)

SUPPLEMENT: [This section is current through the latest supplement]



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 3. Liability for Conspiracy With Client.

1 Witkin Cal. Proc. Attys § 287

[§ 287] Liability for Conspiracy With Client.

(1) *Cause of Action.* In *Wolfrich Corp. v. United Services Auto. Assn.* (1983) 149 C.A.3d 1206, 197 C.R. 446, the court held that an action would lie for civil conspiracy against an insurer and its attorney; i.e., attorneys may be liable for participation in tortious acts with their clients. (149 C.A.3d 1211.)

C.C. 1714.10, enacted in 1988 to modify the *Wolfrich* decision, provides that a conspiracy cause of action may only be included in a complaint when the court makes an order allowing it after determining that the plaintiff has established a reasonable probability of prevailing. The statute is limited to civil conspiracies between the attorney and the client that arise from attempts to contest or compromise a claim or dispute and are based on the attorney's representation of the client. (C.C. 1714.10(a).) The statute does not apply to a cause of action "where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." (C.C. 1714.10(c).) (See *Westamco Inv. Co. v. Lee* (1999) 69 C.A.4th 481, 486, 81 C.R.2d 634 [C.C. 1714.10 does not apply to malicious prosecution actions]; *Shafer v. Berger, Kahn, Shafon, Moss, Figler, Simon & Gladstone* (2003) 107 C.A.4th 54, 82, 131 C.R.2d 777, *infra*, §304 [under C.C. 1714.10(c), plaintiffs were permitted to sue attorney for allegedly conspiring with insurer to commit actual fraud where plaintiffs, as third-party beneficiaries under insurance policy, justifiably and detrimentally relied on attorney's misrepresentations regarding coverage]; *Alden v. Hindin* (2003) 110 C.A.4th 1502, 1506, 2 C.R.3d 845 [trial court erred in sustaining demurrer to entire complaint that contained independently stated causes of action for malicious prosecution and conspiracy; although compliance with C.C. 1714.10 was necessary for conspiracy, it was not for malicious prosecution]; Cal. Civil Practice, 3 Torts, §33:30; for detailed treatment of C.C. 1714.10, see 3 *Cal. Proc.* (5th), *Actions*, §§211, 212.)

In *Pavicich v. Santucci* (2000) 85 C.A.4th 382, 102 C.R.2d 125, defendant attorney, together with W and K, persuaded plaintiff to invest in a brew pub project. At the time, defendant represented K individually and the limited partnership and corporation comprised of W and K. Throughout preliminary discussions, neither defendant, nor W, nor K disclosed to plaintiff prior claims by former associates or threatened litigation. Litigation ensued, including allegations that defendant, W, and K conspired to conceal the threats of litigation. Defendant demurred on the ground that, as to the civil conspiracy claim, there was no compliance with C.C. 1714.10. The trial judge overruled the demurrer, concluding that C.C. 1714.10 was inapplicable. *Held*, affirmed.

(a) The statute's procedural hurdle of judicial approval seems aimed at situations where the attorney is acting in an official capacity. C.C. 1714.10(a) refers to actions against an attorney for conspiring with his or her client that arise from attempts to contest or compromise a claim and that are based on the attorney's representation of the client. Yet, acting in this official capacity creates exactly a situation in which an attorney could be liable for conspiring with a client. These situations are specifically excepted under C.C. 1714.10(c). "Basically, the problem with section 1714.10 is that it excludes from its scope what is essentially an element of a conspiracy cause of action." (85 C.A.4th 395.)

(b) Although framed in the context of invoking C.C. 1714.10(a), defendant's demurrer, by arguing that C.C. 1714.10(c) does not apply, in effect challenges whether plaintiff's pleadings state a cause of action for conspiracy. They do. Plaintiff's complaint contains no allegation that defendant was acting in any capacity other than as attorney for K, the corporation, and the limited partnership. Defendant owed plaintiff a duty to abstain from express misrepresentation, and the pleadings indicate that this duty was violated. (85 C.A.4th 396.) In addition, defendant violated his fiduciary duty to the corporation and limited partnership because he ignored the preexisting claims and tried to conceal them from potential investors, thus exposing the corporation and the limited partnership to settlement and defense costs. Thus, conspiracy allegations by the corporation and limited partnership state a claim against defendant for conspiring with K. (85 C.A.4th 398.)

(2) *Limitations on Liability.* In *Doctors' Co. v. Superior Court* (1989) 49 C.3d 39, 260 C.R. 183, 775 P.2d 508, the court held that the *Wolfrich* theory of liability of an attorney for conspiracy with the insurer was contrary to the decision in *Gruenberg v. Aetna Ins. Co.* (1973) 9 C.3d 566, 576, 108 C.R. 480, 510 P.2d 1032, 2 Summary (10th), *Insurance*, §247, and disapproved *Wolfrich*. In *Gruenberg*, the attorneys were relieved from liability because the duty breached was "peculiar to the insurers, not shared by their attorneys." Thus, "*Gruenberg* precludes holding persons acting solely as the insurer's agents or employees liable for a conspiracy to violate that duty or cause its violation by the insurer." (49 C.3d 46, 49.) However, it "remains true, of course, that under *other* sets of circumstances" attorneys may be liable for participating in tortious acts with their clients, and that liability may rest on a conspiracy. "For example, an attorney who conspires to cause a client to violate a statutory duty peculiar to the client may be acting not only in the performance of a professional duty to serve the client but also in furtherance of the attorney's own financial gain." (49 C.3d 46.) (See *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 C.A.3d 692, 709, 711, 282 C.R. 627 [in action by minority shareholder against attorney who represented corporation, attorney did not make representations to plaintiff and attorney did not owe duty of disclosure to plaintiff; following *Doctors' Co.*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Cause of Action.* See *Panoutsopoulos v. Chambliss* (2007) 157 C.A.4th 297, 306, 68 C.R.3d 647 [plaintiff lessees had no viable claim under C.C. 1714.10(c) in that lessor's attorneys were not party to lease and owed no duty to plaintiffs, and there was no evidence that attorneys, through numerous letters to plaintiffs, were acting for their own benefit rather than actively seeking advantage for their client].



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A. In General.

4. Standard of Care.

1 Witkin Cal. Proc. Attys § 288

[§ 288] Standard of Care.

(1) *In General.* An attorney must exercise the knowledge, skill, and ability ordinarily possessed and exercised by other attorneys similarly situated. (See *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, *infra*, §328; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §203.)

(2) *Specialist.* In *Wright v. Williams* (1975) 47 C.A.3d 802, 121 C.R. 194, plaintiffs, seeking to acquire a vessel for use in business cruises, consulted defendant, a specialist in maritime law. Under defendant's guidance, plaintiffs bought a converted Coast Guard ship, but the federal statute prohibited its use in "coastwise trade" because it had been once owned by an alien. Plaintiffs contended that defendant's representation of them was negligent. The evidence of defendant's knowledge of the intended use of the vessel was conflicting, and plaintiffs offered no expert testimony on the issue of standard of care. The trial judge granted defendant's motion for judgment under C.C.P. 631.8 (motion for judgment in court trial; see 7 *Cal. Proc.* (5th), *Trial*, §430 et seq.). *Held*, affirmed.

(a) The standard of care is generally that of members of the profession in the same or a similar locality under similar circumstances. No California decision deals with a legal specialist, and out-of-state authority is similarly lacking. However, writers have argued that the test should be different from that applicable to lawyers generally, and the "similar circumstances" approach of *Smith v. Lewis*, supports this view. "One who holds himself out as a legal specialist performs in similar circumstances to other specialists but not to general practitioners of the law." (47 C.A.3d 810.) "We thus conclude that a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (47 C.A.3d 810.)

(b) Proof of the standard ordinarily requires expert testimony. Where the plaintiff's action is related to the legal specialist's expertise, "only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (47 C.A.3d 810.) (See *Enriquez v. Smyth* (1985) 173 C.A.3d 691, 697, 698, 219 C.R. 267 [evidence, including testimony by attorney specializing in bankruptcy law, was sufficient to show defendant's negligence both in causing client to file petition for bankruptcy and in subsequent handling of bankruptcy action].)

Where an attorney's negligence is readily apparent from the facts, expert testimony is not necessary. (*Wilkinson v.*

Rives (1981) 116 C.A.3d 641, 647, 648, 172 C.R. 254; see *Goebel v. Lauderdale* (1989) 214 C.A.3d 1502, 1508, 1509, 263 C.R. 275 [bankruptcy specialist's advice to general contractor to collect money in violation of Penal Code constituted malpractice as a matter of law; hence, testimony of bankruptcy expert was not required]; *Stanley v. Richmond* (1995) 35 C.A.4th 1070, 1092, 41 C.R.2d 768 [family law attorney's failure to research federal statutes and regulations governing veteran's pension and provide for tax consequences of partnership withdrawal payments].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See CACI, No. 600 [standard of care].



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A. In General. 5. Commentary.

1 Witkin Cal. Proc. Attys § 289

[§ 289] Commentary.

Commentary on attorney liability for negligence is extensive. (See *Mallen & Smith, Legal Malpractice*; Rutter Group, 1 Professional Responsibility, §6.215 et seq.; Cal. Civil Practice, 3 Torts, Chap. 33; 108 *Harv. L. Rev.* 501 [malpractice liability of criminal defense attorneys]; 109 *Harv. L. Rev.* 1102 [evidentiary use of ethics codes as proof of legal malpractice]; 15 *Hastings L. J.* 590 [client's strategy and election of remedies]; 45 *Stanf. L. Rev.* 645 [analysis of expanded liability of, and ethical implications for, attorneys in banking and securities industries]; 24 *U.C.L.A. L. Rev.* 422 [negligence in drafting contract or will]; 29 *Western State L. Rev.* 235 [examining meaning of competence for malpractice liability, fiduciary breach, and disciplinary offense]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §201 et seq.; 2C *Am.Jur. P.P. Forms* (2000 ed.), *Attorneys at Law*, Form 133 et seq.; 14 *Am.Jur. Trials* 266 et seq.; 30 *Am.Jur. Trials* 607 [defending against claims of ineffective assistance of counsel]; 62 *Am.Jur. Trials* 395 [defense of legal malpractice claim arising from representation of small business].)

Many annotations deal with the subject. (See 28 *A.L.R.3d* 389 [representing conflicting interests]; 55 *A.L.R.3d* 977 [negligence in connection with estate, will, or succession matters]; 59 *A.L.R.3d* 1176 [negligence in connection with investigation or certification of title to real estate]; 78 *A.L.R.3d* 255 [negligence in domestic relations case]; 87 *A.L.R.3d* 168 [malpractice in settling or failing to settle client's case]; 90 *A.L.R.3d* 293 [malpractice in allowing statute of limitations to run]; 6 *A.L.R.4th* 342 [malpractice in connection with attorney's withdrawal as counsel]; 40 *A.L.R.4th* 535 [liability for improper or ineffective incorporation of client]; 41 *A.L.R.4th* 351 [liability for client's suicide based on attorney's professional act or omission]; 78 *A.L.R.4th* 725 [malpractice in handling or defending medical malpractice claim]; 90 *A.L.R.4th* 1033 [negligence in preparing or conducting litigation: measure and elements of damages]; 4 *A.L.R.5th* 273 [malpractice in defense of criminal prosecution]; 18 *A.L.R.5th* 892 [malpractice in connection with services related to adoption of child]; 18 *A.L.R.5th* 902 [malpractice in defense of parents in proceedings to terminate parental rights]; 35 *A.L.R.5th* 717 [vicarious liability of attorney for acts of associated counsel]; 50 *A.L.R.5th* 301 [admissibility and effect of evidence of professional ethics rules in legal malpractice action]; 9 *A.L.R.6th* 285 [allowance of punitive damages in malpractice action].)

SUPPLEMENT: [This section is current through the latest supplement]

See 41 *A.L.R.6th* 1 [legal malpractice in connection with attorney's withdrawal as counsel--criminal and

business-related cases; superseding 6 *A.L.R.4th* 342, text, p. 365]; 41 *A.L.R.6th* 463 [legal malpractice in connection with attorney's withdrawal as counsel--tort, civil rights, family law, probate, and unspecified cases; superseding 6 *A.L.R.4th* 342, text, p. 365]; 104 Proof of Facts 3d 317 [inadequate factual investigation by attorney].



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CHAPTER I - Attorneys

Witkin Summary of California Law VI. LIABILITY FOR NEGLIGENCE

B. Duty and Breach.

1. Duty to Client.

a. Questions of Law and Fact.

1 Witkin Cal. Proc. Attys § 290

[§ 290] Questions of Law and Fact.

(1) *Existence of Duty.* As in other negligence cases, the existence of a duty is a question of law. (*Ishmael v. Millington* (1966) 241 C.A.2d 520, 525, 50 C.R. 592; *Starr v. Mooslin* (1971) 14 C.A.3d 988, 998, 92 C.R. 583; see 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §224; 6 *Summary* (10th), *Torts*, §860.)

In *Bolton v. Trope* (1999) 75 C.A.4th 1021, 89 C.R.2d 637, defendant attorney, representing plaintiff in a personal injury matter, had plaintiff examined by three board-certified neurologists regarding a possible brain injury. No injury was found, and no recommendations were made that defendant should consult a neuropsychologist. After the case settled, plaintiff sought to introduce the testimony of a neuropsychologist to establish malpractice. The trial judge concluded that, as a matter of law, defendant had no duty to consult a particular type of expert to prove a medical condition when none of the medical experts consulted made that recommendation. *Held*, affirmed. After obtaining the conclusions of multiple medical professionals who evaluated plaintiff for medical problems, defendant determined that the settlement offer was reasonable. This determination was wholly consistent with the medical information available, and defendant had no duty to retain a neuropsychologist. (75 C.A.4th 1026.)

(2) *Breach of Duty.* Breach of duty is a question of fact. (*Ishmael v. Millington*, *supra*, 241 C.A.2d 525; *Wright v. Williams* (1975) 47 C.A.3d 802, 807, 121 C.R. 194, *supra*, §288 ["After a shaky start, the California law has evolved the proposition that the issue of attorney malpractice is in essence a question of fact similar to that involved in other professional negligence"]; see 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §224; 6 *Summary* (10th), *Torts*, §866.)

The court in *Wright v. Williams* traced the history of the rule, pointing out that the contrary view of *Gambert v. Hart* (1872) 44 C. 542, 552, was undermined by later cases and eventually "laid to rest, albeit silently," in *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, *infra*, §328. "By approving the trial court's action in instructing the jury in a fashion which left to it the determination of whether the attorney's conduct was under the facts negligent or not, our Supreme Court impliedly disapproved of *Gambert's* inflexible proposition that judges apply, in all instances, their own experience to decide whether attorney conduct is negligent or satisfies the duty of due care." (47 C.A.3d 808.) Thus, apart from special circumstances, where reasonable minds cannot differ as to the conduct, or where because of a governing legal principle the alleged negligence does not proximately cause harm, the issue in attorney malpractice is

determined by the rules applicable to professional negligence generally, and the reviewing court must examine the record to determine support for the determinations of fact. (47 C.A.3d 809.)

The following decisions are illustrative. (See *Schultz v. Harney* (1994) 27 C.A.4th 1611, 1621, 1622, 33 C.R.2d 276 [attorney has duty to know and properly apply law relating to fees and statutory restrictions on fees; allegation that attorney charged excessive and unlawful fee for otherwise satisfactory settlement is sufficient to charge professional negligence]; *Crookall v. Davis, Punelli, Keathley & Willard* (1998) 65 C.A.4th 1048, 1066, 77 C.R.2d 250 [question of fact whether attorneys' failure to raise statutory prohibition of deficiency judgment as affirmative defense was breach of duty]; *Dawson v. Toledano* (2003) 109 C.A.4th 387, 396, 134 CR.2d 689 [sanction of client for filing frivolous appeal does not mean that appellate attorney handling case has committed malpractice as matter of law; whether attorney breached duty is question of fact].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Existence of Duty.* See *Martorana v. Marlin & Saltzman* (2009) 175 C.A.4th 685, 697, 96 C.R.3d 172 [in class action, where trial court approved class settlement agreement that included notice procedure, and procedure was followed by claims administrator, class counsel had no duty to contact plaintiff specifically before claim-filing deadline had lapsed].



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1. Duty to Client.

b. Expert Evidence.

1 Witkin Cal. Proc. Attys § 291

[§ 291] Expert Evidence.

(1) *In General.* The fact of breach is proved by expert opinion on whether the attorney followed the standards of skill and diligence prevailing in the profession. (*Lysick v. Walcom* (1968) 258 C.A.2d 136, 156, 65 C.R. 406, supra, §120 [following settled rule in medical malpractice cases]; *Lipscomb v. Krause* (1978) 87 C.A.3d 970, 975, 976, 151 C.R. 465; *Tibor v. Superior Court* (1997) 52 C.A.4th 1359, 1364, footnote 1, 61 C.R.2d 326, infra, §314 [when one party submits expert declaration in support of motion for summary judgment in case involving specialized area of law, opposing party should also submit expert declaration]; see 14 A.L.R.4th 170 [admissibility and necessity of experts regarding standards of practice and negligence in attorney malpractice actions]; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §225; 1 Cal. Evidence (4th), *Opinion Evidence*, §§22, 86.)

(2) *Exception: Breach Clearly Established.* Where the evidence establishes the attorney's "numerous, blatant and egregious violations" of professional standards as prescribed by the Rules of Professional Conduct, expert testimony is not required to sustain a finding of negligence. (*Day v. Rosenthal* (1985) 170 C.A.3d 1125, 1146, 1147, 1149, 217 C.R. 89; see *Goebel v. Lauderdale* (1989) 214 C.A.3d 1502, 1508, 1509, 263 C.R. 275 [expert testimony is not necessary where negligence is readily apparent].)

(3) *Qualifications of Expert.* The standards for reviewing the qualifications of experts in a legal malpractice action are the same as in a medical malpractice action. (*Jeffer, Mangels & Butler v. Glickman* (1991) 234 C.A.3d 1432, 1438, 286 C.R. 243, 1 Cal. Evidence (4th), *Opinion Evidence*, §40.)

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1. Duty to Client.

c. Necessity of Attorney-Client Relationship.

1 *Witkin Cal. Proc. Attys* § 292

[§ 292] Necessity of Attorney-Client Relationship.

(1) *In General.* In *Jager v. Alameda* (1992) 8 C.A.4th 294, 10 C.R.2d 293, the family support division of the county district attorney's office obtained a judgment for child support for plaintiff mother, under which her former husband owed \$ 21,250. The district attorney's office collected \$ 23,941, but plaintiff claimed that the amount of support and interest then owed was \$ 25,710, and she sued the district attorney, alleging professional negligence in performing legal services for her. *Held*, judgment for defendant on demurrer affirmed. The statutory framework that authorized the district attorney's action did not create an attorney-client relationship between a parent seeking child support enforcement and the district attorney; the purpose of the statutory action is to provide a procedure for a county to recoup public assistance, and to assist parents with limited resources so that public funds are not again unnecessarily expended; hence, notwithstanding the collateral benefit to the custodial parent, the "client" is the county. (8 C.A.4th 297.) (See *Streit v. Covington & Crowe* (2000) 82 C.A.4th 441, 444, 98 C.R.2d 193, citing the text [attorney specially appearing in lieu of attorney of record for single motion was representing client's interests, had attorney-client relationship, and owed that client duty of care].)

In *Canton Poultry & Deli v. Stockwell, Harris, Widom & Woolverton* (2003) 109 C.A.4th 1219, 135 C.R.2d 695, a malpractice action, D filed a workers' compensation claim against plaintiff, his employer, and plaintiff's insurer retained defendant to handle the claim. D also filed a civil action against plaintiff. When counsel for D sought a global settlement of both cases, defendant advised D's counsel that the civil action by D was not defendant's concern. Neither defendant nor the insurer advised plaintiff that the insurer was negotiating to settle the compensation case, or that D expressed interest in a global settlement. Although plaintiff believed defendant was retained as plaintiff's counsel for the workers' compensation claim, defendant had advised plaintiff that defendant represented only the insurer. Plaintiff alleged that because of defendant's services in the compensation case and knowledge of D's desire for a global settlement, defendant breached a duty by not notifying plaintiff of that development, and that plaintiff was damaged by expending more money to defend the civil action than it would have in conjunction with a global settlement. The trial court sustained defendant's demurrer based on *Lab.C. 3755*, which relieves an employer from liability in a workers' compensation case once the insurer assumes liability for the claim. *Held*, affirmed.

(a) Under *Lab.C. 3755*, once the insurer serves notice on a workers' compensation claimant that the insurer has

agreed to pay compensation for which the employer is liable, the employer is relieved of liability for that compensation. The insurer is then substituted for the employer in the proceedings and the employer is dismissed. Thus, the statute effectively relieves the employer of duties to the claimant for the compensation case. (109 C.A.4th 1226.)

(b) Absent a conflict of interest, a dual-client relationship can exist when counsel is hired by an insurer in a workers' compensation case to represent its insured. Thus, until dismissed from the case, an employer may reasonably believe that counsel retained by its insurer is hired on the employer's behalf. (109 C.A.4th 1227, citing *Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 C.A.4th 1229, 45 C.R.2d 565, *infra*, §293.) However, once the employer is dismissed from the compensation case and the matter continues only against the insurer, "the employer has no reasonable basis to believe that it is still in an attorney-client relationship with the attorney, absent developments in the workers' compensation case itself that require the attorney to protect or defend the interests of the employer." (109 C.A.4th 1227, 1228.) Here, no extenuating developments existed, and there was no attorney-client relationship between defendant and plaintiff when D sought the global settlement. Thus, the malpractice action based on negligence and breach of fiduciary duty can have no factual basis. (109 C.A.4th 1228.) (See *Zenith Ins. Co. v. O'Connor* (2007) 148 C.A.4th 998, 1010, 55 C.R.3d 911 [no attorney-client relationship was implied between reinsurer and attorney for insurer based solely on contract between insurer and reinsurer, and reinsurer failed to demonstrate contacts and communications with attorney necessary for relationship].)

(2) *Attorney Acting as Neutral Mediator*. An attorney who agrees to act as a neutral mediator in a conflict between the attorney's client and another party assumes a duty to the nonclient that, if breached, may subject the attorney to actionable legal malpractice. In *Furia v. Helm* (2003) 111 C.A.4th 945, 4 C.R.3d 357, plaintiff general contractor sued defendant attorney H for legal malpractice and fraudulent misrepresentation and concealment arising from an agreement by H, who represented plaintiff's construction client, L, to attempt to mediate differences between plaintiff and L. H memorialized the agreement in letters to plaintiff and L, but also sent a confidential letter to L reassuring L that H would not be truly neutral. The trial court sustained H's demurrer on grounds that plaintiff failed to allege an attorney-client relationship or to successfully plead damages, and entered judgment for H. *Held*, affirmed, based on the failure to allege recoverable damages.

(a) Actionable legal malpractice, as other actionable negligence, contains the elements of duty and breach of duty. By accepting employment to give legal advice *or to render other legal services*, an attorney "impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise." (111 C.A.4th 954.)

(b) Although an attorney-client relationship did not exist between plaintiff and H, acting as a neutral mediator nevertheless imposed the duty on H to perform as a mediator with the skill and prudence expected of a mediator. Moreover, as an attorney mediator, H had the same duty of full disclosure as an attorney representing clients with conflicting interests, and that duty encompassed disclosing to plaintiff facts that would cause plaintiff to believe H would not be impartial. Under these circumstances, the pleading sufficiently alleged facts establishing the existence of a duty owed by H to plaintiff, the breach of which amounted to actionable legal malpractice. (111 C.A.4th 954.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. In *Wood v. Jamison* (2008) 167 C.A.4th 156, 83 C.R.3d 877, defendant attorney represented M in a nightclub joint venture. P, an elderly woman, had just lost her son and placed her husband in an Alzheimer's facility. M misrepresented himself to P as her nephew in order to obtain money, and convinced P to obtain a loan secured by her primary residence for investment in the joint venture. Defendant met with M and P to arrange for the loan, located a lender, completed all documentation for the loan, and attended the loan escrow closing with P. Defendant received a referral fee from the lender, and an additional sum from the loan proceeds as repayment of a loan he had made to M. Defendant, well aware of P's life situation, did not disclose these sums to her, nor did he provide P with conflict disclosures or waivers or refer her to independent counsel; neither did defendant advise P of the risks of the joint venture or that the loan terms were inappropriate for her. Defendant did not refer P to an accountant or financial advisor. When P died, plaintiff trustee brought several actions including a malpractice action against defendant. The trial court

found defendant committed malpractice, breached his fiduciary duty to P, and committed financial abuse of an elder. *Held*, judgment affirmed.

(a) Regardless of defendant's attempt to deny it, an attorney-client relationship existed between defendant and P. Not only did defendant tell plaintiff that he had performed "work" for P by representing her in a business transaction, the work defendant performed to obtain the loan was sufficient to establish an attorney-client relationship. (167 C.A.4th 163.)

(b) The evidence of malpractice and breach of fiduciary duty was overwhelming. Defendant failed to advise P of a conflict of interest, failed to advise that the investment was not appropriate for her, or at least refer her to an independent investment advisor, and obtained a profit from the transaction that he never disclosed to P. (167 C.A.4th 163.)



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1. Duty to Client.

d. Duty Where Dual Attorney-Client Relationship Exists.

1 Witkin Cal. Proc. Attys § 293

[§ 293] Duty Where Dual Attorney-Client Relationship Exists.

In *Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 C.A.4th 1229, 45 C.R.2d 565, plaintiff was the insurer for an employer that was sued by an employee for personal injuries. Defendant law firm, hired by plaintiff to represent the employer, failed to allege the affirmative defense of workers' compensation exclusivity, and plaintiff ultimately was forced to settle the action for the policy limits. Plaintiff then sued defendant for legal malpractice, but the trial court granted defendant's motion for nonsuit. *Held*, reversed.

"[W]hen, pursuant to insurance policy obligations, an insurer hires and compensates counsel to defend an insured, *provided that the interests of the insurer and insured are not in conflict*, the retained attorney owes a duty of care to the insurer which will support its independent right to bring a legal malpractice action against the attorney for negligent acts committed in the representation of the insured." (38 C.A.4th 1235.) In the absence of a disqualifying conflict of interest, "the attorney has a dual attorney-client relationship with both insurer and insured," and this relationship provides a sufficient basis for the malpractice action. (38 C.A.4th 1237.) (See *American Cas. Co. v. O'Flaherty* (1997) 57 C.A.4th 1070, 1076, 1077, 67 C.R.2d 539 [attorney had no duty to insurer that had *not* retained him and whose insured's interests conflicted with those of insurer that *had* retained him; distinguishing *Unigard*]; *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 C.A.4th 114, 127, 93 C.R.2d 534, *supra*, §42 [insurer could sue attorney originally retained by insured where attorney-client relationship was also created between insurer and attorney and no conflict of interest existed in attorney's dual representation; following *Unigard*].)

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1. Duty to Client.

e. Duty To Refer to Specialist.

1 Witkin Cal. Proc. Attys § 294

[§ 294] Duty To Refer to Specialist.

In *Bucquet v. Livingston* (1976) 57 C.A.3d 914, 129 C.R. 514, the court reversed a judgment for defendant attorney on the pleadings, holding that plaintiff had stated a cause of action for negligent estate planning where defendant had overlooked a vital provision of the Internal Revenue Code. However, the opinion does not impose a duty on an estate-planning attorney to seek the advice of a certified tax specialist: "We merely hold that the potential tax problem of general powers of appointment in *inter vivos* or testamentary marital deduction trusts were within the ambit of a reasonably competent and diligent practitioner from 1961 to the present." (57 C.A.3d 925.)

In *Horne v. Peckham* (1979) 97 C.A.3d 404, 158 C.R. 714, defendant attorney, not a tax specialist, drew a trust agreement intended as a tax shelter, which proved to be invalid. In upholding a judgment for damages in favor of the client, the court approved the following instruction based on a similar BAJI instruction on medical malpractice: "It is the duty of an attorney who is a general practitioner to refer his client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skillful practitioner would do so." (97 C.A.3d 414.) Many tax matters could be handled by general practitioners without referral to a specialist, but here defendant admitted his need for expert assistance and his lack of knowledge concerning the tax consequences of the trust. (97 C.A.3d 415; citing *Bucquet*.) (On association of another lawyer where attorney is not otherwise competent to handle matter, see *Rules of Professional Conduct, Rule 3-110*, *infra*, §432.)

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1. Duty to Client.

f. Duty To Advise of Remedies Outside Scope of Representation.

1 Witkin Cal. Proc. Attys § 295

[§ 295] Duty To Advise of Remedies Outside Scope of Representation.

In *Nichols v. Keller* (1993) 15 C.A.4th 1672, 19 C.R.2d 601, plaintiff, an employee of a subcontractor at a construction project, was injured on the job. He consulted attorney F, who agreed to file a workers' compensation claim and referred plaintiff to attorney K who actually prosecuted the claim. Approximately 19 months after the accident, plaintiff consulted another attorney, who advised him that a third-party claim should have been filed in connection with the industrial injury. Nine months later, plaintiff filed a malpractice action against attorneys F and K. Defendants' motions for summary judgment were granted. *Held*, reversed.

(a) One of an attorney's basic functions is to advise, and failure to provide advice may be the basis of liability. An attorney should give advice when requested and should volunteer opinions when necessary to further the client's objectives. (15 C.A.4th 1683, 1684.)

(b) "Generally speaking, a workers' compensation attorney should be able to limit the retention to the compensation claim if the client is cautioned (1) there may be other remedies which the attorney will not investigate, and (2) other counsel should be consulted on such matters. However, even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention." (15 C.A.4th 1684.)

(c) Foreseeability of harm is the chief factor in duty analysis. The foreseeability factor compels a finding of duty here, because a trained attorney is more qualified to recognize the various potential remedies, and it is foreseeable that a lay client will remain ignorant of those remedies if not advised about them. (15 C.A.4th 1686, 1687.) "Thus, a lawyer who signs an application for adjudication of a workers' compensation claim and a lawyer who accepts a referral to prosecute the claim owe the claimant a duty of care to advise on available remedies, including third party actions." (15 C.A.4th 1687.) (See *Meighan v. Shore* (1995) 34 C.A.4th 1025, 1029, 40 C.R.2d 744 [husband and wife consulted attorney about injury to husband; although husband was client, attorney had duty to inform wife of potential cause of action for loss of consortium].)

In *Janik v. Rudy, Exelrod & Zieff* (2004) 119 C.A.4th 930, 14 C.R.3d 751, defendant attorneys secured a \$ 90

million recovery from an insurer for a large class of claims representatives who had not been paid overtime. The complaint had alleged a single cause of action under the Labor Code. Plaintiff then brought a class action for legal malpractice, alleging that defendants mishandled the underlying case by failing to seek recovery under the unfair competition law (UCL) where the statute of limitations would have permitted the recovery of another year of overtime wages in addition to those recovered under the Labor Code. Defendants demurred on the ground that as counsel for the plaintiff class they owed no duty to consider and protect class interests with respect to claims beyond those specified in the class certification order. The trial court sustained defendants' demurrer without leave to amend. *Held*, reversed.

(a) Defendants' duty extended beyond the claims that were literally described in the class certification order. Like the client in *Nichols*, representative plaintiffs and absent class members in a class action are entitled to assume that counsel will consider and bring to the attention of at least the class representatives all claims that exist, given the circumstances underlying the certified claims. (119 C.A.4th 941.) Here, an action under the UCL would have been based on the same practice and involve the same legal analysis as the certified cause of action under the Labor Code. Thus, class counsel "were obliged to consider the advantages and disadvantages to the class of seeking to add a UCL cause of action to their complaint, to bring these considerations to the attention of the class representatives, and to take or recommend such action ... as would an attorney using the 'skill, prudence and diligence' commonly exercised by attorneys handling such litigation." Whether defendants did so is a question of fact that may not be disposed of by demurrer. (119 C.A.4th 943.)

(b) A malpractice action was appropriate for challenging the adequacy of defendants' representation. Although the trial court determined in certifying the class that defendants were competent to represent the class, this did not absolve counsel of potential liability for negligence in the prosecution of the claim or relieve them of the duty to meet the standard of care that plaintiff alleges was breached in failing to seek the maximum recovery. Moreover, the class action court never considered whether defendants were properly discharging the duties to the class, nor was this issue raised in prior proceedings before the Court of Appeal. (119 C.A.4th 943.) "Because the class action court never considered whether counsel had adequate reason to forgo the additional UCL claim, the class action court's authority is in no way undermined by permitting this question to be considered in the present malpractice action." (119 C.A.4th 945.)

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g. No Liability for Acts of Third Persons.

1 Witkin Cal. Proc. Attys § 296

[§ 296] No Liability for Acts of Third Persons.

In *Zalta v. Billips* (1978) 81 C.A.3d 183, 144 C.R. 888, Z and M were two of several defendants in a medical malpractice action. The insurer for Z and M, retained B firm as attorneys for Z and M, and other attorneys represented the other defendants. A settlement was agreed on in open court, under which Z and M were not required to contribute to the fund. However, B did not announce this fact in open court, and 2 days later newspaper articles appeared reporting that Z and M were among the defendants who would share in the payment. Z and M then filed this action against B, seeking damages for breach of an alleged duty to publicly disclose the fact that Z and M had not been required to pay. *Held*, judgment on demurrer for B affirmed.

(a) *No duty to present client in favorable public light.* Although B owed a fiduciary duty to plaintiffs, this did not require B to publicize plaintiffs' noncontribution to the settlement, so as to present plaintiffs in a favorable public light. "No case holds counsel liable for damages resulting from the reaction of persons outside the court system, such as news reporters, to events taking place within the system, such as proceedings at a settlement conference." (81 C.A.3d 188.) An attorney representing a defendant who has been sued for money has a duty to negotiate a settlement that releases the client from liability; the attorney is not responsible for third persons' misunderstanding of its significance. "The duty to shape the content of outside reportage of events taking place in the courtroom is more properly that of press agent or public relations representative than of counsel or attorney at law." (81 C.A.3d 190.)

(b) *No causal connection.* The complaint alleged two independent unconnected events: a court proceeding that formalized the settlement, and newspaper articles indicating that plaintiffs were among those who would contribute to it. "Reporters may or may not have relied on the settlement proceedings, may or may not have been present in the courtroom, may or may not have talked to other counsel in the case, may or may not have interviewed litigants, witnesses, and court attaches." (81 C.A.3d 190.) In other counts the complaint alleged that R, counsel for the plaintiff in the malpractice action, made misstatements to news reporters. These averments suggest that plaintiffs' principal quarrel is with R, who named them as defendants, listed Z's name first in the caption, and held a press conference to publicize the fact of settlement. These allegations compel the legal conclusion that R's acts constituted an independent intervening cause of the harm alleged to have been suffered by plaintiffs, and the effect of B' failure to speak out was wholly speculative. (81 C.A.3d 191.)

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B. Duty and Breach.

2. Duty to Client's Beneficiary.

a. In General.

1 Witkin Cal. Proc. Attys § 297

[§ 297] In General.

The scope of liability for negligence has been greatly enlarged by the recognition of a cause of action in favor of the person intended to be benefited by the attorney's performance, usually the intended beneficiary under an improperly drawn will. (See *Biakanja v. Irving* (1958) 49 C.2d 647, 651, 320 P.2d 16 [allowing tort action against notary public who was illegally practicing law and failed to have will properly attested; overruling *Buckley v. Gray* (1895) 110 C. 339, 342, 42 P. 900]; 6 *Summary* (10th), *Torts*, §1179.)

In *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, although no actionable negligence was found (see *infra*, §326), a tort action for negligence and a contract action as a third-party beneficiary (see 1 *Summary* (10th), *Contracts*, §698) were both held to be proper remedies of the intended beneficiary against the attorney draftsman. As to the tort action, the court said: "We are of the view that the extension of his liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss. The fact that the notary public involved in *Biakanja* was guilty of unauthorized practice of the law was only a minor factor in determining that he was liable, and the absence of the factor in the present case does not justify reaching a different result." (56 C.2d 589.) (See *Heyer v. Flaig* (1969) 70 C.2d 223, 74 C.R. 225, 449 P.2d 161, 3 *Cal. Proc.* (5th), *Actions*, §626 [statute of limitations did not commence to run until death of testator].)

In *Donald v. Garry* (1971) 19 C.A.3d 769, 97 C.R. 191, plaintiff alleged that he forwarded a contract claim to M, a licensed collection agency; that defendant, M's attorney, filed an action on it; and that the action was later dismissed for lack of diligent prosecution. *Held*, citing the text, judgment for defendant on demurrer reversed; the complaint met the test of *Lucas* and *Rest.2d*, *Torts* §324A. (19 C.A.3d 771.) (See *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 C.A.3d 104, 110, 128 C.R. 901, *infra*, §303; *Meighan v. Shore* (1995) 34 C.A.4th 1025, 1029, 40 C.R.2d 744 [husband and wife consulted attorney about injury to husband; although husband was client, attorney had duty to inform wife of potential cause of action for loss of consortium]; *Johnson v. Superior Court* (1995) 38 C.A.4th 463, 478, 45 C.R.2d 312 [where attorney's representation of partnership involved obligation to protect partners' rights, breach of duty would entitle partners to bring action]; 61 *A.L.R.4th* 464 [what constitutes negligence sufficient to render attorney liable to person other than immediate client]; 61 *A.L.R.4th* 615 [attorney's liability, to one other than immediate client, for

negligence in connection with legal duties].)

An obvious distinction was made in *Hiemstra v. Huston* (1970) 12 C.A.3d 1043, 91 C.R. 269. Plaintiff, the decedent's son, alleged that defendant attorneys, without consultation with decedent's prior attorneys or examination of his prior wills, prepared a will for decedent that left the whole estate to his wife instead of to plaintiff. *Held*, judgment on demurrer sustained; plaintiff was merely complaining of the testator's change of mind, not of defendant's negligence. (12 C.A.3d 1048.) (See *Goldberg v. Frye* (1990) 217 C.A.3d 1258, 1269, 266 C.R. 483 [attorney for administrator of estate owes no duty to devisees of estate].)

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2. Duty to Client's Beneficiary.

b. No Duty to Potential Beneficiary.

1 Witkin Cal. Proc. Attys § 298

[§ 298] No Duty to Potential Beneficiary.

Whether an attorney's duty extends beyond a deceased client to an individual who would have benefited had the decedent executed a will consistent with the draft submitted by the attorney was answered in *Radovich v. Locke-Paddon* (1995) 35 C.A.4th 946, 41 C.R.2d 573. Defendant attorney prepared and delivered the draft of a will to the client, but she died without executing it. Plaintiff, the client's husband and one of the beneficiaries of the proposed will, sued defendant attorney and his law firm for malpractice, claiming that defendants were dilatory and negligent in preparing the will and, ultimately, in failing to have decedent execute it. Defendants' motion for summary adjudication, based on the claim that they owed no duty to plaintiff, was granted. *Held*, affirmed.

(a) *Attorney's duty of undivided loyalty.* Although *Donald v. Garry* (1971) 19 C.A.3d 769, 97 C.R. 191, *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, and *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, *supra*, §297, cast light on the extent of an attorney's duty under the facts here, none of those cases resolves it. (35 C.A.4th 956.) However, a review of factually similar decisions from other jurisdictions reveals that other courts refuse to extend liability to potential third-party beneficiaries, because to do so would compromise the fundamental importance of an attorney's duty of undivided loyalty to the client, a point reaffirmed in *Flatt v. Superior Court* (1994) 9 C.4th 275, 36 C.R.2d 537, 885 P.2d 950, *supra*, §113. (35 C.A.4th 959, 962.)

(b) *Policy consideration.* A rule of law encouraging attorneys to rush clients into making testamentary decisions before they are ready would be against public policy. (35 C.A.4th 962.) Plaintiff argued that defendants delayed in preparing decedent's will and failed to encourage her to take action on it once it was prepared. (35 C.A.4th 963.) It might have been professionally appropriate for defendants to have inquired of decedent whether she had questions or wished further assistance in completing the change of testamentary disposition. However, relevant policy considerations relieve defendants of any duty to plaintiff to have done so. (35 C.A.4th 965.)

Similarly, an attorney has no duty to nonclient beneficiaries under a will to evaluate and ascertain the testamentary capacity of a client seeking to amend the will or make a new will, and no duty to preserve evidence of that evaluation. In *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.* (2003) 109 C.A.4th 1287, 135 C.R.2d 888, the adult children of decedent C sued defendant attorneys for malpractice in connection with defendants' preparation and

amendment of C's estate plan documents. Plaintiffs alleged that defendants were negligent in failing to ascertain whether C had testamentary capacity, that C lacked capacity, and that as a result of defendants' negligence, plaintiffs received less under the terms of their settlement of ensuing trust litigation than they would have under the preexisting estate plan. The trial court sustained defendants' demurrer, finding as a matter of law that defendants did not owe a duty to potential heirs to determine the competency of C to execute trust documents. *Held*, affirmed. The considerations identified in *Radovich* and the negligent will-drafting and execution cases establish that an attorney owes no duty to the beneficiary of a will to ascertain and document the testamentary capacity of the client. To impose a duty would severely compromise the attorney's duty of loyalty to the client. In addition, counsel would be subject to conflicting duties to different sets of beneficiaries where, as here, some individuals would benefit under a previous will and others under a later one. Factually similar cases from other jurisdictions as well as the Rest.3d, The Law Governing Lawyers, support not extending an attorney's duty to potential beneficiaries under the circumstances here. (109 C.A.4th 1298.) (See *Boranian v. Clark* (2004) 123 C.A.4th 1012, 1018, 20 C.R.3d 405 [attorney's sole duty was to dying client-testator and he owed no duty to testator's beneficiary to evaluate or ascertain testator's capacity to make new will or to urge testator to consider alternative disposition simply to avoid future claim of malpractice; following *Radovich* and *Moore*].)

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See *Chang v. Lederman* (2009) 172 C.A.4th 67, 86, 90 C.R.3d 758 [testator's attorney owed no duty to expressly named beneficiary whose actual bequest was properly perfected but who alleged that testator intended to revise estate plan to increase that bequest; to expand attorney's duty of care to beneficiaries who could have been, but were not, named in revised estate plan would expose attorney to impossible duties and limitless liability because interests of "potential beneficiaries are always in conflict"].



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2. Duty to Client's Beneficiary.

c. No Duty to Unidentified Beneficiary.

1 Witkin Cal. Proc. Attys § 299

[§ 299] No Duty to Unidentified Beneficiary.

An extraordinary extension of the duty to the beneficiary (supra, §§297, 300) was urged but rejected in *Ventura County Humane Soc. v. Holloway* (1974) 40 C.A.3d 897, 115 C.R. 464. The testator retained defendant attorneys to draw his will, mainly in favor of charities devoted to the preservation of animal, bird, and fish life. One of the beneficiaries named in the will was "Society for the Prevention of Cruelty to Animals (Local or National)." Extensive hearings were conducted in the probate court to determine the exclusive claim of the San Francisco society, culminating in a settlement of \$ 700,000 to that society. Plaintiff, a similar organization, then sued the attorneys for damages, alleging negligence in drawing the will, causing expenses in litigating their own claim of an interest under the will. The novel theory argued was that the attorneys owed a duty to the class of potential beneficiaries to investigate, determine the true intention of the testator, and draft an unambiguous will. In support of the theory they cited various practice works advising lawyers to exercise care in determining the correct name of a charity and making designations as specific and unambiguous as the testator's desires will permit. *Held*, no cause of action was stated; neither a legal duty nor causation was sufficiently pleaded in the complaint.

(a) The scope of duty is determined by the relationship, and the primary duty is to carry out the intention of the testator. "Consequently, when, as in the case at bench, the testamentary intent has been implemented, no good reason exists why the attorney should be held accountable for using certain words suggested or selected by the testator which later prove to be ambiguous. In addition, the task of proving whether claimed ambiguity was the result of negligence of the drafting attorney, or whether it was the deliberate choice of the testator, would impose an insurmountable burden on the parties, since in such a case the trier of fact would be required to decide this crucial issue without the benefit of the testimony of the most important witness, the testator himself. Once recognized, such a duty would apply by parity of reasoning not only to wills, but also to contracts, conveyances and other legal instruments. The duty thus created would amount to a requirement to draft litigation-proof legal documents." (40 C.A.3d 905.)

(b) The complaint failed to allege the true intention of the testator, hence failed to show that they suffered any loss from the will as drafted. (40 C.A.3d 906.)

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2. Duty to Client's Beneficiary.

d. Duty to Executor and Sole Beneficiary.

1 Witkin Cal. Proc. Attys § 300

[§ 300] Duty to Executor and Sole Beneficiary.

In *Osornio v. Weingarten* (2004) 124 C.A.4th 304, 21 C.R.3d 246, attorney W was retained by E to draft a new will that would revoke prior wills and codicils and name plaintiff O as the sole beneficiary. E was a dependent adult and O was her care custodian, which subjected O to presumptive disqualification as a donee under *Prob.C. 21350(a)(6)*, unless E obtained a certificate of independent review from another attorney under *Prob.C. 21351(b)* (see 14 *Summary* (10th), *Wills and Probate*, §§303, 304). Following the probate court's conclusion that O could not overcome her disqualification, O filed a malpractice action against W on the theory that W owed her a duty of care as E's intended beneficiary, that in preparing the will W failed to advise E that O would be presumptively disqualified without a certificate of independent review, and that W failed to ensure that E's wishes were carried out by not referring E to independent counsel. The trial court sustained W's demurrer without leave to amend. *Held*, reversed.

(a) Under *Biakanja v. Irving* (1958) 49 C.2d 647, 320 P.2d 16, and *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, *supra*, §297, an attorney's duty may extend to a client's intended beneficiary after considering the following factors: (1) The extent to which the transaction was intended to benefit the beneficiary, (2) the foreseeability of harm, (3) the degree of certainty that the beneficiary was injured, (4) the closeness of the connection between the attorney's conduct and the injury, (5) the policy of preventing future harm, and (6) whether extending liability for negligently prepared wills would impose an undue burden on attorneys in general. (124 C.A.4th 320.)

(b) Applying these factors, it is apparent that O could have sufficiently alleged that W breached a duty of care owed to her:

(1) E's engagement of W was intended to benefit O, i.e., by drafting a will to pass E's estate solely to O. (124 C.A.4th 330.)

(2) At the time W drafted the will, it was foreseeable that if W failed to exercise due care to effectuate the testamentary transfer, O would be damaged. (124 C.A.4th 331.)

(3) O sustained injury. Although E intended that O would receive her entire estate, O receives nothing if she is

unable to rebut her presumptive disqualification. (124 C.A.4th 331.)

(4) Although there might be intervening factors to break the causal connection between W's conduct and O's damage (e.g., proof that E was unlikely to obtain a certificate even if properly advised of its importance), O might establish that, but for W's failure to advise E and refer her to independent counsel, O would not have been damaged. Thus, the closeness of W's conduct to the injury can be resolved only through the presentation of evidence. (124 C.A.4th 332.)

(5) Imposition of an extended duty under the circumstances here promotes a public policy of encouraging the competent practice of law by estate planning attorneys. If testamentary beneficiaries like O are presumptively disqualified and then deprived of bringing an action against the attorney responsible for the failed bequest, "no one would be able to bring such action." (124 C.A.4th 332.)

(6) Extending liability will not impose an undue burden on attorneys who prepare instruments containing donative transfers to presumptively disqualified persons. Instead, imposing the duty promotes public policy because it encourages attorneys "to devote their best professional efforts on behalf of their clients to ensure that transfers of property to particular donees are free from avoidable challenge." (124 C.A.4th 335.)

(c) *Radovich v. Locke-Paddon* (1995) 35 C.A.4th 946, 41 C.R.2d 573, and *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.* (2003) 109 C.A.4th 1287, 135 C.R.2d 888, supra, §298, are distinguishable. In *Radovich*, unlike here, there was no plain expression of the testator's intent to benefit the plaintiff, and imposition of liability there to potential beneficiaries under an unsigned estate planning document could have improperly compromised the attorney's primary duty of undivided loyalty to the client. *Moore* concerned whether an attorney owed a duty to beneficiaries to evaluate and ascertain the testamentary capacity of a client seeking to amend a will or make a new will. Here, O asserts that E's will contained an accurate expression of E's intentions but that the transfer failed due to W's negligence. (124 C.A.4th 336.) Thus, W owed a duty of care to O, and O should have been given the opportunity to amend her complaint. (124 C.A.4th 338.)

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3. Duty to Other Third Parties.

a. General Rule: No Duty to Third Party.

1 Witkin Cal. Proc. Attys § 301

[§ 301] General Rule: No Duty to Third Party.

In *Norton v. Hines* (1975) 49 C.A.3d 917, 123 C.R. 237, plaintiff, having successfully defended an action for breach of contract, sued his adversary's attorney for professional negligence, rather than malicious prosecution, in advising the adversary to bring the prior action. *Held*, plaintiff's reliance on *Biakanja v. Irving* (1958) 49 C.2d 647, 651, 320 P.2d 16, and *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, *supra*, §297, was misplaced and no cause of action was stated. "Clearly, an adverse party is not an intended beneficiary of the adverse counsel's client." (49 C.A.3d 921.) (On attorney's liability for malicious prosecution, see 5 *Summary* (10th), *Torts*, §510; on standing of successor fiduciary to sue attorney for predecessor fiduciary for malpractice that causes loss to estate, see *Borisoff v. Taylor & Faust* (2004) 33 C.4th 523, 15 C.R.3d 735, 93 P.3d 337, 14 *Summary* (10th), *Wills and Probate*, §467 [Probate Code provides standing].)

The following cases illustrate application of the rule that an attorney's duty extends only to the intended beneficiaries of the attorney's acts:

Goodman v. Kennedy (1976) 18 C.3d 335, 344, 134 C.R. 375, 556 P.2d 737, 6 *Summary* (10th), *Torts*, §1180 [plaintiffs, adverse parties to transaction who bargained with attorney's clients at arm's length, were not entitled to sue attorney for negligent advice to clients].

Parnell v. Smart (1977) 66 C.A.3d 833, 838, 136 C.R. 246 [attorney for defendant owes no duty to plaintiff].

Held v. Arant (1977) 67 C.A.3d 748, 751, 134 C.R. 422 [cross-complainant first attorney was third party to relationship between client and cross-defendant successor attorney].

Weaver v. Superior Court (1979) 95 C.A.3d 166, 179, 156 C.R. 745, 6 *Summary* (10th), *Torts*, §1180 [adverse party was permitted to bring action for malicious prosecution but not for attorney's negligence in investigation of facts before filing complaint].

Fox v. Pollack (1986) 181 C.A.3d 954, 960, 961, 962, 226 C.R. 532, citing the text [unless attorney has made

contrary representations, attorney owes no duty to unrepresented party who deals at arm's length with attorney's clients in real estate transaction; cases collected].

St. Paul Title Co. v. Meier (1986) 181 C.A.3d 948, 950, 952, 226 C.R. 538 [attorney representing real estate purchaser has no duty to escrow agent; cases collected].

Mattco Forge v. Arthur Young & Co. (1995) 38 C.A.4th 1337, 1356, 45 C.R.2d 581 [attorney had no duty to accounting firm retained as expert witness on behalf of client].

Major Clients Agency v. Diemer (1998) 67 C.A.4th 1116, 1133, 79 C.R.2d 613 [client's agent was denied equitable indemnity from client's attorney; attorney had no duty to agent where attorney and agent were involved in contract negotiations with third party on behalf of client].

Zenith Ins. Co. v. O'Connor (2007) 148 C.A.4th 998, 1008, 55 C.R.3d 911 [attorney representing insurer regarding coverage obligations and potential bad faith liability owed no duty to reinsurer absent mutual intent to benefit reinsurer].

However, an attorney for a trustee may owe a duty to the beneficiaries of the trust. (*Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 C.A.3d 307, 315, 316, 160 C.R. 239 ["when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary"].)

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b. Illustrations.

1 *Witkin Cal. Proc. Attys* § 302

[§ 302] Illustrations.

In *Burger v. Pond* (1990) 224 C.A.3d 597, 273 C.R. 709, plaintiff wife and her husband, K, filed an action against defendant, K's attorney in a prior action for dissolution of K's marriage with his first wife. The complaint alleged that defendant knew K intended to remarry; that he knew K did not meet the residency requirements for dissolution, but nevertheless obtained a decree, which was later set aside as invalid; that, as a result, plaintiff's subsequent marriage was invalid; that K incurred substantial legal fees in seeking a valid dissolution; and that both plaintiffs suffered emotional distress. The trial judge granted summary judgment for defendant, on the ground that, as K's attorney, he owed no legal duty of care to plaintiff wife. *Held*, affirmed.

(a) Under the cases dealing with attorneys' liability to third party nonclients for professional negligence, defendant is not liable to plaintiff. As recognized in *Mason v. Levy & Van Bourg* (1978) 77 C.A.3d 60, 143 C.R. 389, *infra*, §309, whether liability will extend to plaintiff depends on the extent to which the transaction was intended to benefit or affect plaintiff. "[T]he benefit or effect must be both intended and an objective of the particular service the attorney was retained to perform." (224 C.A.3d 605.) Here, the transaction between K and defendant was not intended to benefit or affect plaintiff wife; the sole purpose was to dissolve K's existing marriage. (224 C.A.3d 605.)

(b) Sound policy considerations support this result. Although a client's future spouse may be affected by the resolution of matters associated with a marriage dissolution, the loyalty demanded by the attorney-client relationship dictates that the attorney consider the interests of the client only. (224 C.A.3d 605, 606.)

(c) The situation here is not like that presented in *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, *supra*, §297, where the attorney's professional negligence comes to light only after the client-testator is dead, and if the intended beneficiary is not entitled to recover no one may do so. K is a party to this action and, if he proves defendant's negligence, will hold defendant accountable for his failure to perform his duties with reasonable competence. (224 C.A.3d 606.)

(d) *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, 6 *Summary* (10th), *Torts*, §1022, is distinguishable. Although plaintiff wife may have had direct contact with defendant, defendant did not direct

any action or information toward her and never gave her legal advice, and she did not ask defendant to act as her attorney. (224 C.A.3d 606.)

In *Sooy v. Peter* (1990) 220 C.A.3d 1305, 270 C.R. 151, the Ws were the beneficiaries on a junior deed of trust. In a foreclosure proceeding brought by the holder of the first deed of trust represented by attorney S, the Ws were represented by attorney P. They were not informed of the foreclosure sale, did not appear, and lost their interest when the holder of the senior deed of trust was the sole bidder. The Ws then sued attorney S, alleging that he had falsely represented to attorney P that the foreclosure sale had been stayed by a court order, and that the Ws would receive adequate notice of termination of the stay and of any foreclosure sale. Attorney S cross-complained against attorney P, seeking compensation for attorneys' fees and other costs incurred in defending the Ws action. He alleged that the damages resulted from P's professional negligence in failing to keep the Ws informed of the status of the stay. The trial court sustained a demurrer to the cross-complaint. *Held*, judgment for P on demurrer affirmed. P owed no duty of care to S, attorney for the adverse party; S represented a client who was dealing at arm's length with P's client. (220 C.A.3d 1313.)

In *B.L.M. v. Sabo & Deitsch* (1997) 55 C.A.4th 823, 64 C.R.2d 335, defendant law firm and individual attorneys acting as bond counsel for the city of Rialto, allegedly stated to plaintiff B.L.M., a developer, that payment of the prevailing wage was not required on a particular construction project. Relying on this assurance, plaintiff expended funds on planning and development. When defendants later concluded that payment of the prevailing wage was necessary, the project was unable to go forward. Plaintiff sued on a theory of legal malpractice, but the trial court, finding that defendants owed no duty to plaintiff, granted summary judgment to defendant. *Held*, affirmed.

(a) *Plaintiff was not third-party beneficiary.* Plaintiff's argument--that it was a third-party beneficiary of the contract between the city and defendant because it was specifically identified as the developer of the project--would put defendant in an untenable position. Under plaintiff's theory, whenever an attorney is named in a contract as counsel for one party, that attorney would owe a professional duty of care to all parties. That concept is unworkable and undermines the very nature of the attorney-client relationship. (55 C.A.4th 831, 832.)

(b) *No action for negligent misrepresentation.*

(1) *Bily v. Arthur Young & Co.* (1992) 3 C.4th 370, 11 C.R.2d 51, 834 P.2d 745, 6 Summary (10th), *Torts*, §992, requires an *intent to influence* as an element of negligent misrepresentation. (55 C.A.4th 835.) "There is no specific allegation in the complaint of intent on the part of [defendants] to induce B.L.M. to act in reliance on the representation; the only indication of such intent would be the inference to be drawn that if [defendants] said it they must have intended B.L.M. to rely on it. That is a thin reed on which to hang potentially enormous liability." (55 C.A.4th 836.)

(2) *Bily* also requires *justifiable reliance* by plaintiff. Here, plaintiff was represented by its own counsel, who at one point gave advice directly contrary to the representation made by defendants, and there is nothing in the complaint to justify plaintiff's reliance on a law firm representing the city. (55 C.A.4th 836.) "In light of the fact that an attorney is prohibited from representing one who holds a position adverse or antagonistic to an existing client, it would be anomalous to hold that a person in an adverse or antagonistic position could nonetheless rely on a legal opinion of the attorney as a basis for holding the attorney liable for negligent misrepresentation. This would in fact amount to creating a duty of professional care on the part of the attorney toward a person with whom the attorney would be prohibited from maintaining a professional relationship." (55 C.A.4th 838.)

(3) Prior cases have limited recovery by a third party against an attorney under a negligent misrepresentation theory to situations involving misrepresentations of *fact*. Where the third party relied on a *legal opinion* provided by the attorney, recovery has not been permitted. (55 C.A.4th 839, 840.) There is no decision that would permit recovery under the theory of negligent misrepresentation. (55 C.A.4th 840, 841.)

In *Hall v. Superior Court* (2003) 108 C.A.4th 706, 133 C.R.2d 806, a 21/2-year-old girl drowned in a swimming

pool at the home of her paternal grandmother while her father, B, was present but her mother, E, was not. E retained attorney H to represent her alone in a wrongful death action against B's mother. B never consulted with H about the case. After E recovered a settlement, B sued E, from whom he was then estranged, for half the recovery, and brought a malpractice and breach of fiduciary duty action against H, alleging that H owed him a duty to advise him of his rights in the wrongful death action. H sought summary judgment on the basis that he owed no duty to B because B was never a client. The trial court denied the motion. *Held*, H had no legal duty to B as a matter of law.

(a) *Meighan v. Shore* (1995) 34 C.A.4th 1025, 40 C.R. 2d 744, on which B relies, is distinguishable. There, both spouses consulted an attorney about a personal injury suffered by the husband following hospital treatment and the attorney knew, or could readily ascertain, that the wife had a potential claim for loss of consortium, but failed to so advise. Here, E and B never met together with H or suggested that the claim regarding the daughter's death was *theirs*. All contact and discussion was between H and E regarding E's legal rights. Thus, H's sole client was E, and E had no expectation B would benefit from or rely on H's legal services. (108 C.A.4th 714.)

(b) Because B was present at the scene of the drowning, H faced a potential conflict of interest had he represented both E and B. In addition, it would have posed an undue burden on H to require him to contact B, who was estranged from E, to advise B about his legal rights or suggest that B contact an attorney. An attorney's duty does not extend to persons who have not come seeking legal advice and whom the attorney has never met. Moreover, it is doubtful H could have discussed the matter with B without breaching his duty of loyalty to E. (108 C.A.4th 714.)

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c. Exceptions.

1. Foreseeable Reliance on Misrepresentation.

1 Witkin Cal. Proc. Attys § 303

[§ 303] Foreseeable Reliance on Misrepresentation.

The theory of liability to an intended beneficiary of the client (*supra*, §§297, 300) was applied in *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 C.A.3d 104, 128 C.R. 901, in the context of negligent misrepresentation to a party who was not the client's intended beneficiary. Plaintiff alleged that he was a prospective lender of \$ 800,000 to BBC, a partnership; that defendant attorneys gave B, a member of the partnership, a letter stating that in their professional opinion BBC was a general partnership of 14 general partners; that they knew this letter was to be used to induce plaintiff to make loans to BBC; that they failed to disclose the belief on the part of many of the 14 that BBC was a limited partnership and that they had no personal liability for its obligations; and that, in reliance on the letter, he made loans and thereafter incurred litigation costs in a still-pending attempt to establish liability of the 14 as general partners. *Held*: (1) No cause of action for fraud was pleaded, for there was no allegation of fraudulent intent. (57 C.A.3d 110.) (2) A cause of action for negligent misrepresentation was pleaded.

(a) "[T]he essence of plaintiff's causes of action sounding in negligence is that defendants knew about the *doubt* as to the status of the partnership because of the contention of certain partners that they were limited partners, only, and knowingly failed to reveal that doubt to plaintiff. Even though defendants may have believed that there was a general partnership ... , the firm had a duty to reveal to plaintiff this doubt as to the status of the partnership. ... Half the truth is often as misleading as outright falsehood." (57 C.A.3d 111.)

(b) The imposition of a duty on the part of defendants to the plaintiff is proper under the principles stated in *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, *supra*, §297, and *Donald v. Garry* (1971) 19 C.A.3d 769, 97 C.R. 191, *supra*, §297. "The defendants' opinion concerning the status of the partners was rendered for the purpose of influencing plaintiff's conduct, and harm to him was clearly foreseeable. We have no difficulty, therefore, in determining that the issuance of a legal opinion intended to secure benefit for the client, either monetary or otherwise, must be issued with due care, or the attorneys who do not act carefully will have breached a duty owed to those they attempted or expected to influence on behalf of their clients." (57 C.A.3d 111.)

In *Home Budget Loans v. Jacoby & Myers Law Offices* (1989) 207 C.A.3d 1277, 255 C.R. 483, HBL, as a condition

of arranging a loan for A, required that she consult an attorney and have him provide a written statement that he had explained the terms to her and that she understood them. The law firm of J & M provided such a letter. Thereafter, A sued HBL for rescission based on fraud, and HBL cross-complained against J & M alleging that the J & M attorney falsely represented that he had made the required explanation. The trial judge sustained J & M's demurrer. *Held*, reversed, on the authority of *Roberts*.

(a) An attorney advising a client owes no duty to third persons affected by that advice in the absence of a showing that the legal advice was foreseeably transmitted to or relied on by the plaintiffs, or that the plaintiffs were the intended beneficiaries of a transaction to which the advice pertained. (207 C.A.3d 1283.)

(b) The attorney is liable, however, when he or she gives the client a written opinion with the intention that it be transmitted to and relied on by the plaintiff in dealing with the client. (207 C.A.3d 1283.)

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2. Misrepresentation to Third Party's Attorney.

1 *Witkin Cal. Proc. Attys* § 304

[§ 304] Misrepresentation to Third Party's Attorney.

In *Cicone v. URS Corp.* (1986) 183 C.A.3d 194, 227 C.R. 887, an attorney was sued for malpractice in connection with the sale of his former clients' business. The attorney cross-complained against the buyer and its attorney for fraud and negligent misrepresentation, alleging that the sellers' loss was caused by his reliance on a statement made by the buyer's attorney during negotiations. *Held*, judgment on demurrer reversed.

(a) Regarding the cause of action for fraud, an attorney has a duty "not to defraud another, even if that other is an attorney negotiating at arm's length." (183 C.A.3d 202.) Hence, cross-complainant's allegations of intentional misrepresentation, justifiable reliance, proximate causation, and resulting damages in the form of exposure to malpractice liability, state a cause of action for fraud. (183 C.A.3d 202.)

(b) A cause of action for negligent misrepresentation was also pleaded. If an attorney owes a duty of care to third persons whom he expects to influence by his representations, "then a fortiori why should such a duty of care not exist toward the third party's attorney where an affirmative misrepresentation of fact is made directly to the attorney for the purpose of influencing his client?" (183 C.A.3d 210.) Imposing such a duty poses no legitimate threat to the attorney-client relationship. "All that is required to avoid negligent misrepresentation is that the attorney have some reasonable basis for believing the truthfulness of his or her representations. Imposing possible liability where such a basis is lacking will not prevent an attorney from devoting his entire energies to his client's interest. Neither will it require the attorney to assist opposing counsel in the performance of the latter's duties to his client." (183 C.A.3d 211.)

In *Shafer v. Berger, Kahn, Shafon, Moss, Figler, Simon & Gladstone* (2003) 107 C.A.4th 54, 131 C.R.2d 777, plaintiff prevailed in an arbitration with an insured home remodeler, the award was confirmed, and judgment was entered. When plaintiff's attorney sought payment from the insurer, the insurer's attorney, L, through letters to plaintiff's counsel accompanying only a third of the judgment amount, misrepresented that the insurer did not indemnify the insured for wilful acts. Plaintiff relied on those statements and entered into a settlement agreement for less than the judgment. When plaintiff's attorney later learned that the insurer had agreed to indemnify the insured for wilful acts, plaintiff brought this action against L for fraud and against L and the insurer for conspiracy. The trial court sustained

defendant's demurrers in which L argued that he owed no duty of truthful disclosure about coverage, and that C.C. 1714.10 (supra, §287) barred the conspiracy claim. *Held*, reversed. If an attorney commits actual fraud in dealing with third parties, the fact that the attorney did so in the capacity of counsel for a client does not negate liability. Nor may an attorney conspire with a client to defraud or injure a third person or engage in tortious conduct toward that person, "even if that other is an attorney negotiating at arm's length." (107 C.A.4th 71.) If plaintiff had known the truth of coverage, plaintiff would have aggressively sought full payment of the judgment. However, plaintiff justifiably relied on a misrepresentation, one L had a duty not to make. (107 C.A.4th 76.)

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3. Duty as Escrow Holder.

1 Witkin Cal. Proc. Attys § 305

[§ 305] Duty as Escrow Holder.

Wasmann v. Seidenberg (1988) 202 C.A.3d 752, 248 C.R. 744, recognizes an attorney's duty to the adverse party independent of professional negligence. Under the terms of a property division in a marriage dissolution, plaintiff was to convey his community interest in the residence to his wife, B, in exchange for \$ 70,000 or a promissory note in that amount secured by a trust deed on the property. B ultimately hired defendant attorney S to complete the settlement. Plaintiff's attorney sent a signed grant deed to S stating that he was authorized to record the deed only on obtaining the cash or the note. B obtained the deed from S and recorded it. After plaintiff's attorney had made a number of unsuccessful demands on S for information regarding the execution of the settlement agreement, the present action was filed against S for legal malpractice and constructive fraud. *Held*, judgment for defendant on demurrer reversed.

(a) S owed no professional duty to the adverse party, and no cause of action for legal malpractice could be stated. (202 C.A.3d 752.) However, a cause of action could be stated against S in his fiduciary role of escrow holder if he accepted the entrustment of the deed; and the allegations of acceptance were legally sufficient. Plaintiff and his attorney reasonably relied on S because of his professional status and role as attorney for B. If S did not want to be responsible for the deed, he should have promptly returned it to plaintiff, and a trier of fact could find that a failure to do so was an acceptance of plaintiff's entrustment. Thus, S was obligated to prevent recordation of the deed until B deposited into escrow the sum due to plaintiff. The complaint therefore stated a cause of action for negligence. (202 C.A.3d 756, 757.)

(b) The complaint also stated facts sufficient to support a cause of action for constructive fraud. Plaintiff alleged that S not only breached his fiduciary duty by allowing recordation of the deed, but also compounded his wrongdoing by failing to disclose this fact despite repeated inquiries from plaintiff's attorney. Recordation of the deed was a material fact, and suppression of this information worked to benefit B and to prejudice plaintiff. (202 C.A.3d 757.)

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4. Party Holding Lien Against Client's Recovery.

1 Witkin Cal. Proc. Attys § 306

[§ 306] Party Holding Lien Against Client's Recovery.

Disagreement exists whether an attorney is liable for settlement proceeds disbursed to a client in knowing disregard of a third party's lien.

Liability was found in *Kaiser Foundation Health Plan v. Aguiluz* (1996) 47 C.A.4th 302, 54 C.R.2d 665. F, injured in a motorcycle accident, hired defendant A to sue the other driver. F incurred over \$ 23,000 in medical expenses, and he agreed in writing to reimburse plaintiff health plan for those expenses, and authorized A to reimburse plaintiff from any settlement or judgment. The personal injury action was settled for \$ 85,000, but A, after unsuccessful efforts to settle plaintiff's claim for less than \$ 23,000, disbursed the settlement proceeds without paying plaintiff. Plaintiff sued F and A for breach of contract and constructive trust and, after settling with F, obtained a judgment for \$ 23,000 against A. *Held*, affirmed.

(a) Under *Miller v. Rau* (1963) 216 C.A.2d 68, 30 C.R. 612, an attorney who disburses funds to a client despite notice of a third party's contractual right to those funds may be liable for conversion. (47 C.A.4th 305.)

(b) The *Miller* rule has been applied in a case involving an attorney's failure to pay an equitable lien against his client's settlement proceeds (47 C.A.4th 306, discussing *McCafferty v. Gilbank* (1967) 249 C.A.2d 569, 57 C.R. 695, 1 Summary (10th), Contracts, §722), as well as in cases involving the failures of a successor attorney and a liability insurer to pay the fee liens of prior attorneys (47 C.A.4th 306, 307, discussing *Weiss v. Marcus* (1975) 51 C.A.3d 590, 124 C.R. 297, supra, §170, and *Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 C.A.3d 745, 133 C.R. 376).

(c) Defendant knew about his client's reimbursement agreement, and had negotiated with plaintiff in an attempt to settle for less. He nonetheless disbursed the entire amount of the settlement without an attempt to protect plaintiff's interest. Hence, plaintiff was entitled to recover from A under *Miller*. (47 C.A.4th 307.)

(d) A argues that *Miller* and its progeny were abrogated by *Brian v. Christensen* (1973) 35 C.A.3d 377, 110 C.R. 688. However, *Brian* held only that Welf.C. 11417, dealing with Medi-Cal liens, imposes a duty on the client, not the

attorney, to notify the Director of Health Care Services of a pending settlement in a personal injury action. *Brian* did *not* consider whether the attorney could have been held liable under *Miller* for the disbursement of funds in disregard of an equitable lien, and an opinion is not authority for a proposition not considered. (47 C.A.4th 308.)

Farmers Ins. Exchange v. Smith (1999) 71 C.A.4th 660, 83 C.R.2d 911, sharply disagreed with *Aguiluz* and adopted the reasoning and holding of *Farmers Ins. Exchange v. Zerin* (1997) 53 C.A.4th 445, 61 C.R.2d 707, 13 Summary (10th), *Personal Property*, §221, that reached a result contrary to *Aguiluz* based on similar facts. In *Smith*, plaintiff insurers sued for conversion and sought to impose a constructive trust against defendant attorney who had represented clients who filed medical claims against plaintiffs. On settling the claims against third-party tortfeasors, defendant subtracted his fee and costs and disbursed the remaining funds to his clients. Neither defendant nor his clients reimbursed the insurers. Plaintiffs asserted a theory of equitable liens against the settlements based on policy provisions that provided for reimbursements of payments made by the insurer from any recovery from a third party. The trial judge found for plaintiffs. *Held*, reversed.

(a) *Equitable lien theory is inapplicable*. Unlike *Aguiluz*, *Zerin* held that the reimbursement provisions of the policies did not create an equitable lien on settlement proceedings just because the attorney was given notice of those reimbursement provisions. An equitable lien is merely an equitable remedy available to accomplish justice in a given situation. The *Aguiluz* court assumed a per se rule that property in an attorney's control, that is known to be someone else's, imposes a duty on the attorney as a matter of equity to ensure that the property goes to its rightful owner, regardless of the attorney's duty to the client or the attorney's right to be paid. Thus, in personal injury actions, the attorney is essentially being forced to perform an unpaid service to the policyholder's insurer even though there has been neither detrimental reliance on the part of the insurer nor unjust enrichment of the attorney. More importantly, the attorney's duties lie with the policyholder client, not the potentially adverse insurer. When an attorney receives the proceeds of litigation instituted on behalf of the client, the attorney's duty is to turn over those proceeds to the client. (71 C.A.4th 667.) The idea that attorneys have some duty to withhold the insurer's reimbursement claim is based on a misplaced equitable lien notion that the litigation proceeds are assumed already owned by the insurer. However, unless a court of equity actually first creates a lien and then enforces it, one does not exist. (71 C.A.4th 671.)

(b) *Equities do not favor creation of lien*. The actual equities do not favor creation of an equitable lien in this context for the following reasons: (1) The insurer has a perfectly adequate remedy at law against the policyholder. (2) A supposed duty on the attorney to collect the insurer's reimbursement claim subjects the attorney to an inequitable conflict between the client and an insurer. First, the client may direct the attorney not to do so, and second, the litigation proceeds may be insufficient to cover both the insurer's reimbursement and the attorney's fee. (3) The assumed duty on the attorney ignores the problem of allocation of tort recovery between property damage, emotional distress, pain and suffering, and medical payments, thus again subjecting the attorney to a conflict between the client's preferred allocation to nonreimbursable items, such as emotional distress, and the insurer's preference for an allocation to medical expenses or property damage, or as the case may be. (71 C.A.4th 672.)

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4. Liability of Partner.

1 Witkin Cal. Proc. Attys § 307

[§ 307] Liability of Partner.

(1) *In General.* Members of a law partnership may be subject to liability under trust principles and the rule of the Uniform Partnership Act of 1996 (*Corp.C. 16100* et seq.) that each partner is liable for misappropriation of another acting within the scope of the partner's apparent authority (*Corp.C. 16305, 16306(a).*) (See *Blackmon v. Hale* (1970) 1 C.3d 548, 557, 83 C.R. 194, 463 P.2d 418; 9 Summary (10th), *Partnership*, §35 et seq.; 70 A.L.R.3d 1298 [vicarious liability of attorney for tort of partner in law firm]; on ethical responsibilities of supervisory partners, see A.B.A. Model Rules of Professional Conduct, Rule 5.1.)

In *Blackmon*, A and H were law partners. Plaintiff client gave A, his attorney, a cashier's check for \$ 24,500 payable to the firm trust account, to use as an offer to buy a note and mortgage for plaintiff. A deposited the check in the firm trust account. Later A had H sign a check for \$ 21,386 payable to A's own trust account, and A misappropriated the money. *Held*, H was liable.

(a) Although the firm records indicated that the partners regarded plaintiff as the client of A only, plaintiff was never so informed. He reasonably believed that he was dealing with a partnership, for the office sign read "Adams and Hale, Attorneys at Law," and A had instructed him to make his check payable to the firm trust account. (1 C.3d 558.) This brought the case within former Corp.C. 15014 (now *Corp.C. 16305*) and former Corp.C. 15015 (now *Corp.C. 16306*). (1 C.3d 557.)

(b) The firm trust account, established in compliance with the Rules of Professional Conduct (*infra*, §453), was a voluntary trust, and members of the firm were voluntary trustees. (1 C.3d 559.) A trustee is responsible for wrongful acts of a cotrustee if the trustee negligently fails to exercise reasonable supervision (see 13 Summary (10th), *Trusts*, §119), and this rule was applicable here. H signed the check on the firm trust account payable to A without consulting plaintiff, and H did not meet his burden of explanation of this surrender of trust assets to the exclusive possession of a cofiduciary. (1 C.3d 559, 560.)

(2) *Liability of Former Partner.* In *Redman v. Walters* (1979) 88 C.A.3d 448, 152 C.R. 42, plaintiff employed the firm of M, B & W to file a lawsuit in 1969. W did not meet plaintiff, did not participate in the suit, and severed his relationship with the firm in 1970. The firm of M & B continued to represent plaintiff without formal substitution as

attorneys of record and plaintiff was never advised of the change. In 1974, the suit was dismissed for lack of prosecution, and plaintiff brought an action against the partnership and W for malpractice. The trial judge gave summary judgment for W. *Held*, under established principles of partnership law, W would be liable for any negligence of the partnership. (a) Under former Corp.C. 15036(1) (now Corp.C. 16806), the dissolution of a partnership does not of itself discharge the existing liability of a partner. (88 C.A.3d 453.) (b) Whether plaintiff waived or was estopped to assert W's continuing liability, by reason of knowledge of legal papers listing counsel as M and B, presented at most a triable issue of fact. (88 C.A.3d 455.) (See *Beane v. Paulsen* (1993) 21 C.A.4th 89, 95, 96, 98, 26 C.R.2d 486 [attorneys who were former shareholders of law corporation had joint and several liability to former client of corporation as guarantors of corporation's financial responsibility for malpractice; notice to client of corporation's dissolution could not release shareholders from liability for negligent acts already committed].)

(3) *Limitation of Liability*. Members of a law partnership may limit their personal liability for partnership debts and malpractice by registering and doing business as a registered limited liability partnership (LLP) under Corp.C. 16951 et seq. (See *supra*, §20; 9 *Summary* (10th), *Partnership*, §122 et seq.)

A partner in a registered limited liability partnership is not liable or accountable, directly or indirectly, including by indemnification, contribution, or assessment, for debts, obligations, or liabilities of the partnership or other partners, whether arising in tort or contract. (Corp.C. 16306(b).) However, partners remain liable for their own malpractice and tortious conduct (Corp.C. 16306(e)) and may, by written agreement, assume liability for any future specified debts or obligations of the partnership (Corp.C. 16306(c)). To receive this protection, the partnership must have a current, effective certificate of registration issued by the State Bar. (Corp.C. 16306(f); see Corp.C. 15049 [filing procedures with Secretary of State]; State Bar Limited Liability Partnership Rules and Regulations, §1.0 et seq.; on organizing and operating as limited liability company, see C.E.B., Limited Liability Companies, §1.2; 9 *Summary* (10th), *Partnership*, §136 et seq.)

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 5. No Liability to Associated Attorney.

1 Witkin Cal. Proc. Attys § 308

[§ 308] No Liability to Associated Attorney.

A conflict formerly existed over whether an attorney associated for a single case owed a duty to cocounsel. *Pollack v. Lytle* (1981) 120 C.A.3d 931, 940, 942, 175 C.R. 81, applying agency principles and distinguishing cases that relied on a successor attorney's duty to former attorneys (infra, §309), held that the associated attorney owed a fiduciary duty to the principal attorney. However, *Joseph A. Saunders, P.C. v. Weissburg & Aronson* (1999) 74 C.A.4th 869, 873, 87 C.R.2d 405, disagreed and held that the duty of both successor and associated counsel was the same--to serve the best interest of the client.

Beck v. Wecht (2002) 28 C.4th 289, 121 C.R.2d 384, 48 P.3d 417, resolved the conflict by agreeing with *Saunders*, disapproving *Pollack*, and adopting a bright-line rule refusing to recognize a fiduciary duty between cocounsel to conduct their joint representation in a manner that protects the other's prospective interests in fees.

In *Beck*, attorney B associated attorney M into a personal injury action involving client S. B and M then associated W as local trial counsel. By separate written agreements, M would advance all costs, and all attorneys would share in B's contingent fee according to specified percentages. On the night before closing arguments, S advised W and M to settle. M was to contact the corporate defendant but did not. The jury returned a defense verdict, and S sued M and W for malpractice in failing to carry out the settlement instructions. M settled with S, and as a condition of the settlement B was paid a sum, and B released claims against M. Later, B sued W for breach of fiduciary duty to recover the fee he would have received had M and W settled the case. W filed a cross-complaint. The trial court entered summary judgment against both on claims for loss of contingency fees and indemnity. *Held*, affirmed. "[W]e agree with *Saunders* that it would be contrary to public policy to countenance actions based on the theory that cocounsel have a fiduciary duty to protect one another's prospective interests in a contingency fee." (28 C.4th 291.) B's dissatisfaction with the handling of the underlying action by W and M illustrates the conflicts that may arise among attorneys representing the same client and the resulting inability to consider the client's best interests. Thus, to avoid detriment to the jointly represented client, "it is imperative that no collateral duties arise to interfere with the duty of 'undivided loyalty and total devotion' owed to the client." (28 C.4th 297.) (On vicarious liability of principal attorney for acts of associated attorney, see 35 A.L.R.5th 717.)

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6. No Liability to Forwarding Attorney.

1 Witkin Cal. Proc. Attys § 309

[§ 309] No Liability to Forwarding Attorney.

In *Mason v. Levy & Van Bourg* (1978) 77 C.A.3d 60, 143 C.R. 389, plaintiff, the attorney for L in pending cases, entered into a written contract with defendant attorneys to substitute them as the attorneys of record "on a contingency referral basis." The agreement provided that plaintiff was to receive a percentage of the 50% contingent fee charged to the client. In the present action plaintiff alleged that defendants failed to exercise their best efforts to settle or try the cases prior to the expiration of the statutory time to bring the case to trial, and that as a result plaintiff lost his share of the fee that would otherwise have been recovered. *Held*, judgment for defendant on demurrer affirmed.

(a) *No breach of contract.* Under *Fracasse v. Brent* (1972) 6 C.3d 784, 100 C.R. 385, 494 P.2d 9, *supra*, §216, no cause of action for compensation under a contingent fee contract accrues in favor of the attorney against the client until the occurrence of the contingency, i.e., recovery by settlement or trial. Plaintiff, unable to recover from his former *client* because of this rule, seeks to impose on the successor attorney an obligation to compensate even though the contingency has not occurred. However, public policy precludes the imposition of that obligation, which would dilute the successor attorney's duty of undivided loyalty to the client. Thus, here a cross-action had been filed against L, the client; and defendants might have concluded that L's best interests would be served by allowing his action to lapse, with the resulting loss of the contingent fee for both plaintiff and defendants. Defendants had a duty to exercise independent professional judgment on behalf of the client, without considering any interest of plaintiff. (77 C.A.3d 67.) "Considerations of public policy support the conclusion that an attorney's duty of undivided loyalty to his client should not be diluted by imposing upon him obligations to the client's former attorney, or at least obligations greater than the client himself owed to the former attorney." (77 C.A.3d 67.)

(b) *No liability for negligence.* In accordance with the rule that an attorney's duty is owed only to intended beneficiaries (*supra*, §299), defendants owed no duty to plaintiff to handle the case in any particular manner; their duties were owed only to L, the client. (77 C.A.3d 67, 68, citing the text.)

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C. Causation and Damages.

1. Early Rule of Sole Causation.

1 Witkin Cal. Proc. Attys § 310

[§ 310] Early Rule of Sole Causation.

The courts formerly invoked strict rules of causation and damage in attorney malpractice actions, thus placing a heavy burden of pleading and proof on the client. The action would fail unless the client made a satisfactory showing that he or she had a good claim, right, or defense that was lost by reason of the attorney's act or omission. This was equivalent to saying that a client suffers damage only on losing a fair chance of a victory or other advantage, and not when the client loses a procedural right. (See *Siddall v. Haight* (1901) 132 C. 320, 323, 64 P. 410 [recovery was denied where attorney negligently delayed levying execution on land, judgment debtor's wife filed homestead claim, and evidence showed that land was wife's separate property and not subject to execution]; *McGregor v. Wright* (1931) 117 C.A. 186, 196, 3 P.2d 624 [plaintiff alleged that he lost his position as bankruptcy trustee for acts in reliance on improper advice of defendant attorney; *held*, recovery required that plaintiff's reliance "was the sole and proximate cause of such removal" and that "any loss suffered was caused solely by the negligence of the attorney"]; 15 *Hastings L. J.* 597 [causation and damages]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §222 [burden of proof].)

One of the strongest statements of the early strict view was made in *Feldesman v. McGovern* (1941) 44 C.A.2d 566, 112 P.2d 645. Plaintiff sued his attorneys, alleging that they negligently failed to perform one of the duties for which they were employed, namely, filing a petition for his discharge in bankruptcy. A general demurrer was sustained and the resulting judgment for defendants was upheld. The court first approved the rule that, in situations involving actions to be tried or defended, the client must allege and prove that if the attorney had performed the act the client would have been successful in the litigation. (44 C.A.2d 568.) Then the court applied this same principle to the bankruptcy proceeding, holding that, because a discharge is not mandatory, the plaintiff must anticipate and negative in the complaint all of the possible prohibited acts on the plaintiff's part that might have prevented a discharge. (44 C.A.2d 569.) The decision seems of dubious value as a precedent in the light of its questionable insistence on anticipating defenses in the complaint (see 4 *Cal. Proc.* (5th), *Pleading*, §420), and its still more questionable reliance on the old doctrine of construction against the pleader, after denial of leave to amend (see 4 *Cal. Proc.* (5th), *Pleading*, §§442, 448). (44 C.A.2d 570, 571.)

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 2. Current Rule of Proximate Causation.

1 Witkin Cal. Proc. Attys § 311

[§ 311] Current Rule of Proximate Causation.

(1) *In General.* In *Gambert v. Hart* (1872) 44 C. 542, the client's motion for new trial was denied because of neglect to follow proper procedure. The attorney contended, however, that no damage was shown because the law governing the merits was uncertain, and it was not clear that the case would have been won. *Held*, the attorney was liable; the mistake *precluded* a determination on the merits, and it was possible and perhaps probable that the client would have won. (44 C. 552.)

Gambert is more in line with the present approach than other early decisions (*supra*, §310), for later opinions express a much more liberal view of the client's right of action. In *Modica v. Crist* (1954) 129 C.A.2d 144, 276 P.2d 614, judgment on demurrer was reversed. The court held that (a) negligence of an attorney may be alleged generally, as in other negligence actions; (b) proximate cause may likewise be alleged generally, and, as in other negligence actions, it is sufficient to show that the attorney's negligence is a proximate cause; it need not be the sole cause. (129 C.A.2d 146, 147.) Other cases have also concluded that it is sufficient to show that the attorney's negligence was a proximate cause of the client's loss; it is not necessary to prove that it was the sole cause. (See *Ishmael v. Millington* (1966) 241 C.A.2d 520, 529, 50 C.R. 592, *infra*, §324; *Thomas v. Lusk* (1994) 27 C.A.4th 1709, 34 C.R.2d 265 [although defendant attorney was negligent in failing to preserve hammer involved in accident, instruction shifting burden of proof of causation to defendant was erroneous, because neither party had greater access to evidence on that issue, and plaintiff had not established *prima facie* case or substantial probability of causation].)

In *Lombardo v. Huysentruyt* (2001) 91 C.A.4th 656, 110 C.R.2d 691, defendant represented the settlor of a trust who was also a conservatee. The settlor attempted to amend the trust to make plaintiffs the beneficiaries, but in the conservatorship proceedings, the court had entered an order that he had no power to amend or revoke the trust without prior court approval. Defendant was aware of the order, but believed that it was ambiguous about whether court approval was required before execution of an amendment. After the settlor's death, defendant petitioned for approval of the amendment. The probate court denied the petition, finding that the amendment was invalid for lack of prior approval. Plaintiffs sued defendant for professional negligence in that, among other things, defendant failed to take steps necessary to effectuate the amendment by failing to apply for court approval. The trial court granted a nonsuit for defendant, stating that the probate court erred in finding the amendment invalid without a hearing to explore the surrounding circumstances. Thus, due to the probate court's error, there was no causal connection between defendant's

conduct and plaintiffs' alleged damages. *Held*, reversed and remanded. The trial court erred in ruling as a matter of law that the probate court's ruling superseded defendant's alleged negligence. Whether the probate court was correct or not, factual questions exist about whether defendant caused plaintiffs' damages. Plaintiffs offered evidence that a reasonable attorney confronted with the conservatorship order would have taken reasonable steps before execution of the amendment (e.g., seeking instructions regarding the proper interpretation of the order) to avoid the result reached by the probate court, which was foreseeable given the ambiguous wording of the order. (91 C.A.4th 664.) (See *Church v. Jamison* (2006) 143 C.A.4th 1568, 1585, 50 C.R.3d 166 [Lombardo does not preclude attorney defendant in malpractice action from arguing that underlying action was wrongly decided].)

In *New Plumbing Contractors v. Edwards, Sooy & Byron* (2002) 99 C.A.4th 799, 121 C.R.2d 472, plaintiff alleged damages when defendant law firm, retained by plaintiff's insurer to defend plaintiff in the underlying action, settled the case without consulting plaintiff. *Held*, causation was lacking as a matter of law. When a policy gives an insurer unfettered discretion to settle, the insurer may control settlement negotiations without interference from its insured and generally has no liability to the insured for settling within the policy limits. "Thus, there is no cause of action where the insured claims the settlement injured its business reputation ... , nor any where the insured claims the settlement unfairly used up its deductibles." (99 C.A.4th 802.) Here, the policy permitted plaintiff's insurer to settle without consulting plaintiff. Hence, defendant's recommendation of settlement was not a cause of harm to plaintiff. (99 C.A.4th 802.)

(2) *Same Standard in Nonlitigation Context.* In *California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey* (2000) 84 C.A.4th 702, 101 C.R.2d 72, plaintiff insurer, having retained defendant attorney to represent an insured in a personal injury action, sued defendant for malpractice for failing to provide information about the extent of the insured's injuries, thus causing plaintiff to reject a settlement offer within policy limits and exposing it to bad faith liability to its insured. The trial court refused defendant's request to instruct the jury under the case-within-a-case procedure for determining causation and damages, and plaintiff prevailed. *Held*, affirmed.

(a) When the malpractice involves negligence in the prosecution or defense of a legal claim, the case-within-a-case method is appropriate. In those cases, the issue is whether the attorney has mishandled the underlying case, e.g., letting the statute of limitations run, or improperly handled the trial. The client must prove that, but for the attorney's negligence, a better result could have been obtained in the underlying action. (84 C.A.4th 709.)

(b) In other contexts, most often involving business transactions, causation and damages may be more simply established under rules generally applicable to negligence claims, and the case-within-a-case procedure need not be used. As a general rule, an attorney's liability, as in other negligence cases, is for all damages directly and proximately caused by the attorney's negligence. Here, plaintiff sought damages for defendant's negligence in carrying out certain duties owed directly to plaintiff, i.e., failure to supply vital information and exposing plaintiff to a potential bad faith lawsuit. (84 C.A.4th 713.)

Viner v. Sweet (2003) 30 C.4th 1232, 135 C.R.2d 629, 70 P.3d 1046, disagreed with *California State Auto. Assn. Inter-Ins. Bureau*, found no reason to relax the causation standard in nonlitigation malpractice cases, and held that "a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (30 C.4th 1244.) Plaintiffs sued a corporate transactional lawyer and his law firm for malpractice in representing plaintiffs in the sale of a company and a related employment termination agreement. The jury found defendants liable, and the trial court denied defendants' motions for judgment notwithstanding the verdict or a new trial based on failure to instruct that plaintiffs needed to prove that they would have received a better deal "but for" the attorney's negligence. *Held*, reversed.

(a) California has adopted the substantial factor test of the *Rest.2d, Torts* §432 for cause-in fact determinations, and that test subsumes the traditional "but for" test of causation and governs this case. (30 C.4th 1240.)

(b) There is nothing distinctive about transactional malpractice to justify a departure from the requirement in negligence cases that the plaintiff establish causation by showing that *but for* the negligence, the harm would not have

occurred. "Determining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not. In both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent." (30 C.4th 1242.)

(c) Obtaining evidence in transactional malpractice cases should prove no more burdensome than in the litigation context. Plaintiff may use circumstantial evidence, and express concessions by the other parties that they would have accepted other or additional terms is not necessary. Moreover, plaintiff need not prove causation with absolute certainty; plaintiff need only introduce evidence that provides a reasonable basis to conclude that it is more likely than not that defendant's conduct was a cause in fact of the result. (30 C.4th 1243.) (See *Viner v. Sweet* (2004) 117 C.A.4th 1218, 1224, 12 C.R.3d 533 [on remand from Supreme Court, plaintiff was found not to have presented substantial evidence in five of seven claims that if defendant had not been negligent it was more likely than not that plaintiff would have obtained more favorable result; lengthy dissent disagreed with result and argued for new trial].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Same Standard in Nonlitigation Context.* See *Wood v. Jamison* (2008) 167 C.A.4th 156, 164, 83 C.R.3d 877, Supp., supra, §292 [attorney's breach of fiduciary duty, consisting of failing to advise elderly client of attorney's conflict of interest and inappropriateness of loan secured by client's property facilitated loan transaction and forced client's trustee to defend foreclosure proceedings with large expenditure of trust assets and thus was proximate cause of loss of trust property].



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3. Intervening Negligence of Substituted Counsel.

1 Witkin Cal. Proc. Attys § 312

[§ 312] Intervening Negligence of Substituted Counsel.

In *Cline v. Watkins* (1977) 66 C.A.3d 174, 135 C.R. 838, 6 Summary (10th), *Torts*, §1213, the client's complaint alleged that first attorney W was negligent, that second attorney S was also negligent, and that their negligence caused her to lose a community property interest in a divorce action. Attorney W demurred on the ground that, after being relieved as attorney, his alleged negligence could not have been a proximate cause of the injury to plaintiff client; i.e., that the intervening negligence of S was a superseding cause. *Held*, S's intervening negligence was not a superseding cause as a matter of law, and the issue of proximate cause, i.e., reasonable foreseeability, was one of fact. The court rejected the contention that substitution of counsel was such an exceptional circumstance that all responsibility for the prevention of harm passes to substituted counsel.

"Except for a still developing certification of a few specialties, the bar supplies no means of assessing the qualifications of its members. A member of the public seeking the services of a lawyer thus has no real means of determining his capability. Nor has a member of the public engaging the services of a lawyer any real means of gauging the quality of service performed. Where a lawyer originally retained is relieved and another substituted, the client is likely to have some general dissatisfaction with the quality of service of the original lawyer but is unlikely to be aware of any specific reason for the dissatisfaction although a legitimate reason exists. The same lack of means to assess lawyer quality which results in the retention of a negligent lawyer in the first instance may well result in his being replaced by another negligent lawyer when the client acquires the vague uneasiness that the first is not doing what he should." (66 C.A.3d 180.) (Cf. *Stuart v. Superior Court* (1992) 14 C.A.4th 124, 127, 128, 18 C.R.2d 142 [client retained new attorney and substitution of attorney form was filed almost 3 months before return of summons was required; former attorney could not be held liable for new attorney's failure to return summons].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Damages Must Be Shown.

1 *Witkin Cal. Proc. Attys* § 313

[§ 313] Damages Must Be Shown.

A malpractice plaintiff must show that a different result would have occurred with a careful attorney. In *Campbell v. Magana* (1960) 184 C.A.2d 751, 8 C.R. 32, plaintiff sued C for damages for personal injuries. Defendant attorneys negligently allowed the mandatory 5-year period for bringing the cause to trial to run, and plaintiff brought this action against defendants for the amount claimed from C. The trial judge found that plaintiff's alleged cause of action was worthless because no actionable negligence could have been proved against C, and that consequently she suffered no damage from defendants' negligence. Attacking this established rule barring recovery, plaintiff argued that even a nonmeritorious cause of action has settlement or nuisance value. *Held*, this speculative possibility could not be invoked to overcome the requirement of showing recoverability on the cause of action. The court also pointed out that plaintiff's best settlement offer was \$ 350 and she was holding out for \$ 100,000. (184 C.A.2d 753, 754.)

Benard v. Walkup (1969) 272 C.A.2d 595, 77 C.R. 544, presents a damage issue of an unusual kind. Plaintiff was injured in an automobile accident due to the negligence of Williams. Plaintiff engaged attorney S under a written contingent fee contract to file the action for damages; S failed to file within the 1-year limitations period and the action was barred. Plaintiff then retained attorney W to sue attorney S for malpractice; W did not file until more than 2 years after S's negligent act, and S pleaded the statute of limitations. Plaintiff promptly sued attorney W for failure to sue S in time. The two actions (against S and against W) were consolidated, and judgment was given for plaintiff against S but not against W. *Held*, affirmed. (a) The 2-year statute of limitations in malpractice actions is applicable to liability not founded on an instrument in writing; the present action against S, based on a written contingent fee agreement, was governed by the 4-year statute, and was consequently timely. (272 C.A.2d 601; see 3 Cal. Proc. (5th), Actions, §508.) (b) Because S's sole defense of the statute of limitations was untenable, he was liable to plaintiff for any loss suffered by reason of the failure of the suit against Williams, the tortfeasor, and W's delay in filing the suit against S caused no damage to plaintiff. (272 C.A.2d 605.)

In *Garretson v. Harold I. Miller* (2002) 99 C.A.4th 563, 121 C.R.2d 317, defendant represented plaintiff in a workers' compensation claim. Plaintiff later sued defendant for malpractice alleging defendant's negligence in failing to pursue a personal injury action on plaintiff's behalf. Plaintiff presented no evidence of the employer's income, expenses, or debts, or that the employer was insured. The jury returned a special verdict for plaintiff, but the trial court granted defendant's motion for judgment notwithstanding the verdict. *Held*, affirmed. The issue of collectibility was never tried.

Plaintiff presented no evidence of positive net income, net worth, or other means of satisfying a judgment. Thus, there was no evidence to establish collectibility of a judgment that might have been obtained but for defendant's negligence, and plaintiff made no argument to the jury on that subject. "This failure of proof on the part of plaintiff warranted entry of judgment notwithstanding the verdict." (99 C.A.4th 573, following *Campbell*.)

A number of additional decisions have addressed the issue of damages, including the following:

John B. Gunn Law Corp. v. Maynard (1987) 189 C.A.3d 1565, 1570, 1571, 1572, 1573, 235 C.R. 180 [causation and BAJI instructions on causation].

Sukoff v. Lemkin (1988) 202 C.A.3d 740, 744, 749, 249 C.R. 42 [plaintiff must show not only negligence, but also proximate cause and damages].

Jackson v. Johnson (1992) 5 C.A.4th 1350, 1355, 1356, 7 C.R.2d 482 [without "actual loss or damage" there is no tort; following *Campbell*].

Thompson v. Halvonik (1995) 36 C.A.4th 657, 661, 43 C.R.2d 142 [summary judgment for attorney was proper where there was no evidence that damage resulted from delay in prosecuting action].

Mattco Forge v. Arthur Young & Co. (1997) 52 C.A.4th 820, 832, 834, 60 C.R.2d 780 [despite criticism, "trial-within-a-trial" approach of *Campbell* still prevails].

Kurini v. Hanna & Morton (1997) 55 C.A.4th 853, 865, 867, 64 C.R.2d 324 [in malpractice action based on failure to appeal, summary judgment for attorney was proper where client failed to rebut attorney's prima facie showing that appeal would not have been successful].

Loube v. Loube (1998) 64 C.A.4th 421, 425, 74 C.R.2d 906, *infra*, §319 [to recover for professional negligence, client must demonstrate that attorney's breach of duty caused *actual* loss or damages].

Marshak v. Ballesteros (1999) 72 C.A.4th 1514, 1518, 86 C.R.2d 1 [in malpractice action based on attorney's advice that client settle dissolution action, summary judgment for attorney was proper; to prevail, client must prove that settled action would have resulted in better outcome had attorney recommended rejection of settlement offer].

Carlton v. Quint (2000) 77 C.A.4th 690, 698, 91 C.R.2d 844 [summary judgment for attorney was proper where client failed to show that he was damaged by attorney's alleged failure to timely pursue action].

Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 C.A.4th 1052, 1057, 132 C.R.2d 658 [summary adjudication for attorney was proper in malpractice action involving marital settlement where client provided no evidence that former spouse would have settled for less or that trial would result in judgment more favorable than settlement; following *Marshak*].

Barnard v. Langer (2003) 109 C.A.4th 1453, 1460, 1 C.R.3d 175 [nonsuit was proper where client's evidence suggested only speculative harm and not that, but for attorney's negligence, underlying inverse condemnation action would have resulted in better outcome than negotiated settlement; following *Marshak*].

Jalali v. Root (2003) 109 C.A.4th 1768, 1777, 1 C.R.3d 689 [reversing jury verdict for plaintiff in malpractice action where plaintiff failed to prove damages caused by counsel's inaccurate advice that plaintiff need not pay income tax on counsel's contingency fee for settlement of underlying discrimination suit; plaintiff offered no evidence that she could have received greater jury award or that, with accurate tax advice, she would have sought larger settlement].

Slovensky v. Friedman (2006) 142 C.A.4th 1518, 1528, 49 C.R.3d 60 [client was unable to show damages where statute of limitations had run on underlying claim before she consulted attorney].

Fergus v. Songer (2007) 150 C.A.4th 552, 578, 59 C.R.3d 273 [client failed to show either loss or damage from alleged malpractice].

Lazy Acres Market v. Tseng (2007) 152 C.A.4th 1431, 1437, 62 C.R.3d 378 [where insured was required to retain independent counsel due to conflict of interests, but case was settled without contribution from insured, complaint alleged no facts showing that insured would have achieved better result in underlying action but for breach of duty by insurer's counsel; following *Orrick*].

SUPPLEMENT: [This section is current through the latest supplement]

Additional cases addressing issue of damages:

Shopoff & Cavallo LLP v. Hyon (2008) 167 C.A.4th 1489, 1511, 85 C.R.3d 268 [in legal malpractice and breach of fiduciary duty actions, client's allegations of damages were inadequate and uncertain where damages were merely potential and speculative because they were dependent on outcome of future liquidation of proceeds in global settlement agreement; thus, any loss remained contingent rather than actual].



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5. Criminal Defendant.

a. Actual Innocence Requirement.

1 Witkin Cal. Proc. Attys § 314

[§ 314] Actual Innocence Requirement.

(1) *In General.* In *Tibor v. Superior Court* (1997) 52 C.A.4th 1359, 61 C.R.2d 326, plaintiff had previously been charged with rape, but after approximately 2 years the case was dismissed because of the victim's refusal to be cross-examined. Plaintiff sued T, his former attorney, claiming that T was negligent in failing to request DNA testing more promptly and in failing to act more quickly in locating possible alibi witnesses, and that as a result plaintiff spent a longer time in jail. The court found that a triable issue existed as to the timeliness of T's efforts, but that, even if T had acted more quickly, it was not certain that plaintiff would have been found not guilty. (52 C.A.4th 1370, 1371.) The court then considered the pivotal issue: "What does a plaintiff, formerly a criminal defendant, have to prove in a legal malpractice action filed against his former defense counsel?" The answer was "factual innocence" of the crime charged. (52 C.A.4th 1371.)

(a) Courts have generally held that a former criminal defendant, to establish proximate cause, must prove by a preponderance of the evidence not only the attorney's negligence, but also the defendant's own innocence of the criminal charges. (52 C.A.4th 1371.) This rule may relieve an attorney of liability for harm caused by defense counsel's negligence. However, the rule encourages the representation of criminal defendants, who are often indigent, by reducing the risk of malpractice claims. (52 C.A.4th 1372.)

(b) There is good reason to place a greater burden on a former criminal defendant than on a former civil defendant. There is no reason to compensate a guilty person, rewarding him or her indirectly for the crime. (52 C.A.4th 1372.) Also, an aggrieved criminal defendant has alternative malpractice relief by means of a claim of ineffective assistance of counsel. (52 C.A.4th 1373.)

(c) On a motion for summary judgment in which the parties present evidence showing the circumstances of the crime, the court must consider the threshold issue of factual innocence. The attorney must demonstrate that reasonable cause exists to believe that plaintiff committed the offense. The plaintiff then has the burden of establishing that facts exist that would lead no person of ordinary care and prudence to believe or strongly suspect that plaintiff is guilty of the crime. The court then must make a finding, as a matter of law, on the issue of factual innocence. (52 C.A.4th 1373.)

In *Wiley v. San Diego* (1998) 19 C.4th 532, 79 C.R.2d 672, 966 P.2d 983, plaintiff sued his appointed public defender and the county for malpractice following his conviction for battery causing serious bodily injury. Prior to trial on the malpractice claim, the trial judge determined that plaintiff's innocence in the criminal matter was not an issue. The jury found for plaintiff, and defendants challenged the ruling on the issue of actual innocence. *Held*, plaintiff must prove his innocence by a preponderance of the evidence in order to recover on the malpractice claim.

(a) *Civil cases.* A viable cause of action for attorney malpractice arising from a civil case requires (1) breach of a duty to use the skill, prudence, and diligence common to the profession, (2) a proximate causal connection between the breach and resulting injury, and (3) actual loss or damage. In civil actions, the focus is solely on the attorney's alleged error or omission; the client's conduct is irrelevant. (19 C.4th 536.)

(b) *Criminal cases.* In the criminal context, the client's own criminal act remains the ultimate source of the client's predicament; any harm suffered is principally due to the client's criminality. Thus, in addition to the elements of a civil cause of action for professional negligence, the clear majority of courts considering attorney malpractice in criminal cases require proof of actual innocence. These cases treat a defendant attorney's negligence as not causing the former client's injury unless the client proves that he or she did not commit the crime. (19 C.4th 536.)

(c) *Public policy.* The public policy reasons for requiring proof of actual innocence are compelling. Our legal system is premised in part on the maxim that a person cannot take advantage of his or her own wrong. Regardless of an attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of the defendant's own wrongdoing. The attorney's breach of duty may warrant postconviction relief, which is adequately available in the criminal justice system, but it does not translate into civil damages that are intended to make the plaintiff whole. Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury. There, the required nexus between the malpractice and harm is sufficient to warrant a civil action. Thus, "[w]e therefore decline to permit such an action where the plaintiff cannot establish actual innocence." (19 C.4th 539.)

One justice concurred, but disagreed with the majority's decision to add a new element to the tort of malpractice. (19 C.4th 545.) One justice dissented, arguing that the majority opinion in essence holds that a defense attorney owes no duty cognizable in tort to act competently toward a client the attorney knows to be guilty of a charged crime. Moreover, a rule requiring proof of innocence cannot be defended logically and creates a separate standard for criminal clients. (19 C.4th 547.)

(2) *Nature of Damages.* The actual innocence requirement applies regardless of whether the former criminal defendant is seeking damages for a wrongful conviction, for a longer sentence, or for attorneys' fees. In *Lynch v. Warwick* (2002) 95 C.A.4th 267, 115 C.R.2d 391, plaintiff's original counsel, W, advised plaintiff to plead guilty in several criminal matters. Plaintiff refused, retained new counsel, but ultimately, on the advice of the second attorney, pleaded guilty. Plaintiff then sued W for legal malpractice, breach of contract, and breach of fiduciary duty. In the negligence action, plaintiff sought as damages the money he had paid to the second attorney; in the contract action he sought recovery of the amount paid to W as the original retainer. The trial court granted summary judgment for W on the ground that plaintiff had failed to establish his actual innocence of the criminal charges. *Held*, affirmed.

(a) The fact that plaintiff was seeking out-of-pocket expenses, i.e., attorneys' fees, did not distinguish the case from other criminal malpractice actions. "Seeking attorney fees incurred in a legal malpractice action due to the prior attorney's negligence is a typical item of damages." (95 C.A.4th 274.)

(b) Moreover, like cases involving an avoidable conviction or longer sentence, plaintiff's claim of attorney malpractice, while stated in terms of breach of contract, was "integrally involved with guilt or innocence" and the case would involve the same difficult proof of causation problems noted in *Wiley*. For example, to recover fees paid to the second attorney, plaintiff would have to prove not only that W was negligent, but also that the second attorney was not negligent and that there was no unnecessary duplication of effort. W could introduce evidence that plaintiff was guilty, had no viable defense, and should not have hired a second attorney. "As noted in *Wiley*, the jury would be faced with

applying a preponderance of the evidence standard to issues involving a reasonable doubt standard." (95 C.A.4th 274.)

One justice strongly dissented, arguing that *Wiley* was inapposite because it did not address the situation here, in which a convicted criminal defendant seeks to recover, on a breach of contract theory, only money paid to *retained* counsel for services not rendered in a criminal matter and thus, proof of actual innocence was not required. (95 C.A.4th 275.)

(3) *Jury Trial*. In *Salisbury v. Orange* (2005) 131 C.A.4th 756, 31 C.R.3d. 831, plaintiff was convicted of felony assault but obtained a new trial, based on newly discovered evidence and ineffective assistance of counsel, a deputy public defender. After being acquitted on retrial, plaintiff sued his public defender. The trial court bifurcated the actual innocence issue, tried it without a jury, found that plaintiff had not met his burden of proof, and entered judgment against him. Plaintiff argued that he was entitled to a jury determination of his actual innocence claim because the decision rests on the credibility of witnesses. *Held*, reversed.

(a) *Wiley* establishes that actual innocence is an additional element of a cause of action for malpractice arising from a criminal defense, thus supplementing the civil malpractice elements. Cal. Const., Art. I, §16, guarantees the right to a jury trial in civil actions. Hence, "a criminal malpractice plaintiff has the same right to a jury trial on the element of actual innocence as he would have on the civil elements." (131 C.A.4th 764.)

(b) *Tibor* is distinguishable because it involved a motion for summary judgment where the question of factual innocence was a matter of law. Thus, *Tibor* "must be limited to a summary judgment motion where there is no triable issue of fact on actual innocence; any other reading of *Tibor* would contravene a malpractice plaintiff's right to a jury trial." (131 C.A.4th 766.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Criminal Defendant.

b. Exoneration by Postconviction Relief.

1 *Witkin Cal. Proc. Attys* § 315

[§ 315] Exoneration by Postconviction Relief.

A person convicted of a crime must obtain exoneration by postconviction relief as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel. In *Coscia v. McKenna & Cuneo* (2001) 25 C.4th 1194, 108 C.R.2d 471, 25 P.3d 670, plaintiff pleaded guilty to felony conspiracy to violate federal securities laws, for which he was sentenced to 2 years' probation and a fine. Plaintiff subsequently brought a malpractice action, and the superior court sustained defendants' demurrer without leave to amend, concluding that plaintiff's criminal conviction precluded relief in the present action under principles of collateral estoppel, and entered judgment for defendants. *Held*, postconviction exoneration was required; matter remanded to trial court for further proceedings.

(a) Requiring exoneration by postconviction relief in order to establish actual innocence comports with "numerous jurisdictions that have, on similar grounds, required appellate or other postconviction relief as a predicate to recovery in a criminal malpractice action." (25 C.4th 1201.) The requirement is firmly grounded in constitutional and statutory guarantees that protect criminal defendants from abuses of the system and from deficient representation. (25 C.4th 1203.) In addition, the requirement protects against inconsistent verdicts, such as a legal malpractice judgment in favor of a plaintiff whose criminal conviction remains intact, that would contravene judicial policy against two conflicting resolutions arising out of the same or identical transaction. (25 C.4th 1204.)

(b) An intact conviction precludes recovery in a legal malpractice action even when ordinary collateral estoppel principles are not controlling (e.g., where a conviction was based on a guilty plea that would not be conclusive in a subsequent civil action involving the same issues). Also, the conviction, whether from a plea of guilty or nolo contendere, or a trial, bars proof of actual innocence in a legal malpractice action. (25 C.4th 1204.) This rule avoids potentially adverse consequences of distinguishing between convictions based on guilty pleas and convictions after trial for the purpose of determining the preclusive effect of the convictions in legal malpractice actions. "If only the client who pleaded guilty could recover for malpractice without first obtaining postconviction relief, attorneys might be tempted to practice defensive law when faced with the choice of advising a client to enter into a plea agreement or proceed to trial, in order to insulate themselves from malpractice actions." (25 C.4th 1205.)

(c) Examples of the requisite postconviction relief, in the form of a final disposition of the underlying criminal case,

include acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by a refusal to continue the prosecution, or a grant of habeas corpus relief. (25 C.4th 1205.)

(d) To be consistent with the requirements of *C.C.P. 340.6*, the statute of limitations for legal malpractice actions arising from criminal proceedings (see 3 *Cal. Proc.* (5th), *Actions*, §629 et seq.), and in the interests of fairness to both plaintiffs and defendants, a "two-track" approach is adopted. First, the plaintiff must file a malpractice claim within the 1-year or 4-year limitations period set forth in *C.C.P. 340.6(a)*. Second, although the action is subject to demurrer or summary judgment while the plaintiff's conviction remains intact, the court should stay the malpractice action during the period in which the plaintiff timely and diligently pursues postconviction remedies, thus ensuring that the claim will not be barred prematurely by the statute of limitations. (25 C.4th 1201, 1210.) (See *Redante v. Yockelson* (2003) 112 C.A.4th 1351, 1357, 6 C.R.3d 10 [legal malpractice action failed as matter of law where plaintiff, convicted of sex crimes involving minors, failed to establish actual innocence in postconviction proceeding; following *Coscia*]; *Rose v. Hudson* (2007) 153 C.A.4th 641, 652, 63 C.R.3d 248 [actual injury occurred on date of client's conviction, November 1995, and no later than November 1996, when client filed appellate brief claiming ineffective counsel; thus, client's November 2005 malpractice action was untimely under *C.C.P. 340.6(a)*; following *Coscia*].)

SUPPLEMENT: [This section is current through the latest supplement]

Statute of limitations: If a person is required to establish his or her factual innocence of an underlying criminal charge as an element of the malpractice claim, the malpractice action must be commenced within 2 years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. (*C.C.P. 340.6(a)*, as amended in 2009.)



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5. Criminal Defendant.

c. Scope of Actual Innocence and Exoneration Requirement.

1 Witkin Cal. Proc. Attys § 316

[§ 316] Scope of Actual Innocence and Exoneration Requirement.

A plaintiff in a legal malpractice case involving a criminal conviction must show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even if the plaintiff alleges negligent representation only on the greater offense. In *Sangha v. LaBarbera* (2006) 146 C.A.4th 79, 52 C.R.3d 640, on the advice of his former attorney, plaintiff pleaded guilty to felony vandalism. With new counsel, plaintiff persuaded the court to set aside the guilty felony plea. Plaintiff then admitted misdemeanor vandalism, and brought the malpractice action against defendant. The trial court granted defendant's summary judgment motion, finding that plaintiff had failed to raise a triable issue of material fact on whether he had shown actual innocence or postconviction exoneration. *Held*, affirmed. Although the classification of felony or misdemeanor vandalism, as with other crimes, depends on the value of the property damaged, the mental state and criminal acts for both classifications are identical, i.e., an intentional malicious act. Thus, the same policy considerations underlying *Wiley v. San Diego* (1998) 19 C.4th 532, 79 C.R.2d 672, 966 P.2d 983, *supra*, §314, and *Coscia v. McKenna & Cuneo* (2001) 25 C.4th 1194, 108 C.R.2d 471, 25 P.3d 670, *supra*, §315, support the imposition of actual innocence and postconviction exoneration requirements with equal force to a lesser included offense. To hold otherwise would permit a criminal defendant to shift responsibility for his or her own criminal act and avoid the consequences of the conduct. (146 C.A.4th 89, 90.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *All transactionally related offenses:* A plaintiff must prove factual innocence and exoneration as to all transactionally related offenses that comprise the basis for the underlying criminal proceedings in order to maintain a malpractice action. In *Wilkinson v. Zelen* (2008) 167 C.A.4th 37, 83 C.R.3d 779, defendant attorney represented plaintiff in a criminal trial in which plaintiff was convicted of battery on a custodial officer, a felony, and two vehicular misdemeanors. With no opposition, the trial judge granted plaintiff's habeas corpus petition, which alleged incompetent representation, and vacated the convictions on all three counts. Plaintiff then entered into no contest plea agreements on two misdemeanors, one the original vehicular violation, and the other an added misdemeanor for interfering with an officer in the performance of the officer's duty, for which plaintiff received probation. The trial judge found that plaintiff had successfully completed probation, and terminated the order. The convictions were ordered expunged. Plaintiff then filed a legal malpractice action against defendant, claiming that the convictions were due to defendant's

incompetence. The trial judge sustained defendant's demurrer without leave to amend, indicating that plaintiff failed to show that she was factually innocent of all the charges. *Held*, demurrer was properly sustained.

(a) *Factual innocence*. Plaintiff was unable to allege factual innocence as required by *Wiley v. San Diego* (1998) 19 C.4th 532, 79 C.R.2d 672, 966 P.2d 983, text, §314. In order to compromise the original charges that resulted in her conviction, plaintiff entered no contest pleas to two misdemeanors, a result inconsistent with factual innocence because plaintiff thus admitted committing the crimes. Nor did plaintiff's habeas corpus petition raise an issue of factual innocence because it was based on constitutionally inadequate representation by defendant. Moreover, plaintiff "obtained the type of postconviction relief envisioned by *Wiley* as sufficient to cure the harm of incompetent representation, since the trial court granted her habeas corpus petition" resulting in a more favorable disposition for plaintiff. (167 C.A.4th 46.)

(b) *Exoneration*. *Coscia v. McKenna & Cuneo* (2001) 25 C.4th 1194, 108 C.R.2d 471, 25 P.3d 670, text, §315, independently bars plaintiff's action for legal malpractice as she did not obtain postconviction exoneration by her habeas corpus petition. Plaintiff's subsequent pleas to driving under the influence and interference with an officer in the performance of the officer's duty were transactionally related offenses that did not qualify as necessarily included offenses of battery on a custodial officer, the original felony charge. To satisfy *Coscia*, plaintiff must be exonerated of all transactionally related offenses. Because plaintiff pleaded no contest to two offenses transactionally related to the felony charge of battery on a custodial officer "in order to settle the criminal action, and she was placed on probation for those offenses, she cannot in good faith plead exoneration, and the demurrer was properly sustained." (167 C.A.4th 48.) This result is consistent with the thrust of both *Wiley* and *Coscia*, i.e., one who engages in criminal conduct may not recover in a legal malpractice action. This rule that would be defeated by creating an exception that would parse transactionally related offenses in a manner urged by plaintiff that would allow a person convicted of multiple offenses to maintain a malpractice action. (167 C.A.4th 48.)



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5. Criminal Defendant.

d. Distinction: Fee Dispute.

1 *Witkin Cal. Proc. Attys* § 317

[§ 317] Distinction: Fee Dispute.

A convicted criminal defendant need not allege and prove actual innocence or postconviction exoneration to enforce the right to be billed in accordance with the retainer agreement and to challenge unethical or fraudulent billing practices of defense counsel. In *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 C.A.4th 419, 130 C.R.2d 782, plaintiff sued his former counsel alleging breach of written contract, breach of fiduciary duty, fraud, and money had and received. Plaintiff did not allege his innocence of the criminal charges for which he was convicted, or that defendants were negligent in their representation; his primary challenge was directed at defendants' charges and billing practices. Defendants demurred based on plaintiff's failure to allege his actual innocence or postconviction exoneration. The trial court overruled the demurrers on the ground that the action was not a malpractice action and that *Wiley v. San Diego* (1998) 19 C.4th 532, 79 C.R.2d 672, 966 P.2d 983, supra, §314, and its progeny were inapposite. Defendants sought a writ of mandamus to vacate the ruling. *Held*, writ issued to amend plaintiff's complaint, but defendants' relief denied.

(a) The policy considerations and pragmatic problems of quantifying damages that existed in *Wiley* and the other malpractice cases (supra, §314) are not present in litigation arising over a fee dispute. Plaintiff does not seek to shift punishment for the criminal acts to former counsel, nor is a judgment in a fee dispute inconsistent with the prosecution's victory in the criminal case. Moreover, there is no issue of quantifying damages for a wrongful conviction or a longer prison sentence and no problem of applying conflicting standards of proof. Finally, there is no duplication of effort because a fee dispute cannot be resolved through postconviction relief. (106 C.A.4th 424, 426.)

(b) Although fee disputes and malpractice actions share the same statute of limitations, they are not the same. Even "if charging an excessive and unlawful fee could be considered 'malpractice' in the broadest sense, it is not the kind of malpractice the Supreme Court had in mind when it adopted the actual innocence rule." (106 C.A.4th 430.)

(c) The fiduciary duty to charge fair, reasonable, and conscionable fees applies to all attorneys. If only "actually innocent" clients could challenge excessive or unlawful fees, actually guilty clients could never seek redress against unscrupulous counsel. There is no rational basis for affording criminal defense attorneys an impregnable shield against actions to recover excessive or unlawful fees, nor is there a "rational basis for affording civil litigants, no matter how morally blameworthy they may be, a remedy for exactly the same unlawful conduct, double-billing, inflating hours, etc.,

for which most criminal litigants are denied a remedy." (106 C.A.4th 431.) (See *Brooks v. Shemaria* (2006) 144 C.A.4th 434, 440, 442, 50 C.R.3d 430 [in action by convicted criminal defendant against his former attorney, actual innocence requirement did not apply where contract claim was merely fee dispute and professional negligence claim related only to proceedings for return of seized property; following *Bird*].)

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5. Criminal Defendant.

e. Liability of Public Officers.

1 *Witkin Cal. Proc. Attys* § 318

[§ 318] Liability of Public Officers.

(1) *No Statutory Immunity for Public Defenders.* In *Barner v. Leeds* (2000) 24 C.4th 676, 102 C.R.2d 97, 13 P.3d 704, the question was whether a public defender is entitled to statutory immunity under the California Tort Claims Act (*Govt.C. 810* et seq.; 5 *Summary* (10th), *Torts*, §216 et seq.) for acts and omissions in representing a criminal defendant. *Held*, public defenders are not immune in their representation of criminal defendants. Although public defenders are clearly public employees within the meaning of the Act, their actions in representing criminal defendants do not involve the type of basic policy decisions that are within the scope of the immunity. While the representation "entails difficult choices among complex alternatives and the exercise of professional skill ...", the attorney's actions ordinarily involve operational judgments that implement the initial decision to provide representation to the client. Holding deputy public defenders accountable at law for legal malpractice in this context does not result in unwarranted judicial interference in the affairs of the other branches of government, but rather simply subjects these public employees to the same principles of tort law applicable to private attorneys performing identical professional services in the same type of proceedings." (24 C.4th 691, 692.)

(2) *Other Public Officials.* In *Chapman v. Superior Court* (2005) 130 C.A.4th 261, 29 C.R.3d 852, M, a port district commissioner, pleaded guilty to violation of *Govt.C. 1090*, which prohibits an officeholder from having a financial interest in contracts made by the public agency of which the officeholder is a member. M later brought a legal malpractice action against the district's former counsel, C, arguing that damages resulting from the criminal prosecution (lost business opportunities, attorneys' fees, emotional distress) were the result of C wrongfully advising M that his only responsibilities under *Govt.C. 1090* were to disclose financial interests in contracts involving a power company, D, and to recuse himself during voting on issues concerning D, when in fact M should have advised him to resign as commissioner to avoid criminal liability. The trial court denied C's motion for summary judgment. *Held*, writ of mandamus issued directing the trial court to grant C's summary judgment motion. Public policy bars recovery for injuries arising from a public official's wilful crime. M pleaded guilty to wilfully violating *Govt.C. 1090*. "Wilful" in this context means that an official purposefully makes a contract in which the official is financially interested. This is what M did, and he knew that he would benefit financially when the port district voted on matters beneficial to D. M's allegations about C's wrongful advice are irrelevant, as M "cannot obtain indemnity for his willful criminal

wrongdoing." (130 C.A.4th 276.)

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6. Measure of Damages.

a. Value of Claim Lost.

1 Witkin Cal. Proc. Attys § 319

[§ 319] Value of Claim Lost.

The general rule is that the plaintiff is entitled only to be made whole; i.e., to receive the value of the claim lost. (*Smith v. Lewis* (1975) 13 C.3d 349, 361, 118 C.R. 621, 530 P.2d 589, *infra*, §328; see 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §226; 90 *A.L.R.4th* 1033 [measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation]; 51 *Hastings L. J.* 325 [damages recoverable in estate planning malpractice cases: loss of bequest and cost to repair error].)

In *Smith*, plaintiff wife in a divorce action lost a community interest in her husband's retirement benefits. If that interest had been asserted in the divorce proceeding, the divorce court would have ordered payment of plaintiff's share of the retirement benefits on a monthly basis as the husband received them; it could not have awarded her a total sum calculated at present value. (13 C.3d 362.) However, the court in an action seeking damages for negligence does not have the equitable powers of a divorce court, including the sanction of contempt for failure to make payments; it is limited to one award of money damages. "Accordingly, the sum in this case was necessarily derived from an actuarial projection of the accumulated damage suffered by plaintiff now and in the future. By this method, the trial court was best able to approximate within its acknowledged powers the value of the claim lost to plaintiff through defendant's negligence." (13 C.3d 362.)

In *DiPalma v. Seldman* (1994) 27 C.A.4th 1499, 33 C.R.2d 219, plaintiff, acting on defendant's advice, signed a quitclaim deed transferring his interest in certain property to parties with whom he had entered into a settlement before he received the money due under the settlement. Most of the money was never paid, and the other parties later filed for bankruptcy. Plaintiff sued defendant for malpractice, but the trial court granted defendant's motion for nonsuit on the ground that the underlying judgment was uncollectible. *Held*, reversed.

(a) When a claim of malpractice is based on negligence in prosecuting a lawsuit, the plaintiff must also prove that careful management of it would have resulted in a favorable judgment and collection of the judgment, because otherwise there is no damage. However, the element of collectibility does not apply to every legal malpractice action; it applies only when the alleged malpractice consists of mishandling the client's claim. (27 C.A.4th 1506, 1507.)

(b) Here, the alleged negligence consisted of advising plaintiff to quitclaim the property. Had defendant not advised plaintiff to convey the property to the debtors outright, plaintiff might not have collected any money, but at least he would not have lost his interest in the property. (27 C.A.4th 1508.)

In *Loube v. Loube* (1998) 64 C.A.4th 421, 74 C.R.2d 906, plaintiffs, limited partners in a real estate partnership, hired defendant attorneys to sue the general partners. Defendants filed the complaint and ultimately took default against the general partners. Following a prove-up hearing, each plaintiff was awarded \$ 248,102 in compensatory damages, \$ 200,000 in punitive damages, and \$ 7,431 in attorneys' fees and costs. The general partners sought relief for default, asserting in part that plaintiffs had failed to specify the amount of damages in the complaint. The trial judge denied the motion, but reduced the awards of compensatory damages to the jurisdictional amount of \$ 25,000. Plaintiffs then sued defendants for professional negligence, seeking to hold them responsible for the reduction in the compensatory damage award. The trial judge ruled that plaintiffs could recover for attorney negligence only to the extent that the underlying litigation had not made plaintiffs whole, and thus required plaintiffs to prove that, had the underlying matter gone to trial, plaintiffs would have received an award exceeding their actual recovery. Concluding that a trial would have led to no more than \$ 12,850 in compensatory damages and no punitive damages, the trial judge ruled that plaintiffs take nothing. *Held*, affirmed.

(a) To recover for professional negligence, the client must demonstrate that the attorney's breach of duty caused an actual loss or damages. Here, the trial judge properly concluded that plaintiffs suffered no damages because the damage awards plaintiffs in fact received exceeded the value of their claims. (64 C.A.4th 425.)

(b) Plaintiffs' argument that the trial judge should have adopted the \$ 248,102 awarded following the prove-up hearing fails for several reasons: (1) It is unlikely that plaintiffs would have received that amount in a default judgment because they failed to state sums in the complaint equal to or greater than \$ 248,012. (2) An award of damages that exceeds actual loss is contrary to the basic principle that damages are to compensate for loss incurred. A client who has been made whole, from whatever source, may not maintain an action for professional negligence against a former attorney. (3) Liability must be determined by measuring the actual value of the claim rather than the amount a client might have received. (64 C.A.4th 426, 427.)

(c) Thus, the measure of plaintiffs' damages was correctly determined to be the difference between the value of their claim in the underlying action and the award of damages they actually received (i.e., nothing). (64 C.A.4th 428.) (See *Garretson v. Harold I. Miller* (2002) 99 C.A.4th 563, 572, 121 C.R.2d 317, supra, §313 [to avoid judgment notwithstanding verdict, malpractice plaintiff need only prove that "he could have collected something from the defendant" in underlying action, and that amount is proper measure of damages in malpractice case]; *Brandon G. v. Gray* (2003) 111 C.A.4th 29, 37, 3 C.R.3d 330 [malpractice action against attorneys for failure to timely file action against county was not subject to statutory limitation on noneconomic damages; thus, attorneys were jointly liable for total amount of damages plaintiffs would have recovered from county but for negligence of their attorneys].)

In *Hecht, Solberg, Robinson, Goldberg & Bagley L.L.P. v. Superior Court* (2006) 137 C.A.4th 579, 40 C.R.3d 446, law firm H had represented J in a real estate matter in which J lost his investment. J, represented by law firm C, then sued H for malpractice. H settled, and J then sued C for malpractice for securing a premature and inadequate settlement. In the latter action, for purposes of the measure of damages ("collectibility"), J sought discovery of H's business records, including information about H's liability insurance and the security required by the law governing limited liability partnerships. H objected on privacy grounds and that it was not a party to J's action against C. The trial court ordered H to supply J with the information, subject to a protective order. *Held*, the information sought was properly discoverable.

(a) Collectibility is part of a malpractice plaintiff's case and concerns the measure of damages. But collectibility concerns both the solvency and ability of the defendant in the underlying case to satisfy a judgment, and looks to the actual circumstances to determine whether a judgment would have been collectable. (137 C.A.4th 591.) Thus, the malpractice plaintiff "must try the issue and present evidence to show that but for the defendant attorney's negligence, the plaintiff could otherwise have collected a valuable judgment from the defendant in the underlying case." (137

C.A.4th 592.) Because collectibility is a fact-intensive inquiry, pretrial discovery of the material sought is appropriate, particularly where, as here, the record fails to demonstrate that the malpractice plaintiff has access to the necessary probative financial information. (*137 C.A.4th 593.*)

(b) In this case, the required information is in the hands of a nonparty "witness" in the underlying action who is also the plaintiff's former and allegedly negligent counsel, giving rise to privacy and related issues. However H, like any other witness, is properly subject to the deposition subpoena utilized here. And assuming that H has protectable financial privacy rights, the rights "do not preclude discovery that is relevant to the essential issues in the case, such as collectibility, since the malpractice plaintiff can show the requested information is relevant and material to prove that a better result should have been obtained for him by the current Attorney-Defendants." (*137 C.A.4th 595.*) (On discovery of insurance and third party's information, see 2 *Cal. Evidence (4th), Discovery, §§11, 18.*)

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b. Punitive Damages.

1 *Witkin Cal. Proc. Attys* § 320

[§ 320] Punitive Damages.

Punitive damages may be recoverable on proof of actual damages and the requisite intentional wrongful acts. (See *Kluge v. O'Gara* (1964) 227 C.A.2d 207, 38 C.R. 607 [recovery denied where no proof of actual damages]; *Jackson v. Johnson* (1992) 5 C.A.4th 1350, 1351, 1355, 7 C.R.2d 482, 6 Summary (10th), Torts, §1607 [complaint alleging only simple negligence and verdict awarding "0 dollars" actual damages cannot support award of punitive damages]; 13 A.L.R.4th 95 [allowance of punitive damages in malpractice action].)

However, legal malpractice plaintiffs may not recover punitive damages lost in the underlying action as compensatory damages in the malpractice action. In *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 C.4th 1037, 135 C.R.2d 46, 69 P.3d 965, defendant class counsel agreed to dismiss with prejudice the punitive damages claims in a mass tort action in order to settle. Plaintiff sued for malpractice and sought, as compensatory damages, the waived punitive damages, claiming that defendants committed malpractice by certifying the non-opt-out punitive damages class, negotiating and recommending the settlement, and refusing to support plaintiffs' objections to the settlement. The Court of Appeal affirmed the trial court's summary judgment for defendants and held that, as a matter of law, lost punitive damages are not recoverable. *Held*, affirmed.

(a) Awarding punitive damages generally constitutes a moral determination, and lost punitive damages are too speculative to support a cause of action for attorney negligence. (30 C.4th 1048.) In addition, both the complex standard of proof, and the burden the possibility of the recovery would place on trial courts in managing mass tort actions militate against the award. (30 C.4th 1049.)

(b) Permitting recovery of lost punitive damages as compensatory damages in legal malpractice actions would "violate public policy, because the amount of the award bears no relation to the gravity of the attorney's misconduct or his or her wealth. A plaintiff seeking to recover lost punitive damages from [the] negligent attorney is 'deliberately seeking an award disproportionate (or at least unrelated) to the [attorney's] ability to pay. That result ... is contrary to the public purpose of punitive damages.'" (30 C.4th 1047.) A plaintiff may recover punitive damages in a legal malpractice action if the defendant attorneys themselves are guilty of oppression, fraud, or malice, but the measure depends on the gravity of the misconduct and wealth of the attorneys. (30 C.4th 1053, footnote 3.) (See *Expansion Pointe Properties*

Ltd. Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 C.A.4th 42, 56, 61 C.R.3d 166 [punitive damages lost in underlying case were not recoverable by client in malpractice action; although retainer agreement was signed in 1998, trial court's retroactive application of *Ferguson* was proper].)

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c. No Deduction of Attorney's Contingent Fee.

1 Witkin Cal. Proc. Attys § 321

[§ 321] No Deduction of Attorney's Contingent Fee.

In *Kane, Kane & Kritzer v. Altagen* (1980) 107 C.A.3d 36, 165 C.R. 534, defendant attorney negligently failed to serve summons on a complaint for money owed, and the action was dismissed. Plaintiff client sued for the amount that would have been recovered, and received judgment for that amount, but with a deduction of 25%, representing the contingent fee defendant would have received if the collection had been successful. *Held*, the deduction was improper. There is authority supporting the view that the client is entitled only to what he would have recovered had the attorney properly handled the collection. However, the later cases correctly point out that the client who suffers the deduction is not fully compensated because attorneys' fees have been incurred in the malpractice action. "Crediting the defendant with a fee he has failed to earn not only rewards his wrongdoing, but places on plaintiffs' shoulders the necessity of paying twice for the same service." (107 C.A.3d 44.) (See 35 Southwestern U. L. Rev. 529 [multiple recoveries in legal malpractice claims; permitting recovery of damages with no deductions for attorneys' fees].)

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d. No Double Recovery.

1 *Witkin Cal. Proc. Attys* § 322

[§ 322] No Double Recovery.

In *W.W.S.M. Investors v. Greve, Clifford, Diepenbrock & Paras* (1996) 43 C.A.4th 517, 51 C.R.2d 31, plaintiff investors brought a malpractice action against defendant law firm for its failure to provide plaintiff with adequate advice about how to obtain recovery of money wrongfully levied on by the Internal Revenue Service (IRS). The trial court entered judgment for plaintiff, but granted defendant a lien on any judgment in plaintiff's federal case against the IRS. *Held*, the lien was proper.

(a) Plaintiff, relying on *Munoz v. Davis* (1983) 141 C.A.3d 420, 190 C.R. 400, *infra*, §335, argues that the lien was improper. (43 C.A.4th 522.) This case differs from *Munoz* because the trial court here did not create a new cause of action but instead recognized the potential for a double recovery by plaintiff. Plaintiff should not recover twice, and granting a lien to prevent double recovery is similar to the credit awarded in *Gorman v. Gorman* (1979) 90 C.A.3d 454, 153 C.R. 479, 11 *Summary* (10th), *Community Property*, §244. (43 C.A.4th 523.)

(b) However, defendant's recovery under the lien of the amount spent by plaintiff on attorneys' fees and expenses would be inequitable. Therefore, an offset for costs and legal fees is appropriate. (43 C.A.4th 523.)

(c) Furthermore, as the federal action for refund has now been held viable, assignment of the IRS action to defendant might be a better method of protecting against double recovery than the lien. (43 C.A.4th 524.)

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 e. Damages for Emotional Distress.

1 *Witkin Cal. Proc. Attys* § 323

[§ 323] Damages for Emotional Distress.

In *Quezada v. Hart* (1977) 67 C.A.3d 754, 136 C.R. 815, 6 Summary (10th), *Torts*, §1031, the court held that damages for emotional distress cannot be recovered in a legal malpractice action except on a showing of physical impact or injury and affirmative misconduct or bad faith. (67 C.A.3d 761, 762.) However, later cases have undermined this holding. In *Betts v. Allstate Ins. Co.* (1984) 154 C.A.3d 688, 201 C.R. 528, a case involving the negligent defense of an insured, the court, stating that damages for negligent infliction of emotional distress are recoverable in an action for legal malpractice, upheld an award of \$ 50,000 for emotional distress. (154 C.A.3d 717, 718.)

In *Holliday v. Jones* (1989) 215 C.A.3d 102, 264 C.R. 448, 6 Summary (10th), *Torts*, §1025, plaintiff, convicted of involuntary manslaughter, obtained a reversal on the ground of incompetent defense by defendant attorney. In the new trial, plaintiff was acquitted, and thereafter filed this action for damages for intentional infliction of emotional distress. In upholding a judgment against defendant, the court approved the reasoning of a federal Court of Appeals decision, and quoted it as follows: "Were we to accept the notion that a client's recovery on the grim facts of a case such as this must be limited to purely economic loss, we would be doubly wrong. The negligent lawyer would receive the benefit of an enormous windfall, and the victimized client would be left without fair recourse in the face of ghastly wrongdoing. Despite having caused his client a substantial loss of liberty and exposed him to a consequent parade of horrors, counsel would effectively be immunized from liability because of the fortuity of the marketplace. That Healy was guilty of malpractice in the defense of commitment proceedings, rather than in the prosecution of a civil claim for damages, is no reason artificially to shield him from the condign consequences of his carelessness." (215 C.A.3d 118.)

In *Pleasant v. Celli* (1993) 18 C.A.4th 841, 22 C.R.2d 663, the *Quezada* court again considered the issue. Defendant's malpractice consisted of allowing the statute of limitations to expire on plaintiff's medical malpractice claim involving her deceased daughter. Plaintiff was upset because defendant's error delayed resolution of the case and angry because she felt misused by both doctors and lawyers. *Held*, under these circumstances, an award for negligent infliction of emotional distress is barred as a matter of law. (18 C.A.4th 844.)

(a) The rule enunciated in *Quezada* has been superseded by later Supreme Court holdings. Thus, neither physical impact or injury, nor intentional malfeasance or bad faith, is required to recover damages for emotional distress in cases

of attorney malpractice. (18 C.A.4th 851, 852; discussing *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 167 C.R. 831, 616 P.2d 813, 6 Summary (10th), Torts, §1022, and *Burgess v. Superior Court* (1992) 2 C.4th 1064, 9 C.R.2d 615, 831 P.2d 1197, 6 Summary (10th), Torts, §1029.)

(b) However, foreseeability is required, and emotional distress generally is not a foreseeable result of attorney malpractice. Plaintiff's frustration with the prolonged litigation and her feelings of betrayal by doctors and lawyers "simply do not amount to a claim of highly foreseeable shock stemming from an abnormal event." (18 C.A.4th 853.) (See *Merenda v. Superior Court* (1992) 3 C.A.4th 1, 10, 11, 4 C.R.2d 87 [serious emotional harm to client from attorney's ordinary negligence was not foreseeable; hence, damages for emotional distress were not recoverable]; *Branch v. Homefed Bank* (1992) 6 C.A.4th 793, 801, 8 C.R.2d 182, 6 Summary (10th), Torts, §1031 [same]; *Smith v. Superior Court* (1992) 10 C.A.4th 1033, 1038, 1339, 13 C.R.2d 133 [rejecting argument for recovery of damages for emotional distress]; *Camenisch v. Superior Court* (1996) 44 C.A.4th 1689, 1694, 1696, 1697, 52 C.R.2d 450 [rejecting argument that rule against recovery of damages for emotional distress does not apply when malpractice occurs in nonlitigation context; following *Merenda*].)

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7. Illustrations.

1 *Witkin Cal. Proc. Attys* § 324

[§ 324] Illustrations.

In *Pete v. Henderson* (1954) 124 C.A.2d 487, 269 P.2d 78, the attorney for the losing party failed to file a timely notice of appeal. The trial court limited recovery to the amount of the fee. *Held*, on proper pleading and proof that the judgment was erroneous and would have been reversed, the client could recover not only the amount of the fee (\$ 150) but the amount of the judgment he had to pay (\$ 1,660). (124 C.A.2d 490.)

In *Hege v. Worthington, Park & Worthington* (1962) 209 C.A.2d 670, 26 C.R. 132, the trial judge sustained a demurrer in accordance with the requirement of *Feldesman v. McGovern* (1941) 44 C.A.2d 566, 112 P.2d 645, *supra*, §310, of an allegation that the client would have benefitted by performance. *Held*, reversed; under *Modica v. Crist* (1954) 129 C.A.2d 144, 276 P.2d 614, *supra*, §311, an attorney's malpractice may be pleaded in the same manner as in other negligence actions, and the *Feldesman* holding is explainable on the theory of a failure of the plaintiff to plead proximate cause. (209 C.A.2d 677, citing the text criticism of *Feldesman*.)

In *Ishmael v. Millington* (1966) 241 C.A.2d 520, 50 C.R. 592, plaintiff and her husband decided on a divorce and property settlement. Defendant, the husband's personal attorney, advised the husband that he could get more than half the community property if he could establish the wife's adultery. It was then decided that the wife should sue and that defendant should represent her. He prepared the papers and she signed them, relying on her husband's--not the attorney's--representation that she was getting half the property. After the decree, plaintiff discovered that, for a settlement of \$ 8,807, she had surrendered her right to community assets worth \$ 82,500. She sought recovery of the difference between what she received and her half of the community property. *Held*, summary judgment for defendant reversed.

(a) *Breach of duty*. Defendant, by undertaking to represent plaintiff, assumed a duty of ordinary care under the circumstances of the case. (241 C.A.2d 526.) The general standard of *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, *supra*, §297, is appropriate to the normal situation where the attorney represents only one party; it is not adequate where the relationship involves conflicting interests. "[A]n attorney representing two parties with divergent interests must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation." (241 C.A.2d 528.) Here, the trier of fact might reasonably find defendant negligent in failing to disclose the limited

representation the wife was receiving and the possibility of independent advice. (241 C.A.2d 528.)

(b) *Causation*. A client need not prove action in reliance on the attorney's advice; malpractice may consist of a negligent failure to act, and the negligence--whether act or omission--need not be the sole cause of the client's loss. (241 C.A.2d 529.) Defendant attorney was charged not with erroneous advice, but with failure to advise, failure to investigate, and failure to disclose. The wife's reliance on her husband's alleged misrepresentations was not inconsistent with her claim that the loss resulted from her attorney's negligence. "A jury might find that the husband's misrepresentations were a realizable likelihood which made the attorney's inaction negligent, thus forming a concurrent (and not superseding) cause of harm." (241 C.A.2d 529.)

In *Lewis v. Superior Court* (1978) 77 C.A.3d 844, 144 C.R. 1, plaintiff wife sued defendant attorney for damages due to his failure to claim the husband's retirement benefits as community property in a divorce action. Defendant moved for summary judgment on the ground that the decree did not award the interest to either party, hence, that the wife's interest was not divested and she suffered no loss. *Held*, summary judgment was properly denied. Although plaintiff did not lose her interest, the attorney's negligence may have made it unenforceable; e.g., the husband may have received and consumed pension payments, made elections adverse to her, or may have left the jurisdiction. On the other hand, the attorney may be able to show that plaintiff still has a collectible interest, and to that extent will be exonerated from liability. Thus, triable issues of fact were raised. (77 C.A.3d 853.)

In *Aloy v. Mash* (1985) 38 C.3d 413, 212 C.R. 162, 696 P.2d 656, defendant attorney represented plaintiff wife in a dissolution proceeding in 1971. The husband's military retirement pension was vested, although he remained on active duty and was not yet receiving the pension. Relying on *French v. French* (1941) 17 C.2d 775, 112 P.2d 235, 11 Summary (10th), *Community Property*, §78, a case involving a *nonvested* military pension, defendant failed to assert a community property interest in the husband's pension. Plaintiff later filed a legal malpractice action based on this failure, but defendant's motion for summary judgment was granted. *Held*, judgment reversed.

(a) Unlike the defendant in *Davis v. Damrell* (1981) 119 C.A.3d 883, 174 C.R. 257, *infra*, §327, defendant here did not make a rational professional judgment on the basis of all available data; his inaction was based on an incomplete reading of a single case. A triable issue of negligence therefore exists. (38 C.3d 419.)

(b) Defendant cannot take advantage of the holding in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, decided 10 years after his representation of plaintiff, that application of California's community property principles to military pensions violates the Supremacy Clause. *First*, all the available evidence is negative that the United States Supreme Court would have granted certiorari on this issue in the early 1970s. (38 C.3d 420.) *Second*, the argument that "the claim which defendant negligently failed to assert in 1971 luckily turned out to be worthless in 1981--the serendipity defense," must be rejected. (38 C.3d 421.) No case within memory has received less retroactive application than *McCarty*, and "for most purposes, *McCarty* not only is not the law but never really was. ... It would be ironic if the chief legacy of *McCarty* were the immunization of legal malpractice by an attorney who never even pondered the issues which fathered *McCarty*'s brief life." (38 C.3d 421, 422.)

Three justices dissented, arguing that, as a matter of law, defendant's advice in 1971 was not erroneous. (38 C.3d 424.)

In *Granquist v. Sandberg* (1990) 219 C.A.3d 181, 268 C.R. 109, the client retained defendant attorney to represent him in a personal injury action. Although defendant knew that the client was over 70 years of age and in poor health, defendant allegedly failed to seek a preferential trial setting under C.C.P. 36 (see 7 Cal. Proc. (5th), *Trial*, §69). The client died before trial, and the personal representative of his estate sued for legal malpractice. The trial court sustained defendant's demurrer. *Held*, reversed. C.C.P. 36 confers a right on litigants over 70 years of age to have their cases tried and to recover appropriate damages. At his death, the client lost the right to have his case decided during his own lifetime; under former Prob.C. 573(c) (now C.C.P. 377.34; see 14 Summary (10th), *Wills and Probate*, §519), he also lost the right to recover damages for pain, suffering, and disfigurement. (219 C.A.3d 186.) If those rights were lost due

to defendant's malpractice, the client's representative is entitled to recover damages measured by the value of the claim lost. (219 C.A.3d 187.)

The following cases are also instructive:

Enriquez v. Smyth (1985) 173 C.A.3d 691, 699, 700, 219 C.R. 267 [plaintiff's sale of house 2 years after filing of bankruptcy petition was proximately caused by defendant's negligence in filing and handling bankruptcy; thus, selling costs were properly recoverable as damages].

Charnay v. Cobert (2006) 145 C.A.4th 170, 180, 51 C.R.3d 471 [plaintiff adequately alleged that she was prepared to settle underlying action and that, but for advice of defendant attorney to defend action and file cross-complaint, underlying action would have been resolved for fraction of plaintiff's ultimate liability].

Ambriz v. Kelegian (2007) 146 C.A.4th 1519, 1532, 53 C.R.3d 700 [trial court erred in granting defendant attorney summary judgment where plaintiff client presented sufficient evidence to show that she could have prevailed on underlying premises liability action and thus, loss of underlying action through summary judgment was caused by defendant's negligence in improperly investigating case].

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1. Negligence of Client.

1 Witkin Cal. Proc. Attys § 325

[§ 325] Negligence of Client.

California applies a "pure" form of comparative negligence, under which liability is assigned "in direct proportion to the fault of the persons whose negligence has brought such damage about." Thus, contributory negligence of the client is not a complete defense and will not bar recovery. (*Li v. Yellow Cab Co. (1975) 13 C.3d 804, 828, 829, 119 C.R. 858, 532 P.2d 1226, 6 Summary (10th), Torts, §1329*; see *Theobald v. Byers (1961) 193 C.A.2d 147, 13 C.R. 864* [discussing defense of contributory negligence]; *Allen v. Sundean (1982) 137 C.A.3d 216, 226, 186 C.R. 863* [comparative fault system does not apply to intentional torts]; *10 A.L.R.5th 828* [negligence or fault of client as defense to legal malpractice action].)

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2. Mistake of Law.

a. In General.

1 Witkin Cal. Proc. Attys § 326

[§ 326] In General.

In view of the complexity of the law and the circumstances that call for difficult choices among possible courses of action, an attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step. (See *Kirsch v. Duryea* (1978) 21 C.3d 303, 308, 146 C.R. 218, 578 P.2d 935, *infra*, §330, citing the text [principles are equally applicable whether plaintiff's claim is based on tort or breach of contract]; *Sprague v. Morgan* (1960) 185 C.A.2d 519, 523, 8 C.R. 347 ["[i]t has frequently been held that a lawyer is not liable for lack of knowledge as to the true state of the law where a doubtful or debatable point is involved"]; *Banerian v. O'Malley* (1974) 42 C.A.3d 604, 613, 615, 116 C.R. 919, quoting the text [attorney had no duty to notify client's insurer of action against client that reasonably appeared not within policy terms]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §208; 78 *A.L.R.3d* 255 [cases involving domestic relations].)

This theory was given an unusually broad application in *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685. The court held that an attorney may be liable to the intended beneficiary of a client whose will is improperly drawn (*supra*, §297), but also held that the particular mistake in the particular field of law was excusable. (56 C.2d 591.) It would appear from the opinion that, in actions against an attorney, negligence is not in any meaningful sense a question of fact for the lower court, but is one of law on which the appellate court exercises an independent judgment.

The complaint alleged that defendant drafted the testator's will in such a manner that a trust in favor of plaintiffs violated the rule against perpetuities and the rule against suspension of the power of alienation, and that, as a result, plaintiffs were forced to make a settlement with the testator's relatives under which they received \$ 75,000 less than if the instrument had been properly drafted. The defect was in the creation of a trust for a term of 5 years, not to commence until the probate court order of distribution. The remote possibility of long-delayed distribution would invalidate the trust under *Estate of Campbell* (1938) 28 C.A.2d 102, 82 P.2d 22, if the rule of that case is sound. The court expressly refused to decide whether the case is good law; instead, the opinion suggests that any attorney of ordinary skill might make the same blunder. (56 C.2d 593.) In reaching this conclusion, the court almost takes the position that no lawyer can be held responsible for mistakes in regard to perpetuities and suspension of alienation: "Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman; that members of the bar, probate courts, and title

insurance companies make errors in these matters. ... In view of the state of the law ... and the nature of the error, if any ... it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise." (56 C.2d 592.) (See 14 *Stanf. L. Rev.* 580 [*Lucas*].)

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b. Failure To Advise of Possible Change in Law.

1 Witkin Cal. Proc. Attys § 327

[§ 327] Failure To Advise of Possible Change in Law.

In *Davis v. Damrell* (1981) 119 C.A.3d 883, 174 C.R. 257, plaintiff wife retained defendant attorney to represent her in a dissolution proceeding, and asked him whether her husband's military pension was community property. His answer, given in 1970, was that it was not, and the property settlement agreement made no provision for its division. After *In re Marriage of Fithian* (1974) 10 C.3d 592, 111 C.R. 369, 517 P.2d 449, 11 Summary (10th), *Community Property*, §78, established the community character of the pension, plaintiff sued, alleging that defendant's failure to advise her of the unsettled state of the law deprived her of the opportunity to litigate the issue. *Held*, summary judgment for defendant affirmed.

(a) At the time of the challenged conduct, substantial uncertainty existed about the community character of federal pension benefit. Hence, the issue "inherently involved an unsettled point of law," and defendant's failure to anticipate its future resolution could not be professional negligence. (119 C.A.3d 888.)

(b) Unlike the factual situation in *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, *infra*, §328, the record demonstrated defendant's familiarity with the controlling precedents and relevant literature, and his opinion was a reasoned exercise of informed judgment. (119 C.A.3d 888.)

(c) The contention that defendant was under a duty to advise his client of the unsettled state of the law so as to permit an informed choice on litigation of the issue is untenable. "To impose such an extraordinary duty would effectively undermine the attorney-client relationship and vitiate the salutary purpose of the error-in-judgment rule. As a matter of policy, an attorney should not be required to compromise or attenuate an otherwise sound exercise of informed judgment with added advice concerning the unsettled nature of relevant legal principles. Under the venerable error-in-judgment rule, if an attorney acting in good faith exercises an honest and informed discretion in providing professional advice, the failure to anticipate correctly the resolution of an unsettled legal principle does not constitute culpable conduct. ... In short, the exercise of sound professional judgment rests upon considerations of legal perception and not prescience." (119 C.A.3d 889.) (See *Ruchti v. Goldfein* (1980) 113 C.A.3d 928, 934, 170 C.R. 375 ["[w]e do not believe any attorney should be held to have foreseen the 180 degree shift in the law in this area"]; *Sharpe v. Superior Court* (1983) 143 C.A.3d 469, 474, 475, 192 C.R. 16 [not malpractice for attorney to fail to anticipate United States

Supreme Court decision and federal statute].)

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2. Mistake of Law.

c. Recovery Upheld.

1 *Witkin Cal. Proc. Attys* § 328

[§ 328] Recovery Upheld.

A mistake of law in a field in which the law is clear or readily ascertainable is an indication of insufficient knowledge and skill or insufficient effort, and liability may be imposed. In *Gambert v. Hart* (1872) 44 C. 542, the attorney failed to comply with a long-established and familiar procedural requirement in filing a motion for new trial, with the result that the motion was denied. *Held*, he was "guilty of negligence, or betrayed great want of skill in his profession." (44 C. 553.) (See *Moser v. Western Harness Racing Assn.* (1948) 89 C.A.2d 1, 13, 200 P.2d 7, 9 *Summary* (10th), *Corporations*, §127 [erroneous advice on well settled doctrine of corporation law was ground for discharge of attorney for cause]; *Horne v. Peckham* (1979) 97 C.A.3d 404, 416, 158 C.R. 714 ["an attorney has a duty to avoid involving his client in murky areas of the law if research reveals alternative courses of conduct"]; *Village Nurseries, L.P. v. Greenbaum* (2002) 101 C.A.4th 26, 36, 123 C.R.2d 555 [summary judgment based on judgmental immunity should not have been granted where defendant attorneys failed to demonstrate that their advice was based on exercise of informed judgment; defendants presented no evidence of legal research conducted before misadvising plaintiff that notification of plaintiff's mechanics' liens in bankruptcy court would not perfect them]; 78 A.L.R.3d 255 [cases involving domestic relations].)

In *Armstrong v. Adams* (1929) 102 C.A. 677, 283 P. 871, defendant, attorney for a successful plaintiff, prepared a defective finding, which resulted in reversal of the judgment. *Held*, a cause of action was stated; the mistake was "as to the most important part of the case," the "last thing that should have been overlooked," and "[w]hether the failure to make such finding was the result of culpable negligence, want of skill or mere indifference, it was, from the standpoint of liability, inexcusable." (102 C.A. 684, 685.)

In *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, the Supreme Court took a strong position on the duty of an attorney to inform himself or herself on the law. Defendant, an attorney, represented plaintiff wife in a divorce action in 1967. The parties had been married 24 years, and the only substantial community assets were her husband's retirement benefits: federal from his military service, and state from his state employment. Defendant represented to her that these benefits were the husband's separate property and did not plead them as community property. Accordingly, the divorce decree divided the remaining minimal community property and gave plaintiff alimony and child support. Later, at plaintiff's request, defendant made a motion under C.C.P. 473 to amend the decree

to include the omitted community property. The motion was denied, and plaintiff, after consulting other counsel, filed the present action for damages for malpractice. The trial judge denied motions for nonsuit and judgment notwithstanding the verdict, and the jury brought in a verdict for \$ 100,000, based on one-half the current value of the future payments to the husband. *Held*, judgment on the verdict affirmed.

(a) *Defendant's mistaken view of the law.* At the time of defendant's employment it was generally agreed that vested retirement benefits earned during the marriage were community property, and there was some support for the same view as to the contingent federal payments (which later became the law). (13 C.3d 356, 357; see 11 *Summary* (10th), *Community Property*, §58 et seq.) The major authoritative reference works on this subject made it clear that plaintiff had a substantial community interest to assert, and defendant failed to do the research necessary to educate himself on the applicable principles of law. (13 C.3d 356, 358.)

(b) *Mistake the result of negligence.* Defendant invoked *Lucas v. Hamm* (1961) 56 C.2d 583, 15 C.R. 821, 364 P.2d 685, supra, §326, in support of his contention that the law was so unclear that his acts could not be considered negligence. This contention is unacceptable for the following reasons:

(1) An attorney is expected to discover rules of law "which, although not commonly known, may readily be found by standard research techniques." (13 C.3d 358.) The attorney is not responsible for failing to anticipate the manner in which an uncertainty will be resolved, but does have an obligation to undertake reasonable research as the basis of an informed decision. Here, defendant failed to do the research and was unable to exercise an informed judgment. (13 C.3d 358, 359.)

(2) An attorney may choose among alternative strategies and may refrain from pressing a debatable point on a consideration of potential detriment to the client. Here, the decision was not strategic, but "apparently the product of a culpable misconception of the relevant principles of law." (13 C.3d 359.)

(3) *Lucas v. Hamm* is not analogous. The conclusion there was that the rule against perpetuities posed problems for even careful attorneys; but no similar esoteric issue was involved in the ascertainment of rules of community property by consulting readily available authority. (13 C.3d 359.)

(4) Defendant in three prior divorce cases claimed community property interests in pensions on behalf of clients. (13 C.3d 360.)

Two dissenting justices stressed the uncertain state of the law at the time defendant represented plaintiff, and argued that defendant properly sought a compensating alimony award instead of the debatable claim to have a share in the pensions, and that the legal issue involved in pension cases in 1967 was fully as "esoteric" as that in *Lucas v. Hamm*. (13 C.3d 365 et seq.) (See *Aloy v. Mash* (1985) 38 C.3d 413, 419, 212 C.R. 162, 696 P.2d 656, supra, §324 [failure to assert interest in vested military retirement pension presented triable issue of negligence].)

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3. Reasonable Exercise of Judgment.

1 Witkin Cal. Proc. Attys § 329

[§ 329] Reasonable Exercise of Judgment.

Because an attorney is not responsible for loss resulting from an honest and reasonable mistake of law or procedure (see *supra*, §326) it is obvious that no liability can be imposed for a considered and reasonable exercise of judgment about whether a particular count in a complaint should be pressed or abandoned. This point is developed at length in *Floro v. Lawton* (1960) 187 C.A.2d 657, 10 C.R. 98, where the court adds a doleful note of sympathy: "It would appear that the possibility of a malpractice action is an occupational hazard for a lawyer. Of necessity he cannot win every case and there is always the possibility of his having as a client an irascible person who tenaciously clings to the belief, in the face of all evidence to the contrary, that his claim is robust and that the claim of his opponent is weak, and that it would be next to impossible for any lawyer to do otherwise than to secure a judgment as and for all that he has demanded." (187 C.A.2d 674.) (See 7 Am.Jur.2d (2007 ed.), Attorneys at Law §208.)

However, the defense of mere error in judgment will not stand up against a showing of a violation of the client's instructions. In *Lally v. Kuster* (1918) 177 C. 783, 787, 171 P. 961, defendant attorney, employed to sue on a note and mortgage nearly outlawed, filed the action but deliberately delayed bringing it to issue until it was dismissed for lack of prosecution, after the statute of limitations had run. His defense was that the case was weak and that he had hoped that the adverse party (the other side's principal witness) would die and thereby improve the chances of success. Plaintiff client showed that, informed of defendant's strategy, she had repeatedly instructed him to obtain a decision as rapidly as possible. *Held*, the disregard of instructions was negligence and he was liable for the resulting loss. (See *Lally v. Kuster* (1920) 48 C.A. 355, 192 P. 78 [same action after retrial, upholding damage award of \$ 2,694].)

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See *Blanks v. Seyfarth Shaw LLP* (2009) 171 C.A.4th 336, 379, 89 C.R.3d 710 [on remand, to overcome showing of negligence in permitting statute of limitations to lapse under Talent Agency Act (TAA), defendant attorney must prove that delay in filing client's TAA petition was reasoned choice and that it was "prudent trial strategy to risk losing the TAA claims" when basis for that strategy was uncertain and untested legal hypothesis that equal or greater results could be achieved outside Labor Commissioner's jurisdiction].



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4. Conflicting Public Obligation.

1 Witkin Cal. Proc. Attys § 330

[§ 330] Conflicting Public Obligation.

In *Kirsch v. Duryea* (1978) 21 C.3d 303, 146 C.R. 218, 578 P.2d 935, plaintiff suffered an industrial injury for which he received medical treatment with unsatisfactory results. A few days before the limitation period expired for a medical malpractice action, plaintiff's workers' compensation attorney referred him to defendant, an experienced medical malpractice lawyer, who filed a complaint in March 1965. Shortly thereafter plaintiff moved to New Mexico and subsequent communication was by telephone or mail. Defendant reviewed the file, talked to doctors, did some research, and finally concluded that there was insufficient evidence to go to trial. He so informed plaintiff by letter on July 21, 1969, enclosing a substitution of attorneys form. He also offered full cooperation with any attorney chosen, and repeatedly warned of the necessity of bringing the action to trial before March 23, 1970, the expiration of the 5-year period for bringing the case to trial. The letter was unanswered, and a second letter was sent on September 5, 1969, advising plaintiff that defendant would move for withdrawal. Defendant proceeded with the motion, plaintiff did not appear, and the motion was granted. Meanwhile plaintiff consulted several attorneys, one of whom agreed with defendant's assessment of the case and declined employment. Two others agreed to represent plaintiff, but defendant did not hear from them until after the March 23 deadline, and the case was dismissed. In this action for legal malpractice, plaintiff's expert, a lawyer, testified that it was improper for an attorney to withdraw 2 months before the deadline for bringing an action to trial; i.e., that defendant's withdrawal, though proper, was too late. The jury awarded substantial damages. *Held*, reversed.

(a) *Conflicting obligations under system of justice.* "An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." (21 C.3d 309.) When conflicting interests arise, they must be balanced. "To hold the attorney responsible in damages whenever in retrospect it appears he mistakenly sacrificed his client's interests in favor of his public obligations would place an impossible burden on the practice of law. Moreover, awarding damages against the attorney would violate sound public policy, because an attorney frequently faced with the question whether vigorous advocacy in favor of a client must be curtailed in light of public obligation would tilt in favor of the client at the expense of our system of justice." (21 C.3d 309.) Hence, "[t]he attorney's choice to honor the public obligation must be shown to have been so manifestly erroneous that no prudent attorney would have done so." (21 C.3d 309.)

(b) *Statutes and Rules of Professional Conduct.* An attorney's duty is to maintain only such actions as appear legal

or just (*B. & P.C. 6068(c)*; *infra*, §541), and the attorney must not present a claim or defense that is not warranted under existing law unless it can be supported by a good faith argument for a change in the law (former Rules of Professional Conduct, Rule 2-110(2), now *Rules of Professional Conduct, Rule 3-200(B)*; *infra*, §434). (*21 C.3d 310.*)

(c) *Application of rules to facts.* On the materials available to defendant the possibility of recovery was remote, and his conclusion that the action was not meritorious cannot be said to be manifestly erroneous. (*21 C.3d 310.*)

(d) *Delay in withdrawal cannot support the judgment.* When an attorney seeks to withdraw without the consent of the client, the obvious inference is that the attorney lacks confidence in the merits of the case, and this will ordinarily jeopardize any chance of settlement. Hence, the attorney should delay to give the client the opportunity to obtain other counsel or to file a consensual withdrawal. Defendant did so, and this delay in seeking the formal order was in compliance with the *Rules of Professional Conduct*. (*21 C.3d 311.*) (On conflicts between client's interests and public's interests, see *94 Harv. L. Rev. 1446.*)

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5. Arbitration Agreement.

1 *Witkin Cal. Proc. Attys* § 331

[§ 331] Arbitration Agreement.

In *Lawrence v. Walzer & Gabrielson* (1989) 207 C.A.3d 1501, 256 C.R. 6, plaintiff engaged defendant law firm to represent her in a proceeding for dissolution of marriage, and signed a retainer agreement consisting of a three-page letter in which paragraph 11 stated: "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." Later, plaintiff brought an action for legal malpractice and wilful breach of fiduciary duty, and defendant petitioned to compel arbitration. In opposition, plaintiff filed a declaration stating that the retainer letter had been handed to her by a paralegal who told her to sign it and return it with \$ 7,500 if she wanted defendant firm as her attorneys, and that she had no idea that she was giving up the right to sue for malpractice and obtain a jury trial. On the basis of this declaration, the judge denied the petition. *Held*, affirmed.

(a) If the phrase "any other aspect" of the relationship were considered alone, defendant's position would be compelling. But it was merely one provision in an agreement devoted almost exclusively to financial matters; and under the doctrine of *ejusdem generis*, the words "any other" should be read as referring to others of like kind or character, i.e., financial matters similar to disputes regarding fees and costs. (207 C.A.3d 1501.)

(b) The arbitration clause in the present case was not the product of negotiation; it was drafted by defendant attorneys and presented to plaintiff for her signature. A formal opinion of the State Bar states that "there is nothing inherently improper about an arbitration agreement between a lawyer and client which extends to malpractice claims," but adds that the client must be "fully advised of the possible consequences of that agreement." (207 C.A.3d 1507.) Accordingly, "we conclude plaintiff did not agree to binding arbitration of her claims." (207 C.A.3d 1508.) (See *Mayhew v. Benninghoff* (1997) 53 C.A.4th 1365, 1371, 62 C.R.2d 27 [rejecting contention that *Lawrence* is no longer valid in light of *Moncharsh v. Heily & Blase* (1992) 3 C.4th 1, 10 C.R.2d 183, 832 P.2d 899, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §574]; 26 A.L.R.5th 107 [validity and construction of agreement between attorney and client to arbitrate disputes between them].)

Where no ambiguity exists and the arbitration provision is otherwise valid, it may be enforced. In *Powers v. Dickson, Carlson & Campillo* (1997) 54 C.A.4th 1102, 63 C.R.2d 261, plaintiffs retained attorney T to represent them in the arbitration of a case involving residential construction defects. The initial retainer agreement included a numbered

paragraph 10 titled "Binding Arbitration," which itself contained two paragraphs. The first stated that any dispute relating to attorneys' fees would be submitted to binding arbitration before the Los Angeles County Bar Association. The second provided that "[a]ny other dispute (other than Attorney's fees) between the parties hereto arising out of or relating to this Contract or Attorney's professional services rendered to or for Client, shall be resolved by binding arbitration before the American Arbitration Association." (54 C.A.4th 1106.) An amended retainer agreement, signed 6 months later, contained a numbered paragraph 6 titled "Arbitration," which provided for arbitration before the American Arbitration Association of "any dispute" arising out of breach of the agreement, professional services rendered by T, failure to pay attorneys' fees, or any other disagreement. Plaintiffs ultimately sued T and his law firm for malpractice, and defendants petitioned to compel arbitration. The trial judge, relying on *Lawrence*, denied the petition, and defendants appealed. *Held*, reversed.

(a) *Validity generally*. "An attorney may ethically, and without conflict of interest, include in an initial retainer agreement with a client a provision requiring the arbitration of both fee disputes and legal malpractice claims." Neither the lack of an express waiver of the right to a jury trial, nor plaintiffs' alleged failure to read the entire agreement is grounds for invalidation. (54 C.A.4th 1109.)

(b) *Not an adhesion contract*. The agreements were not adhesion contracts. Plaintiffs did not enter into a standardized contract "on a take it or leave it basis. The retainer agreement and the amendment were negotiated and individualized agreements." Plaintiffs possessed the freedom to employ the attorney of their choice and bargain for the terms of their choice. Their "decision to change legal counsel and their successful renegotiation of the terms of their fee arrangement ... demonstrate that they possessed substantial bargaining strength." (54 C.A.4th 1110.)

(c) *No ambiguity*. Plaintiffs claim that the arbitration provisions are ambiguous because they do not specifically require arbitration of malpractice claims. This argument is not persuasive. "Both arbitration provisions require that any dispute arising out of or related to professional services be resolved by arbitration. The ordinary meaning of 'disputes arising out of or related to professional services' encompasses professional malpractice claims." (54 C.A.4th 1112.) Unlike *Lawrence*, the provisions here apply unambiguously both to legal malpractice claims and to fee disputes. And in the initial agreement, the provision for arbitration of nonfee disputes is contained in a separate paragraph and provides for arbitration before a separate body. (54 C.A.4th 1113.)

(d) *State Bar opinion*. A formal opinion of the State Bar concludes that inclusion in an initial attorney-client retainer agreement of a provision requiring arbitration of malpractice disputes is not ethically improper. (54 C.A.4th 1113.) The opinion suggests but does not require compliance with C.C.P. 1295, relating to arbitration provisions in medical services contracts (see 1 Summary (10th), *Contracts*, §328). (54 C.A.4th 1114, 1115.)

(e) *Conclusion*. The arbitration provisions unambiguously apply to the arbitration of legal malpractice claims and do not violate any ethical proscriptions. Plaintiff's failure to carefully read the agreement and the amendment is not a reason to refuse to enforce the arbitration provisions. The provisions were not included in a contract of adhesion. T was not required to encourage plaintiffs to seek the advice of independent counsel, and it was not necessary that they expressly waive their right to a jury trial. (54 C.A.4th 1115.)

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D. Defenses.
6. Unclean Hands.

1 *Witkin Cal. Proc. Attys* § 332

[§ 332] Unclean Hands.

Blain v. Doctor's Co. (1990) 222 C.A.3d 1048, 272 C.R. 250, after an elaborate discussion of the nature of the unclean hands defense (see 13 *Summary* (10th), *Equity*, §9 et seq.), holds that the doctrine may be applied against a client in a legal malpractice action. The essential allegations of the complaint were: A patient of Dr. B sued him for medical malpractice, and B's insurer, The Doctor's Co., retained an attorney to defend him; the attorney advised B to lie at his deposition; B did so, with the result that an amended complaint was filed seeking punitive damages; the action was later settled, Doctor's paid the policy limits, and B paid nothing. B then brought his action against Doctor's and the attorney on the theory that the attorney's advice exposed him to greater liability, caused him emotional distress, and precluded his further work as a physician. Defendants demurred, raising the unclean hands defense, and the trial judge gave judgment for them on demurrer. *Held*, affirmed.

(a) In two recent out-of-state legal malpractice cases involving injuries resulting from client perjury engaged in at the behest of counsel (*Kirkland*, Ore. App., *Feld & Sons*, Pa. Super.), the courts upheld the defense. (222 C.A.3d 1060.) Plaintiff in response cited *Sontag v. Denio* (1937) 23 C.A.2d 319, 73 P.2d 248, 13 *Summary* (10th) *Equity*, §14, and *Clark v. Millsap* (1926) 197 C. 765, 242 P. 918, for the proposition that a client will not be held *in pari delicto* with the attorney. (222 C.A.3d 1061.) However, "[t]he crux of *Sontag* and *Clark* is not the use of the maxim *in pari delicto* as a litmus test. Rather, as both note, the 'true rule in such cases' is 'that *under the circumstances* there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction ... One was the legal adviser, the other client. The advice of the former being adopted, he procured title to the latter's interest in valuable real estate. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices.' " (222 C.A.3d 1062.)

(b) There is no contradiction between the holdings in *Sontag* and *Clark* on the one hand and *Kirkland* and *Feld & Sons* on the other. But *Kirkland* and *Feld & Sons*, though persuasive authority, are not squarely in point: In both cases the injury stemmed from a criminal conviction, attributable to the ill-advised perjury, and recovery might have softened the effect of the penal sanction. (222 C.A.3d 1062.)

(c) B's emotional distress is attributable to his own knowing misbehavior. "A doctor who lies under oath about the incident for which he is being sued must know that if the lie is discovered it will adversely affect his defense." Hence, the defense of unclean hands bars his present action. (222 C.A.3d 1063.) "Although recognition of a cause of action would tend to deter attorneys from advising their clients to lie under oath, the societal interest in deterring such behavior is already subject to vindication through criminal sanctions or professional disciplinary proceedings. We assume that a bona fide claim of attorney misconduct as egregious as that alleged in the complaint will be reported to the appropriate authorities and that they will respond appropriately." (222 C.A.3d 1063.) (See 51 A.L.R.4th 1227 [legal malpractice liability for advising client to commit crime or unlawful act].)

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E. Indemnity.

1. Claims Against Successor Attorney.
a. Indemnity Denied.

1 Witkin Cal. Proc. Attys § 333

[§ 333] Indemnity Denied.

In *Gibson, Dunn & Crutcher v. Superior Court* (1979) 94 C.A.3d 347, 156 C.R. 326, the court stated the issue as follows: "whether lawyer I who is sued by a former client for professional negligence may cross-complain for equitable indemnity against lawyer II who was retained to extricate the client from the situation created by the alleged negligence of lawyer I." (94 C.A.3d 349.) *Held*, the cross-complaint was improper.

(a) The cross-complaint was seemingly permissible under *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, 5 Cal. Proc. (5th), *Pleading*, §1171, and 6 *Summary* (10th), *Torts*, §1331. However, *American Motorcycle* is factually distinguishable, and attorney-client situations require an exception to its rule. (94 C.A.3d 351, 352.)

(b) *Held v. Arant* (1977) 67 C.A.3d 748, 134 C.R. 422, although not involving comparative negligence issues, did hold that preservation of the attorney-client privilege precludes a cross-action by lawyer I against lawyer II for equitable indemnification; and its reasoning is fully applicable to indemnification under comparative negligence standards. (94 C.A.3d 355.) "A client seeking to extricate himself from a situation caused by the negligence of lawyer I may find his options limited both by legal constraints and practical considerations. The client's perception of his own best interests, after obtaining sound legal advice, may dictate a course which lawyer I may fairly characterize as 'unreasonable and disproportionate to the risk involved.' What effect a settlement so motivated would have on the client's claim against lawyer I is not before us. What is pertinent here is the effect upon the relationship between lawyer II and the client when the client's alternatives are under consideration. Lawyer II should not be required to face a potential conflict between the course which is in his client's best interest and the course which would minimize his exposure to the cross-complaint of lawyer I." (94 C.A.3d 356.)

A strong dissent argues that *Held v. Arant* and similar cases are not persuasive because they were decided before *American Motorcycle*. (But see *Commercial Standard Title Co. v. Superior Court* (1979) 92 C.A.3d 934, 945, 155 C.R. 393, quoting *Held v. Arant* with approval.)

In *Holland v. Thacher* (1988) 199 C.A.3d 924, 245 C.R. 247, plaintiff Mrs. H engaged Attorney Thacher in 1977 to

provide her with legal advice in connection with dissolution of her marriage to Mr. H. She discharged Thacher in February 1978, and retained Attorney Miller to file a dissolution proceeding. Judgment was entered in late 1978, with community property issues reserved for later trial, and Miller continued to represent Mrs. H in the dissolution proceeding and actions by creditors of the community property on defaulted loans that Mrs. H had guaranteed. In 1982, Mrs. H substituted Attorney Mull as counsel, and he negotiated a compromise and settlement of all property rights between Mrs. H and Mr. H; but the agreement did not contain a provision for division of subsequently discovered community assets. Concurrent with his representation of Mrs. H in the dissolution proceeding, Mull filed a legal malpractice action by Mrs. H against Thacher and Miller, for failure to protect her interests in community property allegedly concealed and dissipated by Mr. H. Thacher and Miller filed cross-complaints against Mull for equitable indemnity, contending that Mull failed to pursue assets secreted by Mr. H, and that the settlement caused or exacerbated the damages Mrs. H sought to recover from Thacher and Miller. *Held*, judgment for cross-defendant Mull on demurrer affirmed.

(a) *General tort rule of cross-complaint for equitable indemnity.* A tortfeasor who may be held liable for injuries caused by negligence, including those resulting from subsequent negligence, may cross-complain for indemnity against any subsequent tortfeasor whose negligence exacerbated the original injury. (199 C.A.3d 929; see 5 Cal. Proc. (5th), Pleading, §1171.)

(b) *Rule is inapplicable where cross-complaint is against successor attorney.* Although Courts of Appeal generally disfavor cross-complaints against successor attorneys for indemnity, they have differed on the conditions that might warrant the action. However, the weight of judicial authority prohibits the cross-complaint, and counterarguments are not persuasive. (199 C.A.3d 929, 932.)

(c) *Parker v. Morton exception is not acceptable.* *Parker v. Morton* (1981) 117 C.A.3d 751, 173 C.R. 197, *infra*, §334, did not reject the general rule against cross-complaints, but carved out an exception, allowing them in cases in which the lawyer's responsibility did not call for the exercise of professional judgment. (199 C.A.3d 934.) However, the exception involves two difficulties:

(1) The exception cannot reliably be established until after a malpractice action has been filed against the predecessor attorney, and this initial uncertainty vitiates the protection the exception purports to retain; i.e., the threat to the attorney-client relationship will be present if there is even the possibility that the attorney's conduct may expose the attorney to personal liability. (199 C.A.3d 934.)

(2) Whether the facts of a particular situation imposed a legal duty on counsel that brings the case within the exception would have to be determined prior to trial, but the issue of "professional judgment" cannot ordinarily be determined at this early stage. "[W]hether an attorney's responsibility to the client presented an unambiguous legal duty or rather the 'choice of alternative remedies of uncertain efficacy and requiring the exercise of professional judgment' involves a subjective assessment that cannot always be carried out without invading the sanctity of the attorney-client relationship." (199 C.A.3d 935.)

Other cases have also refused to permit cross-complaints for indemnity. (See *Goldfisher v. Superior Court* (1982) 133 C.A.3d 12, 21, 183 C.R. 609 [following *Held-Gibson* line of cases and declining to follow *Parker*]; *Lewis v. Purvin* (1989) 208 C.A.3d 1208, 1214, 256 C.R. 827 [demurrer was properly sustained to cross-complaint seeking indemnity from attorney who represented plaintiffs before, during, and after defendant's alleged malpractice]; *California State Auto. Assn. Inter-Ins. Bureau v. Bales* (1990) 221 C.A.3d 227, 231, 233, 270 C.R. 421 [insurer, defendant in bad faith and unfair practice action, could not seek equitable indemnity from plaintiff's former attorney on ground that attorney's negligence partially caused plaintiff's damage]; *Austin v. Superior Court* (1999) 72 C.A.4th 1126, 1128, 85 C.R.2d 644 [criticizing *Parker*].)

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1. Claims Against Successor Attorney. b. Indemnity Allowed.

1 Witkin Cal. Proc. Attys § 334

[§ 334] Indemnity Allowed.

Parker v. Morton (1981) 117 C.A.3d 751, 173 C.R. 197, criticizes and distinguishes prior decisions denying indemnity in attorney-client cases (see *supra*, §333) and applies ordinary tort principles of indemnity. The facts, as developed by the pleadings, were as follows: Parker, the attorney for P in a dissolution proceeding, did not assert her community property interest in her husband's military pension; Morton was subsequently retained by P to remedy the problem of the unlitigated pension but failed to pursue her community property claim; P sued Parker for malpractice, and Parker cross-complained against Morton for indemnity, on the ground that Morton's negligence exacerbated the damages suffered by P and claimed in her action against Parker. The trial judge granted summary judgment in favor of cross-defendant Morton. *Held*, reversed.

(a) *General rule of indemnity.* A subsequent tortfeasor who by his or her negligence exacerbates the damages suffered by an injured party may be sued for proportionate indemnity by the original tortfeasor. (*117 C.A.3d 756*, citing *Herrero v. Atkinson (1964) 227 C.A.2d 69, 38 C.R. 490*, and similar cases; see 5 *Summary (10th), Torts*, §112 et seq.) This general rule should be followed unless there are compelling reasons to depart from it. (*117 C.A.3d 756*.)

(b) *Prior cases distinguished.*

(1) *Norton v. Hines (1975) 49 C.A.3d 917, 123 C.R. 237*, and *Goodman v. Kennedy (1976) 18 C.3d 335, 344, 134 C.R. 375, 556 P.2d 737*, were not actions against allegedly negligent successor attorneys; they were brought against adversary attorneys. (*117 C.A.3d 756, 757*.)

(2) *Held v. Arant (1977) 67 C.A.3d 748, 134 C.R. 422*, did involve a cross-complaint against a successor attorney, but the court rejected the claim of implied indemnity on the ground that the peculiarities of the relationship between attorney and client precluded its application. (*117 C.A.3d 759*.) In *Held*, however, the negligence charged against the successor attorney was in choosing between two alternative courses of action. In this case, a quite different claim is made: that the successor attorney failed to pursue one of two available remedies that were not inconsistent, that required no exercise of professional judgment, and one of which was required both to protect the client's interests and to fulfill the client's obligation to mitigate the damages resulting from the first attorney's alleged negligence. When Morton was

employed as the successor attorney, *In re Marriage of Fithian* (1974) 10 C.3d 592, 111 C.R. 369, 517 P.2d 449, 11 Summary (10th), *Community Property*, §78, had established the community character of the military pension; and for each month that it was not dealt with in the dissolution action the wife was losing her share of the monthly payments. Because Parker had been removed as the attorney he could not take action to minimize her damages; it was Morton's duty to advise her to bring an action for division of the benefits, "both in fulfillment of her duty to mitigate damages and to protect her against additional loss in the event the first attorney should be held not to have acted negligently or should prove to be judgment proof." (117 C.A.3d 761.)

(3) *Gibson, Dunn & Crutcher v. Superior Court* (1979) 94 C.A.3d 347, 156 C.R. 326, supra, §333, likewise was a case where the successor attorneys were called on to advise the client as to a choice between alternative remedies--whether to settle with the other creditors and sue the former attorneys for the loss or to litigate with the other creditors. The choice required the exercise of professional judgment, and the "undivided loyalty to client" theory of *Held* was applicable. (117 C.A.3d 763.)

(4) *Commercial Standard Title Co. v. Superior Court* (1979) 92 C.A.3d 934, 155 C.R. 393, followed *Held* but added the "a new twist" that if suit were permitted against the current attorney for the plaintiff, the defendant could require that attorney to recuse himself. The majority's analysis, even if correct, is not controlling here. "The dire suggestion that completely meritless cross-complaints might irresponsibly be filed against the plaintiff's attorney ... is unpersuasive. Ample deterrence is provided by the prospect of liability for actual and punitive damages in a suit for malicious prosecution." (117 C.A.3d 766.)

(c) *Practical considerations*. "Had the problem of cross-defendant's alleged negligence not come to light as a result of the cross-complaint, it probably would have in discovery with respect to cross-appellant's defense to the main action and certainly would have during trial. Two of cross-appellant's prime defenses at trial must of necessity be that plaintiff failed to mitigate her damages by failing to file an action for division of the retirement benefits and that a substantial part of the damages claimed were not proximately caused by cross-appellant's negligence but the negligence of cross-defendant in not advising the institution of such a suit. We are not entirely convinced that in all cases the filing of a cross-complaint against the plaintiff's attorney will necessitate that he discontinue representing the plaintiff in the action, but if there is a problem in that regard it is preferable that the problem be brought to light during the pleading stages of the case rather than in the midst of trial. Again, the instant case demonstrates that that is in the client's best interests. We are informed that in the case at bench, the client has employed new counsel who have instituted suit for division of the retirement benefits and amended her pleadings to include cross-defendant as one of those whose alleged negligence has contributed to her loss." (117 C.A.3d 766.)

One justice dissented, restating the policy bases of the *Held*, *Gibson*, *Goodman*, and *Commercial Standard* cases, rejecting the application of *Herrero* and following cases, and asserting that the successor attorney owes no duty to the original attorney. (117 C.A.3d 767.)

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E. Indemnity.

2. No Indemnity From Original Tortfeasor.

1 Witkin Cal. Proc. Attys § 335

[§ 335] No Indemnity From Original Tortfeasor.

In *Munoz v. Davis* (1983) 141 C.A.3d 420, 190 C.R. 400, the court held that an attorney who negligently fails to file a personal injury action within the period of the statute of limitations may not obtain equitable indemnification from the original tortfeasor.

(a) An automobile driver whose negligence causes personal injuries to another is liable for those injuries, but not for the injury caused by the subsequent malpractice of the victim's attorney. Because the driver and attorney are not jointly and severally liable for the same injury, there is no basis for equitable indemnity. (141 C.A.3d 425, 427.)

(b) To allow an attorney to shift malpractice liability to the original tortfeasor would deprive that party of the protection of the statute of limitations and the right to zealous representation by his own attorney, and would "make every alleged tortfeasor into a malpractice insurer." (141 C.A.3d 430.) (See 20 A.L.R.4th 338 [discussing cases reaching same result].)

In *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 C.A.4th 1509, 80 C.R.2d 94, 3 Cal. Proc. (5th), Actions, §645, plaintiff sued defendant attorney for malpractice and defendant argued that his former firm was also negligent by misplacing and not safeguarding a promissory note to plaintiff, the loss of which was at the heart of the malpractice claim. *Held*, defendant may pursue an equitable indemnity claim against the firm. Unlike in *Munoz*, plaintiff suffered a single injury arising from the loss of the note caused by the alleged negligence of defendant and defendant's former law firm. Thus, defendant and the law firm were potentially concurrent tortfeasors for their acts of malpractice occurring while defendant was a member of the firm. (67 C.A.4th 1548.)

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3. No Indemnity From Concurrent Counsel.

1 Witkin Cal. Proc. Attys § 336

[§ 336] No Indemnity From Concurrent Counsel.

The policy concerns that prohibit an attorney sued for malpractice from cross-complaining against the client's successor attorney (*supra*, §333) may also bar an indemnity cross-complaint against an independent attorney who concurrently represents the dissatisfied client. In *Kroll & Tract v. Paris & Paris* (1999) 72 C.A.4th 1537, 86 C.R.2d 78, plaintiff and defendant law firms concurrently represented an insurer in the underlying action. The insurer lost and sued plaintiff for malpractice; plaintiff cross-complained against defendant for comparative equitable indemnity. Defendant successfully demurred. *Held*, affirmed.

Even though plaintiff and defendant shared the insurer's defense and defendant is not representing the insurer in the malpractice claim, the issues of undivided loyalty, self-protective tendencies, and the preservation of the attorney-client privilege are present here as in the successor attorney situation. (72 C.A.4th 1542.) The commencement of the malpractice action against one attorney does not operate as a waiver of the privilege as to both attorneys regarding communications relevant to the joint representation. The client is the holder of the privilege, and here the insurer expressly preserved the privilege as to defendant by choosing not to sue defendant for malpractice. If the indemnity action were allowed, defendant would be unable to defend itself "to the extent that its actions depended on client communications." (72 C.A.4th 1544.)

In *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker* (2000) 82 C.A.4th 768, 98 C.R.2d 419, an insurer hired plaintiff to defend its insured in a sexual harassment action and simultaneously retained defendant to act as "monitoring counsel" of the case. The insurer ultimately sued plaintiff for malpractice and plaintiff cross-complained against defendant for indemnity. The trial court sustained defendant's demurrer and dismissed the cross-complaint. *Held*, affirmed. The facts here are simply a variation on cases dealing with indemnity from subsequently retained counsel. "[I]t is immaterial that, from one case to the next, the parties are not in precisely the same position as the parties in the other reported decisions. In substance if not in form, we find the case before us analytically indistinguishable from *Kroll & Tract v. Paris & Paris* ... and conclude that the result must be the same." (82 C.A.4th 778.)

In *Musser v. Provencher* (2002) 28 C.4th 274, 121 C.R.2d 373, 48 P.3d 408, the Supreme Court reiterated and approved the reasoning and policy concerns of *Kroll & Tract* and *Shaffery*, but refused to adopt a blanket rule that the public policy considerations of avoiding conflicts of interest between attorney and client and protecting the

confidentiality of attorney-client communications should bar indemnification claims in concurrent counsel or cocounsel cases, and instead adopted a case-by-case approach. M, a family law attorney, sought the services and advice of P, a bankruptcy attorney, in the underlying dissolution action. P provided legally erroneous advice on which M acted by wrongly pursuing a child support claim despite an automatic stay imposed by the bankruptcy court. In the ensuing malpractice action, M settled with the former client and by cross-complaint sought indemnity from P. The trial court entered a judgment of nonsuit against M on the indemnity claim. *Held*, reversed.

(a) The public policy concerns barring indemnity claims in predecessor/successor cases do not necessarily pertain to concurrent counsel or cocounsel situations. This was recognized in *Kroll & Tract* and *Shaffery*, and the reasoning of both courts suggests that whether allowing equitable indemnity in concurrent counsel cases violates those same policy concerns should be considered on a case-by-case basis. (28 C.4th 281, 284.)

(b) The policy concern is the conflict between an attorney's duty to the client and the attorney's self-interest. However, there is no reason to believe that an attorney's self-interest "will interfere with loyalty to the client just because the attorney, as a joint tortfeasor, may face an indemnification claim if the client sues the attorney's concurrent counsel or cocounsel for malpractice." (28 C.4th 284.) No evidence to indicate otherwise was presented in this case. (28 C.4th 284.)

(c) As to attorney-client communications, the fear is that the attorney from whom indemnification is sought may be unable to defend without revealing privileged client communications. However, under the settlement here, M's former client expressly waived her attorney-client privilege with respect to P's representation of her in the underlying dissolution action. (28 C.4th 284.)

(d) "[B]ecause the policy considerations that underlie the rule barring indemnification claims in predecessor/successor cases do not obtain in this concurrent counsel case," it would be unjust to deny M an opportunity to seek indemnity or contribution from P when M has been sued by her former client for damages allegedly attributable to P's tortious conduct. (28 C.4th 285.)

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4. Indemnity Claim by Retained Expert.

1 Witkin Cal. Proc. Attys § 337

[§ 337] Indemnity Claim by Retained Expert.

In *Forensis Group v. Frantz, Townsend & Foldenauer* (2005) 130 C.A.4th 14, 29 C.R.3d 622, H brought a professional negligence action against experts retained by law firm F in an underlying wrongful death and products liability action, but did not sue F. The experts cross-complained against F seeking equitable indemnity for losses incurred in settling the action by H. The trial court granted F's motion for summary judgment based on public policy grounds involving attorney-client loyalty and confidentiality. The experts' motion to set aside the judgment was denied. *Held*, reversed.

(a) *Attorney and expert relationship supports indemnity claim.* In bringing the action against the experts, H alleged that the negligent conduct was analogous to legal malpractice, and by seeking equitable indemnity, the experts contend that the experts and F are joint tortfeasors in the representation of H, and thus subject to comparative fault. (130 C.A.4th 34.) Moreover, the facts here are analogous to those in *Musser v. Provencher* (2002) 28 C.4th 274, 121 C.R.2d 373, 48 P.3d 408, *supra*, §336, because the experts, as retained litigation professionals, are "similar in function to concurrent counsel within the fields of their respective expertise." (130 C.A.4th 34.) Thus, as in *Musser*, the experts, as concurrently acting litigation participants, "should ordinarily be permitted to sue [F] for equitable indemnification of professional malpractice damages for which they have become liable." (130 C.A.4th 35.)

(b) *Public policy considerations.* Under *Musser*, "there is a diminished duty of loyalty toward the former client, at least on the part of an attorney who is defending him- or herself against an equitable indemnity claim by a fellow litigation professional, in a case arising out of the same client representation." The same is true here. (130 C.A.4th 38.) In addition, public policy concerns over conflict of interest or revealing confidential communications are not implicated under the facts of this case. In defending against the indemnification action, F must essentially reveal information about legal strategy and how the experts' material was presented to the trial court in the underlying case. This has little to do with communications with or protection of client H. (130 C.A.4th 39.) Finally, permitting an action for equitable indemnity furthers a public policy of protecting the professional interests of expert witnesses generally and encouraging their participation in the judicial system by providing a recourse against those responsible for harming a client by improperly utilizing the experts and negligently presenting the experts' evidence. (130 C.A.4th 36.)

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F. Malpractice Insurance.

1 Witkin Cal. Proc. Attys § 338

[§ 338] Malpractice Insurance.

(1) *In General.* A typical malpractice insurance policy covers errors and omissions arising out of the rendering of professional services. Some policies cover claims made on an "occurrence basis," i.e., claims arising out of acts or omissions made during the policy period. Other policies provide coverage on a "claims-made-basis," i.e., claims made during the policy period regardless of the date of the error or omission. A policy may cover all attorneys employed by a firm, or it may cover only those attorneys specifically named as insureds. (See 2 *Summary* (10th), *Insurance*, §154; 92 *A.L.R.5th* 273 [professional liability insurance]; on mandatory insurance for law corporations, see *supra*, §29.)

(2) *Interpretation.* A substantial period of time may elapse between the lawyer's negligence, the resulting injury to the client, and the making of a formal claim by the client. If the lawyer has changed insurers during that period, questions of coverage often arise. In resolving these issues, the rule that ambiguities and uncertainties in insurance contracts will be resolved in favor of the insured (see 2 *Summary* (10th), *Insurance*, §70) is applicable. (See *Gyler v. Mission Ins. Co.* (1973) 10 C.3d 216, 219, 220, 110 C.R. 139, 514 P.2d 1219 [phrase "claim or claims ... which may be made" during the policy period covers claims that mature during but are not presented until after the policy period]; *Bay Cities Paving & Grading v. Lawyers' Mut. Ins. Co.* (1993) 5 C.4th 854, 866, 21 C.R.2d 691, 855 P.2d 1263 [where legal malpractice policy provided that multiple claims arising from series of related acts were to be treated as single claim, attorney's two omissions in single debt collection matter constituted single claim under policy]; *Chamberlin v. Smith* (1977) 72 C.A.3d 835, 844, 140 C.R. 493 [rule requiring construction in favor of coverage is applicable in dispute between insurers]; *Employers Reinsurance Corp. v. Mission Equities Corp.* (1977) 74 C.A.3d 826, 829, 141 C.R. 727 [same]; *Stein v. International Ins. Co.* (1990) 217 C.A.3d 609, 266 C.R. 72 [policy did not require filing of lawsuit where it covered claims expenses, including investigation expenses arising from both "suits" and "claims"; however, insurer was not required to reimburse insured for expenses where insured failed to notify insurer of expenses that insured believed were reasonably necessary]; 60 *A.L.R.4th* 983 [what is "claim" under deductibility-per-claim clause in liability insurance policy]; 64 *A.L.R.4th* 668 [what constitutes single accident or occurrence within liability policy limiting insurer's liability to a specified amount per accident or occurrence].)

However, coverage will be denied where the terms of the policy unambiguously exclude from coverage the particular negligence involved. (See *Arant v. Signal Ins. Co.* (1977) 67 C.A.3d 514, 517, 518, 136 C.R. 689 [attorney's negligent advice was given prior to policy period, but resulting damages to client occurred during policy period; coverage was properly denied where policy excluded "acts committed prior to the beginning of the policy period"];

Chamberlin v. Smith, supra, 72 C.A.3d 835, 847, 850 [same]; *Blumberg v. Guarantee Ins. Co. (1987)* 192 C.A.3d 1286, 1293, 1295, 238 C.R. 36 [policy did not cover misrepresentation action brought against defendant by his former partner]; *Johnson v. First State Ins. Co. (1994)* 27 C.A.4th 1079, 33 C.R.2d 163 [attorney who was sued for malpractice brought action claiming that malpractice action was part of conspiracy, and defendant in conspiracy action later brought malicious prosecution action against attorney; professional liability insurance carrier had no duty to defend, because malicious prosecution action arose from conspiracy action that attorney brought on his own behalf].)

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CHAPTER I - Attorneys

Witkin Summary of California Law

VII. REGULATION OF PRACTICE

A. In General.

1. Right To Practice Law.

1 Witkin Cal. Proc. Attys § 339

[§ 339] Right To Practice Law.

(1) *Older Theory of Privilege.* It was formerly said that the practice of law is not a property right but a statutory privilege, which is extended only to persons who possess the required qualifications and who meet the prescribed conditions. (See *Cohen v. Hurley* (1961) 366 U.S. 117, 81 S.Ct. 954, 959, 6 L.Ed.2d 156, 163, *infra*, §340; *Brydonjack v. State Bar* (1929) 208 C. 439, 443, 281 P. 1018 [reviewing earlier cases]; *In the Matter of an Investigation of the Conduct of the Examination for Admission to Practice Law* (1934) 1 C.2d 61, 67, 33 P.2d 829; *In re Lavine* (1935) 2 C.2d 324, 327, 41 P.2d 161.) This statement adds little to the accepted principle that any profession or business affecting the public interest may be regulated and a license granted only to those who meet the required tests. (See 8 *Summary* (10th), *Constitutional Law*, §§1061, 1072, 1079.)

(2) *Current Theory of Right.* The privilege theory was discredited, if not discarded, in two important decisions:

In *Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574, the Court overruled *Cohen v. Hurley*, and held that the penalty of disbarment could not be imposed on an attorney claiming the self-incrimination privilege in a judicial inquiry. (87 S.Ct. 627, 17 L.Ed.2d 577; see 2 *Cal. Evidence* (4th), *Witnesses*, §363; 81 *Harv. L. Rev.* 200.)

Hallinan v. Committee of Bar Examiners (1966) 65 C.2d 447, 451, 55 C.R. 228, 421 P.2d 76, *infra*, §371, involving admission to the State Bar, takes a similar position. (65 C.2d 452, footnote 3.) (See *Willner v. Committee on Character & Fitness* (1963) 373 U.S. 96, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224, 229 [petitioner was denied procedural due process when he was denied admission to New York State Bar without hearing on charges filed against him]; 8 *Hastings Const. L. Q.* 199 [review of Supreme Court decisions on constitutionality of state regulations of legal profession]; 42 *Hastings L. J.* 203 [movement to deregulate practice of law]; 26 *A.L.R.4th* 614 [restrictions on legal practice by legal services corporation or public interest law firm]; on invalidity of citizenship and residency requirements, see *infra*, §358.)

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Witkin Summary of California Law VII. REGULATION OF PRACTICE

A. In General.

2. Regulation by Court.

1 Witkin Cal. Proc. Attys § 340

[§ 340] Regulation by Court.

The important difference between regulation of the legal profession and regulation of other professions is that admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power. (See *Brydonjack v. State Bar* (1929) 208 C. 439, 443, 281 P. 1018 ["[a]dmission to practice is almost without exception conceded everywhere to be the exercise of a judicial function"]; *In re Lavine* (1935) 2 C.2d 324, 328, 331, 41 P.2d 161 ["the courts, in the exercise of their inherent power may demand more than the legislature has required"]; *Hustedt v. Work. Comp. App. Bd.* (1981) 30 C.3d 329, 338, 341, 178 C.R. 801, 636 P.2d 1139, 2 Summary (10th), *Workers' Compensation*, §353 [Lab.C. 4907, granting Workers' Compensation Appeals Board disciplinary power over attorneys appearing before it, is unconstitutional interference with inherent power of courts]; *Merco Const. Engineers v. Municipal Court* (1978) 21 C.3d 724, 727, 147 C.R. 631, 581 P.2d 636, 2 Cal. Proc. (5th), *Jurisdiction*, §197 [former C.C.P. 87, authorizing corporation to appear in municipal courts through nonattorney director, officer, or employee, was unconstitutional legislative attempt to permit unlicensed persons to engage in limited practice of law]; *In re Attorney Discipline System* (1998) 19 C.4th 582, 593, 607, 79 C.R.2d 836, 967 P.2d 49, quoting the text [court's inherent constitutional authority over attorney discipline includes power to assess fees on attorneys to fund State Bar's discipline system]; 105 Harv. L. Rev. 799 [Who Should Regulate Lawyers?]; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §13 et seq.)

In *Cohen v. Hurley* (1961) 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156, a judicial inquiry into ambulance chasing in New York resulted in petitioner being called to testify and produce records concerning his practice. He refused to answer material questions, claiming the privilege against self-incrimination, and, having been adequately warned, persisted in his refusal. He was disbarred for deliberate refusal to cooperate with the court in its efforts to expose unethical practices and to determine incidentally whether his acts of misconduct destroyed his fitness to retain the privilege of membership in the bar. The Court pointed to the long history of judicial control of law practice, and found this inquiry entirely proper: "It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes

to the court, or that the 'payment of awards to persons bringing in legal business' is inconsistent with the personally disinterested position a lawyer should maintain." (81 S.Ct. 958, 6 L.Ed.2d 162.)

Although these observations on legal ethics are still acceptable, the holding of the case, that an attorney may be disciplined for claiming the privilege of self-incrimination in such an inquiry, is not; *Cohen v. Hurley* was overruled on that point in *Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 627, 17 L.Ed.2d 574, 577, supra, §339.

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Witkin Summary of California Law VII. REGULATION OF PRACTICE

A. In General.

3. Control by Legislature.

1 Witkin Cal. Proc. Attys § 341

[§ 341] Control by Legislature.

Despite the judicial function theory (*supra*, §340), a large measure of legislative control over the legal profession has long been exercised and has seldom been successfully challenged. The courts have taken the sound and practical position that, subject to the ultimate and final judicial power that the courts may choose to exert, the Legislature may state qualifications for admission and causes for discipline, and may make other regulations. (See *State Bar v. Superior Court* (1929) 207 C. 323, 331, 278 P. 432 ["[T]he membership, character and conduct of those entering and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control. ... From almost the inception of our state government statutory provision has been made for the admission, disbarment, suspension or disciplining of members of the legal profession"]; *Brydonjack v. State Bar* (1929) 208 C. 439, 444, 281 P. 1018 ["The sum total of this matter is that the legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of these functions"]; 105 *Harv. L. Rev.* 799 [who should regulate attorneys]; 42 *Hastings L. J.* 203 [movement to deregulate practice of law]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §2.)

The following are the principal legislative controls:

(1) The self-governing State Bar of California, by statutory authority and with the approval of the Supreme Court, regulates professional conduct and recommends discipline. (See *B. & P.C. 6000* et seq.; C.R.C. 9.5 et seq. [rules relating to attorney admission and disciplinary proceedings]; *infra*, §§342, 558.)

(2) Municipal corporations, under appropriate charter provision, may impose local license taxes on the practice of a trade or profession, including the practice of law. (See *Franklin v. Peterson* (1948) 87 C.A.2d 727, 731, 197 P.2d 788; 9 *Summary* (10th), *Taxation*, §310.)

Chartered cities, with exclusive power over municipal affairs (see 8 *Summary* (10th), *Constitutional Law*, §993), may also regulate activities of attorneys that do not constitute the practice of law. In *Baron v. Los Angeles* (1970) 2 C.3d 535, 86 C.R. 673, 469 P.2d 353, defendant city adopted an ordinance requiring the registration of "municipal legislative advocates" (lobbyists). It covered persons who attempt to influence municipal legislation or action by boards, commissions, or officers of the city. The person registering was required to furnish information on compensation and

expenditures, proposed legislation he or she was employed to support or oppose, and publications to which he or she contributed material to influence municipal legislation. Plaintiff, a Los Angeles attorney with a substantial practice before administrative agencies of the city, challenged the ordinance in this action for declaratory relief. *Held*, it was valid in part.

(a) Superficially the ordinance was concerned solely with a municipal affair; but its coverage extended to attorneys appearing before local administrative agencies. To the extent that it regulated the practice of law, it entered a field of statewide concern, preempted by the State Bar Act (*infra*, §342 et seq.). (2 *C.3d* 540.)

(b) The State Bar Act, however, does not regulate all acts of attorneys, but only those that constitute the practice of law and that would be illegal if performed by a layperson. Hence, the ordinance is valid as applied to attorneys performing services that a layperson could lawfully perform. The line is difficult to draw, and debatable situations will arise; but "[f]or illustrative purposes, we indicate that an attorney representing a client before a city board or commission which is holding a hearing to reach a quasi-judicial decision on a matter involving factual and legal questions need not register under the ordinance; on the other hand, an attorney authorized by a client to appear at hearings considering local legislation in order to argue for or against the adoption of that legislation would be within the legitimate thrust of the ordinance." (2 *C.3d* 544.)

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CHAPTER I - Attorneys

Witkin Summary of California Law VII. REGULATION OF PRACTICE

B. The State Bar.

1. Nature and Organization.

1 Witkin Cal. Proc. Attys § 342

[§ 342] Nature and Organization.

(1) *Public Corporation.* The State Bar Act (*B. & P.C. 6000 et seq.*), adopted in 1927, created the State Bar of California as a public corporation with the right of perpetual succession (subject to termination by the Legislature). It has power (subject to legislative change) to sue and be sued, to contract, to hold and dispose of property, to do acts incidental or necessary to the performance of its powers, and to raise revenue pursuant to its powers. (*B. & P.C. 6001.*) A 1960 amendment to the California Constitution gave it constitutional status: "The State Bar of California is a public corporation." (Cal. Const., Art. VI, §9.)

(2) *Integrated Bar.* The State Bar Act established what is known as an "integrated" bar, i.e., an organization of members of the legal profession of the state with a large measure of self-government, performing functions such as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of the law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice. (See *State Bar v. Superior Court* (1929) 207 C. 323, 278 P. 432; *Criminal Courts Bar Assn. v. State Bar* (1972) 22 C.A.3d 681, 99 C.R. 661 [discussing organization of State Bar, and rules of Board of Governors on Conference of Delegates at State Bar Convention]; *B. & P.C. 6031(a)*; 18 Cal. L. Rev. 50; 7 Am.Jur.2d (2007 ed.), Attorneys at Law §7.)

Executive direction of the State Bar is centered in a *Board of Governors*. (See *infra*, §343.) A *Committee of Bar Examiners* examines applicants and certifies to the Supreme Court those who fulfill the requirements for admission. (*B. & P.C. 6046*; *infra*, §357 *et seq.*) Disciplinary proceedings are instituted and conducted by the State Bar Court and its various departments. (See *infra*, §561 *et seq.*)

All attorneys licensed in California automatically become members of the State Bar. (*B. & P.C. 6002*; *infra*, §346.)

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B. The State Bar.

2. Board of Governors.

a. Selection of Members.

1 Witkin Cal. Proc. Attys § 343

[§ 343] Selection of Members.

The State Bar is governed by a Board of Governors. (*B. & P.C. 6010* et seq.) The board consists of 22 members who serve 3-year terms (*B. & P.C. 6011, 6013.5, 6014*), and the State Bar President, who is elected from among the outgoing members of the board unless none is able and willing to serve (*B. & P.C. 6021*).

Six members must be nonattorneys. The Senate Committee on Rules and the Speaker of the Assembly each appoint one member; the other four are appointed by the Governor, subject to confirmation by the Senate. (*B. & P.C. 6013.5*.) One member is elected by the board of directors of the California Young Lawyers Association. (*B. & P.C. 6013.4*.)

Only active State Bar members who maintain their principal law offices in the respective State Bar districts may vote, or run as candidates, for the board. (*B. & P.C. 6015, 6018*; see *Hoffman v. State Bar* (2003) 113 C.A.4th 630, 649, 6 C.R.3d 592 [statutes limiting voting and candidacy are constitutional].)

An attorney employed by a public agency who serves as a member of the board may have his or her salary reduced pro rata to the extent the employee works fewer hours than required; the employee must not suffer any other loss of rights, promotions, salary increases, retirement benefits, tenure, or other job-related benefits to which he or she is otherwise entitled. (*B. & P.C. 6013.6*.)

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B. The State Bar.

2. Board of Governors.

b. Public Meetings.

1 Witkin Cal. Proc. Attys § 344

[§ 344] Public Meetings.

All meetings of the Board of Governors must be open to the public except those relating to the following:

- (1) Consultation with counsel regarding pending or prospective litigation. (*B. & P.C. 6026.5(a).*)
- (2) Involuntary enrollment of active members as inactive members due to mental infirmity or illness or substance addiction. (*B. & P.C. 6026.5(b).*)
- (3) The qualifications of judicial appointees, nominees, or candidates. (*B. & P.C. 6026.5(c).*)
- (4) The appointment, employment, or dismissal of an employee, consultant, or officer of the State Bar or complaints or charges brought against those persons unless the affected person requests a public hearing. (*B. & P.C. 6026.5(d).*)
- (5) Disciplinary investigation proceedings and reinstatement proceedings. (*B. & P.C. 6026.5(e).*)
- (6) Appeals to the board from decisions of the Board of Legal Specialization refusing to certify or recertify an applicant or suspending or revoking a specialist's certificate. (*B. & P.C. 6026.5(f).*)
- (7) Appointments to or removals from committees, boards, or other entities. (*B. & P.C. 6026.5(g).*)
- (8) Joint meetings with agencies provided in Article VI of the California Constitution. (*B. & P.C. 6026.5(h).*)

The State Bar has adopted Rules Governing Open Meetings, Closed Sessions and Records of the Board of Governors of the State Bar of California. The rules are published in West's California Rules of Court and are available at the State Bar's website: www.calbar.ca.gov.

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B. The State Bar.

2. Board of Governors.

c. Conflicts of Interest.

1 *Witkin Cal. Proc. Attys* § 345

[§ 345] Conflicts of Interest.

(1) *In General.* Elected and appointed members of the board are subject to disqualification for conflicts of interest. (*B. & P.C. 6035 et seq.*) The definitions in the Political Reform Act of 1974 (*Govt.C. 82000 et seq.*; see 7 *Summary* (10th), *Constitutional Law*, §271 et seq.) govern "[u]nless the contrary is stated or clearly appears from the context." (*B. & P.C. 6035.*)

(2) *Scope of Disqualification.* A member is disqualified from making, participating in making, or attempting to influence a decision of the board or one its committees in which the member has a financial interest, as defined by *Govt.C. 87103* (see 7 *Summary* (10th), *Constitutional Law*, §281), if it is reasonably foreseeable that the interest will be materially affected by the decision. (*B. & P.C. 6036(a).*) A member is also disqualified when there exists a personal nonfinancial interest that will prevent the member from applying disinterested skill and undivided loyalty to the State Bar in making or participating in making decisions. (*B. & P.C. 6036(b).*)

(3) *Exception Where Participation Is Legally Required.* A member otherwise disqualified may nevertheless act "to the extent his or her participation is legally required for the action or decision to be made." However, the fact that a member's vote is needed to break a tie does not make participation "legally required." (*B. & P.C. 6036(c).*)

(4) *Disclosure and Withdrawal.* A disqualified member must immediately disclose the interest, withdraw from participation in the matter, and refrain from voting or attempting to influence another member. The disclosure requirement is satisfied, however, by merely indicating that there is a disqualifying interest. (*B. & P.C. 6036(d).*)

(5) *Effect of Failure To Comply.* Noncompliance with the statute does not invalidate an action or decision of the board or a committee. However, (a) a member who intentionally violates *B. & P.C. 6036(a)* is guilty of a misdemeanor and, on conviction, loses membership on the board; and (b) a member who intentionally violates *B. & P.C. 6036(b)* is liable for a civil penalty. (*B. & P.C. 6037.*)

(6) *Conflict of Interest Code.* The Political Reform Act requires state and local government agencies to adopt a conflict of interest code. (See 7 *Summary* (10th), *Constitutional Law*, §284). In 1986, the Supreme Court approved a

Conflict of Interest Code for the Board of Governors. The Code may be accessed on the State Bar's website:
www.calbar.ca.gov.

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B. The State Bar.

3. Membership in State Bar.

a. In General.

1 Witkin Cal. Proc. Attys § 346

[§ 346] In General.

(1) *All Licensed Attorneys.* "Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." (Cal. Const., Art. VI, §9; see *B. & P.C. 6002.*) Thus, all licensed attorneys are *automatically* members of the State Bar and subject to its regulations and disciplinary authority. (See *infra*, §558.) (On inactive members, see *infra*, §348.)

(2) *Resignation.* An attorney may resign from the State Bar and relinquish the right to practice. If the attorney does so after being charged with misconduct, perpetuation proceedings may be ordered to preserve evidence of the misconduct for use at a future time when the attorney might apply for readmission. (See *Rules of Procedure of the State Bar, Rules 650, 651*; *infra*, §631; *54 A.L.R.4th 264* [propriety of attorney's resignation in light of pending or potential disciplinary action].)

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B. The State Bar.

3. Membership in State Bar.

b. Information Provided by Members.

1 Witkin Cal. Proc. Attys § 347

[§ 347] Information Provided by Members.

(1) *Reporting to State Bar.* Members of the State Bar are required to provide the State Bar with the following information:

(a) A current office address and telephone number, or, if no office is maintained, an address to be used for purposes of the State Bar or the agency charged with attorney discipline. (*B. & P.C. 6002.1(a)(1)*; see *B. & P.C. 6002.1(b)* [former members subject to C.R.C., Rule 9.20 (duties of disbarred, suspended, or resigned attorneys; see *supra*, §82) are required to maintain current address].)

(b) Specialties in which the member is certified. (*B. & P.C. 6002.1(a)(2)*.)

(c) Other jurisdictions in which the member is admitted and the dates of admission. (*B. & P.C. 6002.1(a)(3)*.)

(d) The nature and date of discipline imposed by another jurisdiction including the terms and conditions of probation, and, if suspended or disbarred in another jurisdiction, the date of reinstatement. (*B. & P.C. 6002.1(a)(4)*.)

(e) Information that may be required by agreement with or as conditions of probation imposed by the disciplinary agency. (*B. & P.C. 6002.1(a)(5)*.) This information is available to the State Bar, the Supreme Court, and the disciplinary agency, but may not be made available to the general public unless so required by a condition of probation. (*B. & P.C. 6002.1(d)*.) (See *B. & P.C. 6068(j)* [attorney has duty to comply with requirements of *B. & P.C. 6002.1*]; C.R.C. 950.5 [State Bar is required to maintain Roll of Attorneys with information specified in *B. & P.C. 6002.1*].)

(f) The member's Social Security number, to be furnished by the State Bar to the Franchise Tax Board. (*B. & P.C. 30*.) (On permissible use of federal tax identification number or other identifying number in lieu of Social Security number at time of application, see *B. & P.C. 6060.6*.)

(2) *Reporting to Attorney Disciplinary Agency.* An attorney has a duty to report in writing to the disciplinary agency within 30 days of the time the attorney has knowledge of any of the following:

- (a) The filing of three or more lawsuits against the attorney in a 12-month period for malpractice or wrongful conduct committed in a professional capacity. (*B. & P.C. 6068(o)(1).*)
- (b) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity. (*B. & P.C. 6068(o)(2).*)
- (c) The imposition of judicial sanctions against the attorney except (1) sanctions for failure to make discovery, or (2) monetary sanctions of less than \$ 1,000. (*B. & P.C. 6068(o)(3)*; see *In the Matter of Respondent Y* (1998) 3 Cal. State Bar Ct. Rptr. 862, 866 [*B. & P.C. 6068(o)(3)* requires attorney to promptly inform State Bar of judicial sanctions regardless of pending appeal].)
- (d) The bringing of an indictment or information charging the attorney with a felony. (*B. & P.C. 6068(o)(4).*)
- (e) The conviction of a felony, or of a misdemeanor committed in the course of the attorney's practice, or in a manner in which a client was the victim, or a necessary element of which involved the attorney's improper conduct (including dishonesty or other moral turpitude), or an attempt, conspiracy, or solicitation to commit a felony or misdemeanor of this type. The conviction may be by guilty verdict or a plea of guilty or no contest. (*B. & P.C. 6068(o)(5).*)
- (f) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board in California or elsewhere. (*B. & P.C. 6068(o)(6).*)
- (g) Reversal of a judgment based in whole or in part on misconduct, grossly incompetent representation, or wilful misrepresentation by the attorney. (*B. & P.C. 6068(o)(7).*)

The reporting requirements apply to claims and proceedings against a law firm or corporation in which the attorney was a partner or shareholder at the time of the conduct unless the attorney has knowledge that the matter has already been reported by the law firm or corporation. (*B. & P.C. 6068(o)(8).*)

B. & P.C. 6068(o) "is only intended to provide that failure to report ... may serve as a basis of discipline." (*B. & P.C. 6068(o)(10).*)

(3) *Reporting by Insurer.* A State Bar member's professional liability insurer, within 30 days of receipt, must report every claim or action for damages against the member for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity. (*B. & P.C. 6086.8(b).*) An attorney who does not have insurance must report a settlement, judgment, or arbitration award involving a matter under *B. & P.C. 6068(b)*. (*B. & P.C. 6086.8(c)*; on court's duty to report malpractice judgments, see *B. & P.C. 6086.8(a)*, *infra*, §575.)

SUPPLEMENT: [This section is current through the latest supplement]

(1a) *(New) Online Membership Account.* C.R.C., Rule 9.7, added in 2009, requires members of the State Bar to maintain an online membership account on a secure system provided by the State Bar to report the following:

- (a) The member's office address and telephone number, or if none, another address. (C.R.C., Rule 9.7(a)(1).)
- (b) The member's e-mail address, which may not be disclosed on the State Bar's website without the member's consent. (C.R.C., Rule 9.7(a)(2).)

A member may use the online account for the following: (a) to provide an e-mail address for disclosure to the public on the State Bar website, and (b) to provide additional information as authorized by statute, rule, or Supreme Court directive, or as requested by the State Bar. (C.R.C., Rule 9.7(b).)

Unless otherwise permitted by law or the Supreme Court, the State Bar may not use e-mail as a substitute means of

providing notice that is required to initiate a disciplinary or regulatory proceeding or to otherwise change a member's status involuntarily. (C.R.C., Rule 9.7(c).)

Members without online access or an e-mail address may claim an exemption from these requirements. (C.R.C., Rule 9.7(d).)



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1 Witkin Cal. Proc. Attys § 348

[§ 348] Attorneys Retired From Practice.

Attorneys who retire from practice may be enrolled as inactive members at their own request. (*B. & P.C. 6005, 6006.*) They may become active members on application and payment of the required fees. (*B. & P.C. 6006.*) (On reduced annual fees for retired members, see *infra*, §378.)

Inactive members may not practice law. However, attorneys who are enrolled as inactive members at their own request are considered State Bar members for purposes of the membership periods required to be eligible for judgeships. (*B. & P.C. 6006; Cal. Const., Art. VI, §15.*)

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aa. In General.

1 Witkin Cal. Proc. Attys § 349

[§ 349] In General.

(1) *Grounds for Involuntary Enrollment.* Provision has long existed for the involuntary enrollment as inactive members of attorneys meeting specified criteria. Originally, the statutory provisions were limited to attorneys who were incompetent or insane. The grounds for involuntary inactive enrollment have been broadened substantially. Thus, an attorney may be transferred to involuntary inactive status because of incompetence or insanity (*infra*, §350); because the attorney poses a substantial threat of harm (*infra*, §351); or because of failure to comply with various State Bar reporting or disciplinary requirements (*infra*, §352). (*B. & P.C. 6007*; see *80 A.L.R.4th 136* [validity and construction of procedures for temporary suspension or placement on inactive status of attorney, pending investigation and action on disciplinary charges].)

(2) *Notice of Involuntary Enrollment.* The State Bar disciplinary agency must give notice of a lawyer's involuntary inactive enrollment, and termination of that enrollment, to the same persons and organizations that must be notified of disciplinary action (see *infra*, §629). (*B. & P.C. 6092.5(b)*.)

(3) *Termination of Involuntary Enrollment.* An inactive enrollment must be terminated on proof that the facts that were the basis for the enrollment no longer exist and on the payment of the required fees. (*B. & P.C. 6006, 6007*.)

(4) *Concurrent Disciplinary Proceeding.* The existence of a proceeding or investigation for involuntary enrollment does not automatically abate a disciplinary proceeding (*B. & P.C. 6007(f)*); however, the court may abate the disciplinary proceeding pending findings in the investigation (*Newton v. State Bar (1983) 33 C.3d 480, 483, 484, 189 C.R. 372, 658 P.2d 735*).

(5) *Review by Supreme Court.* The action of the Board of Governors in enrolling a member as an inactive member under *B. & P.C. 6007*, or in refusing to restore the member to active membership after proceedings to terminate the enrollment, is subject to review by the Supreme Court. (*B. & P.C. 6081 et seq.*)

(6) *Rules of Procedure*. Involuntary inactive enrollment proceedings under *B. & P.C. 6007* are governed by the *Rules of Procedure of the State Bar, Rule 400* et seq. (See *infra*, §632 et seq.)

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bb. Incompetence or Insanity.

1 Witkin Cal. Proc. Attys § 350

[§ 350] Incompetence or Insanity.

A member who is incompetent or insane is enrolled as an inactive member. (*B. & P.C. 6005, 6007.*) (See *infra*, §633.) Enrollment is automatic if the determination of incompetency or insanity was made pursuant to any of the following:

- (1) Welf.C. 5300 et seq. (involuntary treatment for imminently dangerous persons). (*B. & P.C. 6007(a).*)
- (2) Welf.C. 6250 (judicial commitment of mentally disordered sex offenders, sexually violent predators, and mentally retarded persons). (*B. & P.C. 6007(a).*)
- (3) Welf.C. 3051, 3106.5, or 3152 (placement in or return to inpatient status at California Rehabilitation Center, for drug addiction or imminent danger of addiction). (*B. & P.C. 6007(a).*)
- (4) A determination of insanity or mental incompetence with confinement for treatment or placement on outpatient status under the Penal Code. (*B. & P.C. 6007(a).*)
- (5) Appointment of a guardian or conservator of the estate, of the person, or both, on account of the member's mental condition. (*B. & P.C. 6007(a).*)
- (6) The member's assertion of a claim of insanity or mental incompetence, rendering the member unable to understand the nature of the proceedings or to assist counsel. (*B. & P.C. 6007(b)(1)*); see *In the Matter of Respondent L.* (1993) 2 Cal. State Bar Ct. Rptr. 454, 460 [no substantive showing is required for inactive enrollment under *B. & P.C. 6007(b)(1)*.]
- (7) A court order assuming jurisdiction over the member's law practice (see *supra*, §85 et seq.). (*B. & P.C. 6007(b)(2).*)

Following a preliminary investigation and formal proceeding, a member may be enrolled as inactive if, due to

mental infirmity or illness or the habitual use of intoxicants or drugs, the member (a) is unable or habitually fails to perform his or her duties or undertakings competently, or (b) is unable to practice law without substantial threat of harm to the interests of clients or the public. (*B. & P.C. 6007(b)(3).*)

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cc. Substantial Threat of Harm.

1 Witkin Cal. Proc. Attys § 351

[§ 351] Substantial Threat of Harm.

An attorney may be involuntarily enrolled as an inactive member on a finding that the attorney's conduct poses a substantial threat of harm to the interests of clients or the public. (*B. & P.C. 6007(c)(1)*; *Conway v. State Bar* (1989) 47 C.3d 1107, 255 C.R. 390, 767 P.2d 657, *infra*, §353.) To make the required finding, each of the following factors must be found, based on all the available evidence, including affidavits:

(1) The attorney has caused or is causing substantial harm to clients or the public. (*B. & P.C. 6007(c)(2)(A)*.)

(2) The clients or the public are likely to suffer greater injury from denial of involuntary inactive enrollment than the attorney is likely to suffer if it is granted, or there is a reasonable likelihood that the harm will reoccur or continue. (*B. & P.C. 6007(c)(2)(B)*.)

(3) There is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter. (*B. & P.C. 6007(c)(2)(C)*.)

Where the evidence shows a pattern of behavior, including acts likely to cause substantial harm, the burden of proof shifts to the attorney to show that there is no reasonable likelihood that the harm will reoccur or continue. (*B. & P.C. 6007(c)(2)(B)*.)

Involuntary inactive enrollment must be ordered when disbarment is recommended in a disciplinary proceeding. (*B. & P.C. 6007(c)(4)*.) (See *infra*, §600.)

The involuntary inactive enrollment must terminate on proof that the attorney's conduct no longer poses a substantial threat of harm to the interests of clients or the public. (*B. & P.C. 6007(c)*.)

The Board of Governors has adopted rules of procedure to implement *B. & P.C. 6007(c)*. (*B. & P.C. 6007(c)(5)*; see *Rules of Procedure of the State Bar, Rule 461 et seq.*, *infra*, §§636, 637.)

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dd. Noncompliance With Reporting or Disciplinary Requirements.

1 *Witkin Cal. Proc. Attys* § 352

[§ 352] Noncompliance With Reporting or Disciplinary Requirements.

(1) *Attorney Not Complying With Reporting Requirements.* An attorney may be involuntarily enrolled as an inactive member on a finding based on all the available evidence, including affidavits, that the attorney has not complied with the reporting requirements of *B. & P.C. 6002.1* (supra, §347) and cannot be located after reasonable investigation. (*B. & P.C. 6007(c)(1)*.) The involuntary inactive enrollment must terminate when the attorney proves compliance with the statute. (*B. & P.C. 6007(c)*.)

(2) *Attorney Violating Probation.* An attorney may be involuntarily enrolled as an inactive member on the occurrence of all of the following: (a) The attorney is under a suspension order any portion of which has been stayed during probation; (b) the board finds that probation has been violated; (c) the board recommends actual suspension because of the probation violation or other disciplinary matter. (*B. & P.C. 6007(d)(1)*; see *In the Matter of Tiernan* (1996) 3 Cal. State Bar Ct. Rptr. 523, 531 [State Bar Court should order involuntary inactive enrollment under *B. & P.C. 6007(d)* only when necessary for public protection].)

The board must terminate the involuntary inactive enrollment upon expiration of a period equal to the period of stayed suspension, or until the court makes an order regarding the recommended actual suspension, whichever occurs first. (*B. & P.C. 6007(d)(2)*.) A period of involuntary inactive enrollment must be credited against any actual suspension. (*B. & P.C. 6007(d)(3)*.)

(3) *Attorney Not Answering Disciplinary Notice.* An attorney must be involuntarily enrolled as an inactive member for failure to answer a properly served statutory notice initiating a disciplinary proceeding within the time allowed. (*B. & P.C. 6007(e)(1)*.) Inactive enrollment must be terminated when the default is set aside or the disciplinary proceedings are completed. (*B. & P.C. 6007(e)(2)*.) Enrollment (but not termination) under *B. & P.C. 6007(e)* is administrative in character, and no hearing is required. (*B. & P.C. 6007(e)(3)*.) (See *Rules of Procedure of the State Bar, Rule 500* [conditions for involuntary inactive enrollment].)

(4) *Attorney Not Complying With Arbitration Fee Award.* The State Bar must enforce unpaid arbitration fee awards by placing the attorney on involuntary inactive status until the award is paid. (*B. & P.C. 6203(d)*; see *supra*, §232 et seq.)

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ee. Constitutional Requirements.

1 Witkin Cal. Proc. Attys § 353

[§ 353] Constitutional Requirements.

Conway v. State Bar (1989) 47 C.3d 1107, 255 C.R. 390, 767 P.2d 657, involved a challenge to the procedures (Rules of Procedure of the State Bar, former Rule 789 et seq.) for involuntary inactive enrollment under *B. & P.C. 6007(c)* (attorney posing substantial threat of harm; supra, §351). *Held*, the procedures satisfied the requirements of due process.

(a) *Notice*. The rules offer a fair opportunity to prepare and present a defense, by requiring at least 10 days' notice of the hearing date, authorizing a continuance of an additional 10 days on a showing of good cause, and providing for the right, by subpoena, to compel the attendance of witnesses and the production of books and papers. (47 C.3d 1117.) Although an attorney facing involuntary inactive enrollment under *B. & P.C. 6007(b)* (mental infirmity or illness or habitual use of intoxicants or drugs; supra, §350) has more time to prepare and a full range of formal discovery devices, those safeguards are not required here. Under *B. & P.C. 6007(c)*, the attorney must have caused, or be causing, substantial harm, and there must be a reasonable threat that harm will recur or continue. The possibility that the attorney's conduct will endanger clients or the public is far greater under *B. & P.C. 6007(c)*, and additional time "would significantly increase the risk of the very harm the statute was meant to forestall." (47 C.3d 1117.)

(b) *Evidence and witnesses*. (1) The use of hearsay evidence in affidavits is permissible. "The interest in a prompt decision served by the use of affidavits and hearsay evidence outweighs whatever increase in accuracy of decision might result from a ban on such evidence." (47 C.3d 1118.) (2) The right to confront and cross-examine witnesses is not required in this context, involving only a temporary deprivation of the right to pursue a profession. (47 C.3d 1118.)

(c) *Prejudice in subsequent proceedings*. The speed with which an involuntary inactive enrollment is completed does not create a likelihood of prejudice in subsequent disciplinary proceedings. The involuntary enrollment order and findings have no probative value in a formal disciplinary proceeding, the attorney is entitled to a full range of discovery procedures, the hearing panel is different, and any final order is subject to review by the *State Bar Court and the Supreme Court*. (47 C.3d 1119.)

(d) *Referee*. The use of a single referee to preside over the hearing and decide the application is permissible. (47 C.3d 1120.) And allowing the referee's order to take effect before review by the Supreme Court does not result in an unconstitutional delegation of judicial power to the State Bar. "[T]he statutory authorization for the State Bar to order involuntary inactive enrollment in exigent circumstances, subject to our immediate and plenary review, cannot reasonably be said to 'defeat or materially impair' the inherent prerogatives of this court." (47 C.3d 1120, footnote 7.)

(e) *Disposition of underlying charges*. Plaintiff argues that failure to guarantee a prompt final disposition of the underlying disciplinary charges violates due process. (47 C.3d 1120.)

(1) Because the procedures under *B. & P.C. 6007(c)* reduce the time an attorney has to meet the charges and give fewer rights than enjoyed by attorneys facing adverse action under other statutes, "a final disposition is required at some point to validate the procedures governing the predeprivation hearing." The 1988 Legislature contemplated such a proceeding by adding *B. & P.C. 6007(c)(3)*, requiring the underlying disciplinary matter to be expedited if an attorney is placed on inactive status. The State Bar has not yet promulgated rules to implement this provision and it is not "appropriate for us to establish any fixed constitutional limits at this juncture." (47 C.3d 1121.)

(2) In *Cleveland Bd. of Education v. Loudermill* (1985) 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494, the Supreme Court held that a delay of 9 months between a temporary suspension and a final adjudication was not unconstitutional per se. (47 C.3d 1121.) "We need not here attempt to determine when delay in the final disposition of the underlying disciplinary charges would amount to a denial of due process, although we would question whether a time span of more than one year from inception to the decision of the review department could be countenanced in any circumstances." (47 C.3d 1122.)

Two justices dissented. (See 17 *Pepperdine L. Rev.* 258; 80 *A.L.R.4th* 136 [validity and construction of procedures for temporary suspension or placement on inactive status of attorney, pending investigation and action on disciplinary charges]; on current procedures, see *Rules of Procedure of the State Bar*, Rule 461 et seq., infra, §§636, 637.)

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4. Constitutionality of State Bar Act.

1 Witkin Cal. Proc. Attys § 354

[§ 354] Constitutionality of State Bar Act.

The constitutionality of the State Bar Act has been upheld against a number of different kinds of attack. (See *In re Shattuck* (1929) 208 C. 6, 9, 279 P. 998; *State Bar v. Superior Court* (1929) 207 C. 323, 340, 278 P. 432; *People v. Ring* (1937) 26 C.A.2d Supp. 768, 70 P.2d 281 [prohibition against "practice of law" by unlicensed person was sufficiently definite to form basis of criminal prosecution].) The principal constitutional issue, whether the Legislature could enter into the field of judicial power, was resolved by the holding that the State Bar, in its regulation of practice and conduct of attorneys, functions as an arm or branch of the court, making recommendations only. All of its rules of professional conduct, its rules of procedure, and its disciplinary measures, are subject to the approval of the Supreme Court, and the court itself may act contrary to a recommendation or independently of any recommendation. (*Brydonjack v. State Bar* (1929) 208 C. 439, 444, 446, 281 P. 1018.)

In *Brydonjack*, a Canadian attorney, concededly possessed of sufficient qualifications, made a motion in the Supreme Court for admission to practice. The sole question was whether the court had the power to admit an applicant in the absence of a favorable recommendation by the State Bar through its Committee of Bar Examiners. The motion was granted. The court pointed out that in prior decisions it had been established that the State Bar has no judicial powers over discipline, and it necessarily follows that it can have no like powers over admission to practice. The function of the examiners is to investigate and recommend, not to make final orders. "Our conclusion, then, is that the legislature in its wisdom has placed at the disposal of this court a competent and effective body to aid it in the important function of admissions to the bar. The applicants are to first submit themselves to this bureau for investigation, and after this is done the power in this court is plenary to admit those who have in our opinion met the prescribed test, whether the investigators do or do not agree with this conclusion." (208 C. 446.)

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5. Use of Compulsory State Bar Dues.

1 Witkin Cal. Proc. Attys § 355

[§ 355] Use of Compulsory State Bar Dues.

(1) *Lathrop Case*. In *Lathrop v. Donohue* (1961) 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191, involving the Wisconsin integrated bar, appellant had objected to paying dues because some of the money collected was allegedly being used to promote legislation to which he was opposed. The main opinion did not decide whether an attorney could be thus compelled to contribute to the support of political activities, because he did not specify particular measures. (81 S.Ct. 1839, 6 L.Ed.2d 1206.) Concurring justices thought the constitutional issue was present and that a state nevertheless may condition the right to practice law on membership in an integrated bar. (81 S.Ct. 1840, 1849, 6 L.Ed.2d 1208, 1218.) Two justices, dissenting, thought the exaction unconstitutional. (81 S.Ct. 1850, 1856, 6 L.Ed.2d 1218, 1225.) (See 75 Harv. L. Rev. 133.)

(2) *Keller Case*. In *Keller v. State Bar* (1989) 47 C.3d 1152, 255 C.R. 542, 767 P.2d 1020, 21 members of the State Bar filed an action against the State Bar and its Board of Governors, attacking the use of members' dues to finance lobbying, amicus curiae briefs, and other activities, including election campaign activities, politically or ideologically objectionable to plaintiffs. The Supreme Court held that the State Bar functioned as a governmental agency and was thus relieved from constitutional constraints on the use of its dues. (47 C.3d 1166, 1167.)

However, the California Supreme Court was reversed in *Keller v. State Bar* (1990) 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1, a unanimous opinion.

(a) The plurality in *Lathrop* expressly reserved judgment on Lathrop's claim of violation of the First Amendment right of free speech; petitioners here present this claim for decision. (110 S.Ct. 2233, 110 L.Ed.2d 11.)

(b) In *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, 7 Summary (10th), *Constitutional Law*, §385, the court held that agency shop dues of objecting employees could not be used to support political and ideological causes of the union. Several federal and state courts have applied the *Abood* analysis to integrated bar associations. (110 S.Ct. 2233, 110 L.Ed.2d 12.)

(c) Contrary to the California Supreme Court's characterization, the California State Bar "is a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies.'" Its funding comes

from dues levied on its members; only lawyers admitted to practice are members, and its services in governance of the profession are essentially advisory in nature: Admission to practice, discipline and establishment of codes of conduct are functions reserved to the *Supreme Court*. (110 S.Ct. 2234, 110 L.Ed.2d 12.) There is, by contrast, "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of the employee unions and their members, on the other." (110 S.Ct. 2235, 110 L.Ed.2d 13.)

(d) "The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." (110 S.Ct. 2235, 110 L.Ed.2d 13.)

(e) The guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal service. Petitioners assert that the State Bar has engaged in "lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor-piercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing air pollution; and (4) requesting Congress to refrain from enacting a guest worker program or from permitting the importation of workers from other countries." The complaint also alleges that the conference of delegates, funded by the State Bar, endorsed a gun control initiative, disapproved statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endorsed a nuclear weapons freeze initiative, and opposed federal legislation limiting federal court jurisdiction over abortions, public school prayer, and busing. (110 S.Ct. 2236, 110 L.Ed.2d 15.)

(f) "Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession." (110 S.Ct. 2237, 110 L.Ed.2d 15.)

(3) *Portion of Dues Is Voluntary*. As a result of *Keller*, the State Bar may not use the dues of dissenting members to finance political or ideological activities. Thus, adopting the procedure outlined in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986) 475 U.S. 292, 106 S.Ct 1066, 89 L.Ed.2d 232, 7 Summary (10th), *Constitutional Law*, §385, and approved in *Keller*, each year the State Bar indicates in its annual dues statement that portion of the fees attributable to "nonchargeable" activities and permits members to reduce their payments by that amount. (See *Brosterhous v. State Bar* (1995) 12 C.4th 315, 323, 335, 341, 48 C.R.2d 87, 906 P.2d 1242 [State Bar arbitration of claims regarding amount of dues attributable to political and ideological activities is not entitled to preclusive effect; hence, member dissatisfied with decision could seek injunction and damages under 42 U.S.C., §1983 (see 8 Summary (10th), *Constitutional Law*, §816)]; *Ventura v. State Bar* (1995) 35 C.A.4th 1055, 1059, 1060, 41 C.R.2d 794 [district attorney had standing to challenge State Bar's calculation of *Hudson* fees deduction from bar dues]; *B. & P.C. 6140.05*, infra, §378 [optional deduction requirement in annual statement]; 40 A.L.R.4th 672 [use of compulsory bar dues for activities from which particular member dissents].)

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6. Attorney Diversion and Assistance Program.

1 Witkin Cal. Proc. Attys § 356

[§ 356] Attorney Diversion and Assistance Program.

(1) *In General.* The Attorney Diversion and Assistance Act (B. & P.C. 6230 et seq.) created the Attorney Diversion and Assistance Program in 2001 to provide services for the treatment and recovery of attorneys impaired from drug or alcohol abuse or mental illness, so that the attorneys may be "returned to the practice of law in a manner that will not endanger the public health and safety." (B. & P.C. 6230.) The State Bar administers the program (B. & P.C. 6231, 6232(a)), and must actively inform attorneys and the general public of it (B. & P.C. 6236). Neither the program nor its authorization limits or alters the Supreme Court's power to discipline or disbar attorneys. (B. & P.C. 6237.) (See 22 California Lawyer 34 (January 2002) [help for addicted attorneys].) (For rules implementing program, see *Rules of Procedure of the State Bar, Rule 800* et seq.)

(2) *Attorney Under Investigation.* An attorney under active investigation by the State Bar may enter the program in the following ways:

(a) By referral of the Office of the Chief Trial Counsel. (B. & P.C. 6232(b)(1).)

(b) By referral of the State Bar Court following the initiation of a disciplinary proceeding. (B. & P.C. 6232(b)(2).)

(c) Voluntarily, and under terms and conditions agreed to by the attorney participant and Office of the Chief Trial Counsel or on approval by the State Bar Court, provided the investigation is based primarily on the self-administration of drugs or alcohol or the illegal possession, prescription, or nonviolent procurement of drugs for self-administration, or on mental illness, and does not involve actual harm to any person. The attorney may be required to agree that violations of attorney discipline statutes may be prosecuted if the attorney is terminated from the program for noncompliance with program requirements. (B. & P.C. 6232(b)(3).)

Neither acceptance into nor participation in the program relieves an attorney of lawful duties and obligations under agreements or stipulations with the Office of the Chief Trial Counsel, court orders, or applicable attorney discipline statutes. (B. & P.C. 6232(c).)

An attorney entering the program under B. & P.C. 6232(b) may be enrolled as an inactive member of the State Bar,

or may have practice restrictions imposed, including restrictions on the scope of practice and monetary accounting procedures. (*B. & P.C. 6233.*) (On inactive status generally, see *supra*, §348 et seq.)

On successful completion of the program and compliance with any conditions of probation, an attorney on inactive status may receive credit for the period of inactive enrollment towards periods of actual suspension and is eligible for reinstatement to active status and removal of the practice restrictions. The attorney is also entitled to a dismissal of the underlying allegations or a reduction in the recommended discipline. (*B. & P.C. 6233.*)

(3) *Attorney Not Under Investigation.* An attorney who is not under investigation may voluntarily enter the program on a confidential basis, either by self-referral or referral by a third party. Confidentiality is absolute unless waived by the attorney. (*B. & P.C. 6232(d).*)

(4) *Confidentiality.* Information provided to or obtained by the program is treated as follows:

(a) Confidential unless waived by the attorney. (*B. & P.C. 6234(a).*)

(b) Exempt from disclosure under *B. & P.C. 6086.1* (*infra*, §568). (*B. & P.C. 6234(b).*)

(c) Not discoverable or admissible in a civil or disciplinary proceeding without the written consent of the attorney participant. (*B. & P.C. 6234(c).*)

Except with respect to *B. & P.C. 6232(d)*, these limitations on the disclosure and admissibility of information do not apply to information relating to an attorney's noncooperation with, or unsuccessful completion of, the program, or to information otherwise obtained by the Office of the Chief Trial Counsel by independent means or from other lawful sources. (*B. & P.C. 6234(e).*) (See *Rules of Procedure of the State Bar, Rule 806* [confidentiality].)

(5) *Costs.* Participants in the program are responsible for all expenses relating to treatment and recovery. The State Bar may also charge a reasonable administrative fee to participants for the purpose of offsetting the costs of maintaining the program. However, the State Bar must establish a financial assistance program to ensure that no attorney is denied acceptance into the program solely due to an inability to pay. (*B. & P.C. 6235.*) (On support of program through annual dues from State Bar membership, see *B. & P.C. 6140.9*; *infra*, §378.)

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VII. REGULATION OF PRACTICE

C. Admission to Practice.

1. In General.

a. General Conditions.

1 Witkin Cal. Proc. Attys § 357

[§ 357] General Conditions.

Certain conditions apply to all applicants for admission; others separately apply to the admission of students ("general applicants"; see *infra*, §360) and to the admission of out-of-state attorneys ("attorney applicants"; see *infra*, §362). (See Rules Regulating Admission to Practice Law, Rule II; *Rest.3d, The Law Governing Lawyers* §2; 8 *Hastings Const. L. Q.* 202 [review of Supreme Court decisions on constitutionality of state regulations on admission to practice]; 49 *U.C.L.A. L. Rev.* 93 [bar admission inquiries regarding mental health and Americans With Disabilities Act]; on unconstitutionality of citizenship requirement, see *infra*, §358.)

A person seeking admission to the California State Bar must meet the following requirements:

(1) The applicant must be at least 18 years of age. (*B. & P.C. 6060(a), 6062(a)(1).*)

(2) The applicant must be of good moral character. (*B. & P.C. 6060(b), 6062(a)(2), (b)(2)*; see *Konigsberg v. State Bar* (1961) 366 U.S. 36, 81 S.Ct. 997, 1001, 6 L.Ed.2d 105, 111, footnote 4 [pointing out that all 50 states, Puerto Rico, and Washington, D.C., prescribe this qualification and regularly place the burden on applicant to demonstrate it]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §24; on investigation and proof, see *infra*, §365 et seq.)

(3) The applicant must comply with certain educational requirements. (See *infra*, §360 et seq.)

(4) "No person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law." (*B. & P.C. 6064.1*; see *infra*, §§375, 376.)

An applicant cannot be denied admission on the basis of *ex parte* statements. Due process requires notice, confrontation, and a hearing. (See *Willner v. Committee on Character & Fitness* (1963) 373 U.S. 96, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224, 230; 2 *A.L.R.3d* 1266 [procedural due process requirements involving applications for admission to bar]; 7 *Summary* (10th), *Constitutional Law*, §§661, 664.) (On permissible use of federal tax identification number or other identifying number in lieu of Social Security number at time of application, see *B. & P.C. 6060.6*.)

SUPPLEMENT: [This section is current through the latest supplement]

State Bar Rules: Under the new organizational structure of the State Bar Rules, provisions governing the admission to practice law are now contained in State Bar Rules, Rule 4.1 et seq.



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C. Admission to Practice.

1. In General.

b. Invalid Citizenship and Residency Requirements.

1 Witkin Cal. Proc. Attys § 358

[§ 358] Invalid Citizenship and Residency Requirements.

(1) *Citizenship Requirement.* The citizenship requirement of former B. & P.C. 6060(a) was held unconstitutional in *Raffaelli v. Committee of Bar Examiners* (1972) 7 C.3d 288, 101 C.R. 896, 496 P.2d 1264. Petitioner, a native of Italy, established a permanent home in California as a foreign student, graduated from college and law school, and passed the bar examination in 1969. He also married an American citizen and became a permanent resident alien eligible for naturalization in 1974. He was refused admission to the bar on the basis of the citizenship requirement and sought mandamus. *Held*, writ of review granted.

(a) *Unconstitutional discrimination against aliens.* Decisions of the United States Supreme Court, the lower federal courts, and state courts, including California's, have held the exclusion of aliens from various occupations and benefits a denial of equal protection. (7 C.3d 292.) Moreover, the following asserted compelling state interests are insufficient to support exclusion from the practice of law:

(1) An attorney must "appreciate the spirit of American institutions." An alien is entirely capable of gaining an understanding of the theory and practice of the American governmental and social system. (7 C.3d 296.)

(2) An attorney must take an oath to support the Constitutions of the United States and California. This is a permissible requirement, but an alien can take the oath, legally and in fact; e.g., a resident alien may be drafted and then take the same oath as other inductees. (7 C.3d 297.) Other cases reject the notion that an alien by reason of that status is lacking in loyalty to this country. (7 C.3d 298.)

(3) An attorney must remain accessible to clients and subject to the control of the bar. The suggestion that an alien might be interned or deported involves an unforeseeable emergency, and a similar risk of inconvenience is involved in the possibility of disability or disbarment of any attorney. (7 C.3d 299.)

(4) The practice of law is a privilege, not a right. This notion has been disparaged and virtually rejected in later cases. (7 C.3d 300, citing *Baird v. State Bar of Arizona* (1971) 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639, *infra*, §376.) "Manifestly we cannot undertake to exhume legal theories so freshly and firmly buried." (7 C.3d 300.)

(5) An attorney is an "officer of the court" and therefore "should be a citizen." There is no demonstrable connection between the two assertions; an alien can meet the responsibilities of a member of the bar. (7 C.3d 300.)

(b) *Other professions compared.* "The law of California today permits an alien to earn his livelihood within our state as a doctor, a dentist, a nurse, a banker, a certified public accountant, an engineer, an architect or a contractor. Moreover, the Attorney General has formally concluded ... that United States citizenship may not constitutionally be required of those who wish to pursue such occupations as teacher or peace officer ... pharmacist, psychologist, psychiatric technician, clinical social worker, private investigator, or insurance broker. ... In its own way, each of these professions is as sensitive a repository of public trust as the profession of attorney." (7 C.3d 303.)

The United States Supreme Court subsequently reached the same conclusion as that in *Raffaelli*. (See *In re Griffiths* (1973) 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910, 8 Summary (10th), *Constitutional Law*, §725.)

The citizenship requirements in *B. & P.C. 6060* (students) and *B. & P.C. 6062* (out-of-state attorneys) were eliminated in 1972.

(2) *Residency Requirement.* Residency requirements have also been ruled unconstitutional. (See *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 105 S.Ct. 1272, 1280, 84 L.Ed.2d 205, 216, 7 Summary (10th), *Constitutional Law*, §614 [New Hampshire rule limiting admission to state residents violates of Privileges and Immunities Clause of U.S. Const., Art. IV, §2, of federal Constitution]; *Barnard v. Thorstenn* (1989) 489 U.S. 546, 109 S.Ct. 1294, 1299, 1302, 103 L.Ed.2d 559, 568, 572 [residency requirement for admission to Virgin Islands Bar violates federal Privileges and Immunities Clause]; *Frazier v. Heebe* (1987) 482 U.S. 641, 107 S.Ct. 2607, 2611, 96 L.Ed.2d 557, 565 [rule of Federal District Court for Eastern District of Louisiana requiring Louisiana bar members to reside or maintain office within district was invalid under Supreme Court's inherent supervisory powers].)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Admission to Practice.

1. In General.

c. Procedure.

1 Witkin Cal. Proc. Attys § 359

[§ 359] Procedure.

(1) *Registration.* All applicants for admission to practice law in California must register with the Committee of Bar Examiners of the State Bar of California. A general applicant must register within 90 days of beginning the study of law. Those who register later than 90 days must pay a late fee. An attorney applicant must register with the Committee before filing an initial application to take the California bar examination. (Rules Regulating Admission to Practice Law, Rule V, §§1, 2.) (On schedule of fees, see Rules Regulating Admission to Practice Law, Appendix.)

(2) *Committee of Bar Examiners.* The Committee examines all applicants for admission and administers the admission requirements. The Committee certifies to the California Supreme Court those persons who fulfill all requirements. A person refused certification may have the action reviewed by the Supreme Court. (Rules Regulating Admission to Practice Law, Rules I, IX.) (On moral character investigation, see *infra*, §364 et seq.) (On composition of committee, including nonattorney members, see *B. & P.C. 6046, 6046.5.*)

(3) *Applications.* Applications that must be filed with the Committee include the following (Rules Regulating Admission to Practice Law, Rule VI):

- (a) An Application for Determination of Moral Character.
- (b) An Application for Extension of Determination of Moral Character.
- (c) An Application to Take the California Bar Examination.
- (d) An Application to Take the First-Year Law Students' Examination.

Until admitted to practice, applicants must keep their applications current, and updates must be submitted to the Committee within 30 days of the change. Rules Regulating Admission to Practice Law, Rule VI. (For forms, see State Bar website: www.calbar.ca.gov.)

SUPPLEMENT: [This section is current through the latest supplement]

State Bar Rules: Under the new organizational structure of the State Bar Rules, provisions governing the admission to practice law are now contained in State Bar Rules, Rule 4.1 et seq.



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C. Admission to Practice.

2. Educational Requirements.

a. Student Applications.

1. Eligibility for Bar Examination.

1 Witkin Cal. Proc. Attys § 360

[§ 360] Eligibility for Bar Examination.

(1) *In General.* To be eligible for the bar examination, a student applicant must have completed at least 2 years of college work or have attained in apparent intellectual ability the equivalent of that work. (*B. & P.C. 6060(c).*) In addition, the applicant must either (a) have received either a juris doctor (J.D.) degree or a bachelor of laws (L.L.B.) degree from an accredited law school, or (b) have studied 4 years under specified conditions and have passed any preliminary examination the Committee of Bar Examiners may prescribe. (*B. & P.C. 6060(e)*; see Rules Regulating Admission to Practice Law, Rules V [registration], VI [applications], VII [educational requirements], VIII [examinations]; *44 A.L.R.4th 910* [validity, construction and application of bar admission educational requirements]; on fees, see *B. & P.C. 6063*; on refunds of application fees and limits on late fees, see *B. & P.C. 6060.3*.)

(2) *Unaccredited Law Schools.* Student applicants may not be required to pass different final bar examinations based on the manner or school in which they acquired their legal education. (*B. & P.C. 6060.5*.) However, credit is given for study in an unaccredited law school only if it meets certain standards, and a similar requirement of standards applies to correspondence school study. (*C.R.C., Rule 9.30*.)

An unaccredited law school must provide a "disclosure statement" to every student prior to the payment of any registration fee. The statement must contain information as to the school's unaccredited status, its assets and liabilities, the success of its students in bar examinations, its library and faculty, and its attempts to obtain accreditation. (*B. & P.C. 6061*.) (On violation, investigation, and enforcement by Attorney General, see *Educ.C. 94361 et seq.*)

(3) *"Baby Bar."* Students at unaccredited law schools must pass the First-Year Law Students' Examination, commonly known as the "baby bar," before receiving credit for any further study; this examination must be given twice a year at reasonable intervals. (*B. & P.C. 6060(h)*; see Rules Regulating Admission to Practice Law, Rules VII, §6, and VIII, §1; *Bib'le v. Committee of Bar Examiners* (1980) 26 C.3d 548, 551, 162 C.R. 426, 606 P.2d 733 [first year examination requirement is constitutional].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* Under the new organizational structure of the State Bar Rules, provisions governing the admission to practice law are now contained in State Bar Rules, Rule 4.1 et seq.



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2. Educational Requirements.

a. Student Applications.

2. Bar Examination.

1 Witkin Cal. Proc. Attys § 361

[§ 361] Bar Examination.

A qualified applicant must pass the bar examination (*B. & P.C. 6060(g)*), which is graded in accordance with standards established by the Committee of Bar Examiners. (Rules Regulating Admission to Practice Law, Rule VIII; see *Johnson v. State Bar* (1968) 268 C.A.2d 437, 444, 74 C.R. 11 [passing grade of 70% is proper requirement].) The bar examination includes both an examination in professional responsibility and a general bar examination or attorneys' examination; and no person who fails may be certified for admission to practice. (*B. & P.C. 6060(f)*; Rules Regulating Admission to Practice Law, Rule VIII; see *Segretti v. State Bar* (1976) 15 C.3d 878, 890, 126 C.R. 793, 544 P.2d 929, *infra*, §628 [professional responsibility examination as condition of reinstatement].)

In *Hoover v. Ronwin* (1984) 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590, plaintiff challenged the grading of bar examinations by the Arizona Supreme Court's committee on examinations as a violation of the Sherman Act. *Held*, the committee's actions were those of the supreme court, and the state action doctrine of immunity from antitrust liability applied. (104 S.Ct. 1998, 80 L.Ed.2d 602.)

SUPPLEMENT: [This section is current through the latest supplement]

State Bar Rules: Under the new organizational structure of the State Bar Rules, provisions governing the admission to practice law are now contained in State Bar Rules, Rule 4.1 et seq.



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2. Educational Requirements.

b. Out-of-State Attorney Applicants.

1 Witkin Cal. Proc. Attys § 362

[§ 362] Out-of-State Attorney Applicants.

B. & P.C. 6062 distinguishes between (1) attorneys admitted to practice in a sister state, United States jurisdiction, possession, territory, or dependency, and (2) those admitted to practice in a foreign state or country. The statute provides as follows:

(1) *Sister state, etc.* The applicant must have passed the general bar examination given by the examining committee. However, an applicant who has been an active member in good standing of the Bar of the admitting sister state or other qualifying jurisdiction for at least 4 years immediately preceding the first day of the examination applied for may elect to take the Attorneys' Examination instead of the general bar examination. Attorneys admitted *less* than 4 years and attorneys admitted 4 years or more in another jurisdiction but who have not been active members in good standing in the admitting jurisdiction for at least 4 years immediately preceding the first day of the examination applied for must take the general bar examination administered to general applicants. (*B. & P.C. 6062(a)(3).*) The applicant must have passed an examination in professional responsibility or legal ethics as the examining committee may prescribe. (*B. & P.C. 6062(a)(4).*) (On general conditions applicable to all applicants, see *supra*, §357; see also Rules Regulating Admission to Practice Law, Rule IV(2) [applicant may elect to take attorneys' examination instead of entire bar examination].)

(2) *Foreign state or country.* The applicant must have passed the general bar examination given by the examining committee (*B. & P.C. 6062(b)(3)*), and an examination in professional responsibility or legal ethics (*B. & P.C. 6062(b)(4)*). (See Rules Regulating Admission to Practice Law, Rule IV(3) [applicant must take entire bar examination]; *14 A.L.R.4th* 7 [validity, construction, and effect of reciprocity provisions for admission to bar of attorney admitted to practice in another jurisdiction].)

SUPPLEMENT: [This section is current through the latest supplement]

State Bar Rules: Under the new organizational structure of the State Bar Rules, provisions governing the admission to practice law are now contained in State Bar Rules, Rule 4.1 et seq.



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2. Educational Requirements.

c. Rights of Unsuccessful Applicants.

1 Witkin Cal. Proc. Attys § 363

[§ 363] Rights of Unsuccessful Applicants.

Applicants who fail either the student or attorney examination have the right to inspect their papers and grades (*B. & P.C. 6065*), and may seek review in the Supreme Court for having been refused certification for admission (*B. & P.C. 6066*; see *C.R.C.*, Rule 9.13(d)). (See *57 A.L.R.4th 1212* [access to bar exam questions and answers].)

Review proceedings have uniformly upheld the decisions and procedure of the Committee of Bar Examiners; and efforts to induce the court to modify the standards or methods of examination, or to make an independent determination of the fitness of a particular applicant, have failed. *In the Matter of an Investigation of the Conduct of the Examination for Admission to Practice Law (1934) 1 C.2d 61, 33 P.2d 829*, stated the attitude of the California Supreme Court: "[I]f any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition, or coercion, or that in any other manner he was prevented from a fair opportunity to take the examinations, this court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court." (*1 C.2d 64.*) (See *Salot v. State Bar (1935) 3 C.2d 615, 617, 45 P.2d 203* [petitioner failed examination seven successive times and failed to show unfair treatment]; *Staley v. State Bar (1941) 17 C.2d 119, 121, 109 P.2d 667* [dissenting opinion contains examination questions and petitioner's answers]; *39 A.L.R.3d 719* [judicial review].)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Moral Character.

a. Investigation by Committee.

1. In General.

1 Witkin Cal. Proc. Attys § 364

[§ 364] In General.

(1) *Validity of Screening Procedure.* The requirement of good moral character is implemented by an investigation procedure directed by the Committee of Bar Examiners. (See Rules Regulating Admission to Practice Law, Rule X; *Martin B. v. Committee of Bar Examiners* (1983) 33 C.3d 717, 721, 190 C.R. 610, 661 P.2d 160, *infra*, §369.)

Screening procedures of this type are valid, so long as they respect constitutional freedoms. (*Law Students Civil Rights Research Council v. Wadmond* (1971) 401 U.S. 154, 91 S.Ct. 720, 728, 27 L.Ed.2d 749, 760 [New York statutory and rule procedure was upheld against claim that any screening system is a threat and that only valid investigation is for serious, concrete character deficiency]; see 85 *Harv. L. Rev.* 212 [scope of character investigations; United States Supreme Court cases]; 4 *San Fernando Valley L. Rev.* 317 [guidance in meaning of good moral character requirement]; 5 *U.C. Davis L. Rev.* 84 [general study of good moral character requirements in California].)

(2) *Investigation Is Confidential.* All State Bar investigations or proceedings concerning an applicant's moral character must be confidential unless the applicant, in writing, waives confidentiality. However, records of the proceeding are subject to lawfully issued subpoenas. (*B. & P.C. 6060.2*.) (See *In the Matter of Lapin* (1993) 2 Cal. State Bar Ct. Rptr. 279, 292 [State Bar was compelled to disclose identity of potential witnesses to applicant who waived confidentiality].)

(3) *Criminal History Information and Fingerprinting.* State and local court, law enforcement, and licensing agency personnel are required to assist the State Bar in investigations related to admission to practice and to furnish state and local summary criminal history information. Also, the State Bar must require applicants to be fingerprinted to establish identity and to determine whether they have criminal records. Information obtained from fingerprinting must be limited to establishing identity, determining character and fitness for admission, and discovering prior and subsequent arrests. Fingerprint records of unsuccessful applicants are destroyed within 1 year after denial of admission. The records of admitted applicants are retained for the limited purpose of criminal arrest notification. (*B. & P.C. 6054*.)

(4) *Violation of School Rules.* A disciplinary action taken against a person for a violation of university or law

school rules may not be used as the sole basis for denying the person admission to practice. (*B. & P.C. 6060.1(a).*)
However, this prohibition does not apply to violations that involve moral turpitude or result in criminal prosecution. (*B. & P.C. 6060.1(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

State Bar Rules: Under the new organizational structure of the State Bar Rules, provisions governing the admission to practice law are now contained in State Bar Rules, Rule 4.1 et seq.



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3. Moral Character.

a. Investigation by Committee.

2. Duties of Applicant and Attorneys.

1 *Witkin Cal. Proc. Attys* § 365

[§ 365] Duties of Applicant and Attorneys.

(1) *Applicant's Duty of Disclosure.* "[I]rrespective of the outcome of any charges preferred against an applicant for admission to practice law in this state, whether he be convicted, acquitted or the charges dismissed, a duty rests upon said applicant to make a full disclosure of such charges to the committee charged with the duty and the responsibility of investigating his fitness to practice law in this state. We are aware that this requirement calls for a high degree of frankness and truthfulness on the part of the attorney making application for admission to practice law in this state, but no good reason presents itself why such a high standard of integrity should not be required. This duty to make a full disclosure is an absolute duty and a justification for a failure to perform it is not to be found in the excuse that an applicant has been advised by some person, no matter how high in official position that person may stand, that such disclosure is not necessary, nor by the sophistic argument that the charges having been dismissed or the disbarment proceedings dropped, in effect no charges were preferred or proceedings instituted." (*Spears v. State Bar* (1930) 211 C. 183, 187, 294 P. 697; see A.B.A. Model Rules of Professional Conduct, Rule 8.1 [attorney's duty of candor and truthfulness in application for admission and in disciplinary matters].)

(2) *Attorney's Duty To Aid Investigation.* A member of the State Bar must not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar. (*Rules of Professional Conduct, Rule 1-200(A).*) Also, a member may not further an application for admission to the State Bar of a person known by the member to be unqualified "in respect to character, education, or other relevant attributes." (*Rules of Professional Conduct, Rule 1-200(B).*) However, these prohibitions do not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to the admission. (*Rules of Professional Conduct, Rule 1-200(C).*) (See *infra*, §412.)

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a. Investigation by Committee.

3. No Liability for Delay in Investigation.

1 Witkin Cal. Proc. Attys § 366

[§ 366] No Liability for Delay in Investigation.

In *Engel v. McCloskey* (1979) 92 C.A.3d 870, 155 C.R. 284, the governmental immunity statutes (see 5 *Summary (9th)*, *Torts*, §136 et seq.) were invoked to deny the recovery of damages for an unreasonable delay in investigation. Thus, Rules Regulating Admission to Practice Law, Rule X does not create a mandatory duty within the meaning of *Govt.C. 815.6* (92 C.A.3d 880); any acts of alleged negligence were immune from liability under *Govt.C. 818.4* and *821.2* (92 C.A.3d 882); acceptance of plaintiff's application and fee did not create a contractual obligation (92 C.A.3d 883); the investigation, though delayed, did not violate plaintiff's federal constitutional rights (92 C.A.3d 884); and the alleged intentional acts to harm plaintiff were immunized by *Govt.C. 821.6* (92 C.A.3d 886). (See *Greene v. Zank* (1984) 158 C.A.3d 497, 513, 204 C.R. 770 [State Bar acts as arm of Supreme Court in conducting preadmission investigation, and State Bar and its officials are entitled to absolute quasi-judicial immunity from damages liability in civil rights action under 42 U.S.C., §1983].)

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3. Moral Character.

b. Review of Committee's Decision.

1 Witkin Cal. Proc. Attys § 367

[§ 367] Review of Committee's Decision.

(1) *Application.* The Committee of Bar Examiners must notify the applicant of its determination of the applicant's moral fitness qualifications within 180 days. (Rules Regulating Admission to Practice Law, Rule X.) An applicant who receives an adverse moral character determination by the Committee may file an application for a moral character proceeding and hearing before the State Bar Court. The application and supporting documents must be filed within 60 days of service of notice of the Committee's determination and must be accompanied by a copy of the notice, the applicable filing fee, and proof of service of copies on the Committee and the Office of Chief Trial Counsel. (*Rules of Procedure of the State Bar, Rule 681.*)

(2) *Response.* A response, which must include a statement of the grounds on which the application is opposed, must be filed within 120 days of service of the application or within the time period granted by the court. (*Rules of Procedure of the State Bar, Rule 682.*)

(3) *Abatement.* The court, on motion of a party or on its own motion, may order the proceeding abated for the time and on the terms it deems proper. Abatement generally stays the proceeding and tolls all time limitations in the State Bar Court, but the court may order perpetuation of evidence. Other forms of relief, such as continuances of trial and withdrawal of an application, are preferred to abatement and must be granted in lieu of abatement unless the court determines that there is no other adequate remedy. (*Rules of Procedure of the State Bar, Rule 683(a)*; on factors to be considered in ruling on motion for abatement, see Rule 683(b).)

(4) *Decision.* The decision of the hearing judge, or of the Review Department if review is granted, is the final State Bar Court decision, and, unless review is granted by the Supreme Court, is binding on all parties. (*Rules of Procedure of the State Bar, Rule 686.*)

(5) *Review by Supreme Court.* Either the applicant or the Committee of Bar Examiners may petition for review by the Supreme Court of the final decision in a moral character proceeding. (See C.R.C., Rules 9.13(d), 9.15, *infra*, §§615, 616.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Admission to Practice.

3. Moral Character.

c. Proof of Good Character.

1. Burden on Applicant.

1 Witkin Cal. Proc. Attys § 368

[§ 368] Burden on Applicant.

The burden of establishing good moral character is on the applicant, and an adverse recommendation by the State Bar will not be overruled without a convincing showing by the applicant. (Rules Regulating Admission to Practice, Rule X; see *Law Students Civil Rights Research Council v. Wadmond* (1971) 401 U.S. 154, 91 S.Ct. 720, 725, 27 L.Ed.2d 749, 758; *Spears v. State Bar* (1930) 211 C. 183, 190, 191, 294 P. 697 [proof was insufficient to sustain burden or overturn recommendations]; *In re Garland* (1934) 219 C. 661, 28 P.2d 354 [failure to disclose prior criminal acts and illegal practice of law; application denied]; *Bernstein v. Committee of Bar Examiners* (1968) 69 C.2d 90, 95, 70 C.R. 106, 443 P.2d 570, *infra*, §373; *Greene v. Committee of Bar Examiners* (1971) 4 C.3d 189, 93 C.R. 24, 480 P.2d 976, *infra*, §373; *Seide v. Committee of Bar Examiners* (1989) 49 C.3d 933, 937, 938, 264 C.R. 361, 782 P.2d 602 [court may refuse to admit applicant to practice law on proof that would not justify disbarment]; *In re Menna* (1995) 11 C.4th 975, 47 C.R.2d 2, 905 P.2d 944, *infra*, §373 [applicant previously disbarred in another state has same burden as disbarred California attorney to prove fitness for admission in California].)

However, in a number of cases the Supreme Court, on the basis of the applicant's statements and supporting letters of recommendation from attorneys, judges, and other persons of repute, has overruled the Committee and granted the application. (See, e.g., *Harrington v. State Bar* (1930) 210 C. 514, 292 P. 456; *In re McCue* (1930) 211 C. 57, 293 P. 47; *Warbasse v. State Bar* (1933) 219 C. 566, 28 P.2d 19; *In re Stepsay* (1940) 15 C.2d 71, 98 P.2d 489; *Hallinan v. Committee of Bar Examiners* (1966) 65 C.2d 447, 55 C.R. 228, 421 P.2d 76, *infra*, §371; *Siegel v. Committee of Bar Examiners* (1973) 10 C.3d 156, 110 C.R. 15, 514 P.2d 967, *infra*, §370; *Hall v. Committee of Bar Examiners* (1979) 25 C.3d 730, 159 C.R. 848, 602 P.2d 768, *infra*, §371; *Martin B. v. Committee of Bar Examiners* (1983) 33 C.3d 717, 190 C.R. 610, 661 P.2d 160, *infra*, §369; cf. *Hightower v. State Bar* (1983) 34 C.3d 150, 157, 158, 193 C.R. 153, 666 P.2d 10 [Committee was ordered to certify petitioner as qualified or to hold further hearings on issue of rehabilitation]; *Lubetzky v. State Bar* (1991) 54 C.3d 308, 285 C.R. 268, 815 P.2d 341, *infra*, §371.)

A number of annotations have considered various aspects of the subject. (See 88 A.L.R.3d 1055 [violation of draft laws as affecting character for purposes of admission to bar]; 39 A.L.R.4th 567 [bar admission as affected by alcohol abuse]; 105 A.L.R.5th 217 [sexual conduct or orientation as ground for denial of admission to bar]; 107 A.L.R.5th 167

[falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on good moral character]; 108 *A.L.R.5th* 289 [failure to pay creditors as affecting applicant's moral character for purposes of admission to bar]; 3 *A.L.R.6th* 49 [criminal record as affecting applicant's moral character for purposes of admission to bar]; 8 *A.L.R.6th* 1 [falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on good moral character; conduct unrelated to admission to bar].)

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2. Right to Due Process.

1 Witkin Cal. Proc. Attys § 369

[§ 369] Right to Due Process.

"In its investigation ... it is important that the Committee maintain a certain degree of integrity. An applicant must be afforded a fair and reasonable opportunity to defend himself against the charges being investigated. When no such opportunity has been given, we must use our supervisory power over the Committee to invalidate the proceedings." (*Martin B. v. Committee of Bar Examiners* (1983) 33 C.3d 717, 721, 190 C.R. 610, 661 P.2d 160.)

In *Martin B.*, petitioner, while in the Marine Corps in 1972, was charged with two counts of rape; at the trial he was acquitted on the first count, and the charges on the second were dismissed after the jury deadlocked 11-1 for acquittal. Despondent and bitter because the military had not assisted him during his trial, petitioner developed a drinking problem. In 1973 he was charged with filing a false claim against the United States Government, pleaded guilty before a special court martial, and was sentenced to hard labor, forfeiture of pay, and reduction in grade to private. Nevertheless, he continued to serve, received medals and an honorable discharge, attended college and law school, and applied for admission to the Bar.

The Committee initiated an investigation and the State Bar Court held hearings, taking testimony of witnesses on the rape charges, and concluding that petitioner was guilty of the acts charged and had lied to the State Bar Court in maintaining his innocence. The State Bar Court also found the false claim conviction to be indicative of bad moral character despite his admission of guilt and expression of remorse. On the basis of these findings the Committee refused to certify petitioner for admission. *Held*, case remanded for further proceedings.

(a) *Denial of due process on rape charge.* (1) The criminal trial took place 10 years ago; no trial transcript existed and no reporter's notes were kept; hence, petitioner could not cross-examine the complaining witnesses on possibly inconsistent prior statements. (2) Several of petitioner's witnesses had become unavailable and their former testimony had not been preserved. (3) The trial judge was dead. (4) Petitioner could not refresh his own memory of the incidents. (33 C.3d 717, 718.) "We therefore conclude that the 'retrial' conducted by the State Bar Court and the Committee was fundamentally unfair, and any conclusions drawn therefrom must be disregarded." (33 C.3d 723.)

(b) *Conclusion that petitioner lied.* The State Bar Court's conclusion that petitioner lied in his testimony regarding the 1972 rape charges was equivalent to finding him guilty of the charges, because the alleged falsehood was his claim of innocence. Hence, this conclusion was subject to the same infirmities as the finding of guilt. (33 C.3d 724.) Moreover, a finding of falsehood based on a denial of guilt, after 10 years of insistence on his innocence, was improper. "[I]t would leave the door open to a dangerous practice by the Committee to force applicants previously acquitted of criminal charges, or even merely arrested with charges later dropped, to 'admit' guilt. Not only does such coercion damage one's reputation and self-esteem, it forces applicants to lie." (33 C.3d 725.)

(c) *The false claim charge.* This appears to have been an isolated incident of dishonesty of a despondent young man of 21 who later matured and had an unblemished record. Participation in unlawful incidents at an early age has been regarded as youthful indiscretion, and the passage of 9 years with an exemplary record would have been a sufficient showing of rehabilitation to justify reinstatement if petitioner had been a disbarred attorney. In view of this record, the filing of the false claim was, by itself, insufficient to justify nonadmittance. (33 C.3d 726.)

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3. Free Speech Considerations.

1 Witkin Cal. Proc. Attys § 370

[§ 370] Free Speech Considerations.

In *Siegel v. Committee of Bar Examiners* (1973) 10 C.3d 156, 110 C.R. 15, 514 P.2d 967, the Supreme Court overruled the Committee's refusal to certify the applicant for admission.

(a) *Petitioner's prima facie case.* Petitioner had a long history of academic achievement, civic and political activities, and strong endorsements of character from responsible sources. (10 C.3d 160.)

(b) *Committee's findings.* The Committee, on a consideration of petitioner's activities as president of the Associated Students of the University of California in 1969 and 1970, found that he made speeches at rallies that contained incitements to violence (e.g., "go down there and take the park"--referring to a place where police were stationed to prevent trespassing on University property); that he could see no objection to "burning down the Bank of America and all of its 500 branches"; and that in his sworn testimony before the Committee he falsely stated that he had never advocated violence. (10 C.3d 172.)

(c) *Review by court: free speech considerations.* In determining whether petitioner testified falsely, the constitutional right must be considered; for, if a speaker knows that at some future time he or she may be called on to interpret the remarks before a body concerned with admission to professional status, the speaker may feel constrained to confine public utterances to statements wholly free of ambiguous and provocative aspects. (10 C.3d 175.) Hence, when different reasonable inferences are possible, the inference favoring the applicant should be drawn; i.e., the burden will be discharged if it is shown that "there is a reasonable basis for concluding that he was not lying when he characterized the thrust and meaning of his speeches." (10 C.3d 176.)

(d) *Test.* The First Amendment requires a test "sternly weighted in favor of the applicant in cases of this kind. ... The test which we adopt and apply today insures that the denial of certification in such a case can be upheld only if it be concluded *beyond any reasonable doubt* that the appellant's version not only is objectively false but has been advanced by him with an intent to deceive the Committee." (10 C.3d 178.)

The court constantly stressed the point that it did not reach the issue whether petitioner did in fact advocate unlawful violence; and the opinion refers to "troublesome aspects" of the case--petitioner's speeches and testimony in explanation were often "confusing, rambling, and difficult to grasp," and the speeches "frequently deteriorate into sheer rant," while his explanations were "equally convoluted and rambling and in places almost smugly pedagogic in their apparent attempt to educate the Committee on the vagaries of petitioner's political life-style." (*10 C.3d 179.*)

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4. Showing Held Sufficient.

aa. Good Moral Character Shown.

1 *Witkin Cal. Proc. Attys* § 371

[§ 371] Good Moral Character Shown.

In *Hallinan v. Committee of Bar Examiners* (1966) 65 C.2d 447, 55 C.R. 228, 421 P.2d 76, petitioner, 29 and a graduate of an accredited law school, passed the bar examination, but was denied admission on the ground that he did not possess the required "good moral character." The Committee specified five grounds (violent behavior, disregard for the rights of others, disrespect for law, untruthfulness, and lack of moral fitness, arising out of civil disobedience activities and fistfights). *Held*, admission ordered.

(a) *Same test for discipline and admission.* In disciplinary proceedings, though findings are given great weight, they are not binding; the court weighs the evidence and resolves any reasonable doubts in favor of the accused. (65 C.2d 450.) Earlier cases distinguished admission from disciplinary proceedings, on the theory that an attorney had a vested property right in practice, while an applicant sought a privilege. However, the person who invests time in legal education should acquire some right. Also, under controlling federal decisions, an applicant is entitled to procedural due process. This makes "it impossible for us to regard admission to the profession as a mere privilege." (65 C.2d 452, footnote 3.) "Fundamentally, the question involved in both situations is the same--is the applicant for admission or the attorney sought to be disciplined a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude." (65 C.2d 453.) Hence, "in considering the kinds of acts which would justify excluding a candidate for admission we may look to acts which have been relied upon to sustain decisions to disbar or suspend individuals previously admitted to practice." (65 C.2d 453.)

(b) *Good character was shown.* Petitioner established a prima facie case, meeting his initial burden of showing the decision erroneous, by letters and testimony of judges, teachers, and lawyers. (65 C.2d 454.) Moreover, the Commission's conclusion that he had a fixed and dominant propensity for lawlessness was unsupported by the evidence:

(1) The civil disobedience activities, although involving some misdemeanor convictions, did not show a character that would obstruct the administration of justice. He expressly repudiated violence, his demonstrations were peaceful, and his opinions on the necessity for the acts were shared by many idealistic youths, legal scholars, and other eminent

people. (65 C.2d 461.) Though intentional violations of law should be punished, exclusion from a chosen profession is not a proper sanction. (65 C.2d 462.)

(2) The fistfights took place mainly in petitioner's youth, 6 years before his application. Petitioner admitted his fault as to most of them, and stated that he had outgrown his pugnacious attitude; others were provoked and in some respects a result of his father's social views. (65 C.2d 464.) These acts do not bear a direct relationship to fitness to practice law. (65 C.2d 472.)

In *Hall v. Committee of Bar Examiners* (1979) 25 C.3d 730, 159 C.R. 848, 602 P.2d 768, petitioner was denied certification for admission because of his alleged lack of remorse and candor concerning acts committed more than 6 years before the application. He submitted substantial evidence of his good moral character (25 C.3d 734, 735); and a detailed analysis of the facts of his prior misconduct demonstrated that they would not, standing alone, justify denial of admission (25 C.3d 742). His present insistence on innocence was not a reflection of lack of respect for law; he refused, in effect, "to become the fraudulent penitent for his own advantage" (25 C.3d 744), and he "should not be denied the opportunity to practice law because he is unwilling to perform an artificial act of contrition." (25 C.3d 745.)

In *Lubetzky v. State Bar* (1991) 54 C.3d 308, 285 C.R. 268, 815 P.2d 341, petitioner was denied admission because he had not proved his good moral character. The hearing panel relied on four grounds: misuse of the judicial process by filing lawsuits for purposes of harassing former friends, in particular F; omission from his bar application of certain litigation; improper taping of two telephone conversations with F; sending obscene mail to F and others. *Held*, the charges were either not sustained or did not evidence bad moral character.

(a) *Prima facie case*. Petitioner had a long history of volunteer work and presented testimonials from attorneys, friends, former teachers, and others, meeting his burden of establishing a prima facie case. (54 C.3d 314, 315.)

(b) *Pattern of litigation harassment*. This finding was based on a defamation action against A in 1975 and on litigation against F, which began in 1983 and eventually involved three suits, including another defamation action. (54 C.3d 315, footnote 5.) The hearing panel concluded that it "seemed" that a pattern of harassment existed, but the panel did not identify any similarities between the 1975 action and the 1983 litigation or find that any of the actions lacked merit. "[W]e are reluctant to credit so tentative a finding of moral turpitude based on undisclosed grounds. ... [A] more carefully articulated assessment of the evidence, leading to precisely formulated findings, is demanded." (54 C.3d 317.) An independent review of the evidence reveals no similarities between the 1975 and 1983 litigation, no indication that the actions (in all but one of which petitioner was represented by counsel) were frivolous, and no basis to conclude that they were improper. (54 C.3d 317, 318.)

(c) *Omissions in bar examination applications*. Petitioner took the bar examination numerous times between 1980 and 1987; he filed a "long form" application in 1980, then filed "short form" applications thereafter. The hearing panel found that he failed to list the F litigation and a previously sealed action regarding records against the University of California Regents. However, by 1986 petitioner knew that the State Bar was aware of the F litigation, and he disclosed both that and the Regents suit after passing the bar examination and before he was notified of the moral character proceedings against him. He had no motive to lie, and the omissions appear to be unintentional and not grounds for exclusion from the Bar. (54 C.3d 319.)

(d) *Unconsented taping of telephone conversations*. These calls strongly inculpated F, rather than petitioner, as the source of the obscene mail and of related hang-up telephone calls. Petitioner taped the calls only after receiving advice from a police detective and a county prosecutor that it was legal to do so under certain circumstances. However, rather than use the tapes in resolving the pivotal issue--who was responsible for the obscene mail--the hearing panel used them for the dubious purpose of finding an additional ground to deny petitioner admission. (54 C.3d 320.) Under P.C. 633.5, the unconsented taping of the conversations was legal because its purpose was to discover evidence of violation of P.C. 653m (annoying telephone calls). Hence, this evidence does not support a finding of moral turpitude. (54 C.3d 321.)

(e) *Obscene mail*. The evidence strongly suggested that F, the principal recipient of the mail and petitioner's main accuser, was the source, and the hearing panel conceded that F's testimony was impeached and his credibility destroyed. Petitioner's fingerprint did appear on one postcard, but his explanation, that F had duped him into depositing the print and then lifted it onto the postcard, was supported by expert testimony and was plausible. (54 C.3d 323.) Aside from the fingerprint, there was virtually no evidence to inculcate petitioner, and an independent review of the evidence is not persuasive that petitioner was responsible for the obscene mail. (54 C.3d 324.) (See *Siegel v. Committee of Bar Examiners* (1973) 10 C.3d 156, 110 C.R. 15, 514 P.2d 967, supra, §370; *Martin B. v. Committee of Bar Examiners* (1983) 33 C.3d 717, 725, 190 C.R. 610, 661 P.2d 160, supra, §369.)

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bb. Rehabilitation Shown.

1 Witkin Cal. Proc. Attys § 372

[§ 372] Rehabilitation Shown.

The significance of the approach in *Hallinan v. Committee of Bar Examiners* (1966) 65 C.2d 447, 55 C.R. 228, 421 P.2d 76, supra, §371, is highlighted in *March v. Committee of Bar Examiners* (1967) 67 C.2d 718, 63 C.R. 399, 433 P.2d 191. Although moral character is a subject of initial inquiry by the Committee, the Supreme Court establishes the criteria, reviews the evidence, and exercises an independent judgment in each case. However, *March* goes further; it introduces a concept of pre-admission rehabilitation, under which an applicant whose previous bad moral character was sufficiently shown may nevertheless be admitted on a showing of repentance.

Petitioner, a former labor organizer, was a member of the Communist Party at various times. He testified falsely under oath before the House Committee on Un-American Activities, made false statements to a union trial committee and in a union appeal, and concealed the facts in his registration as a law student, in his application to take the bar examination, and in his application for admission to practice. He passed the examination but the Committee refused certification. *Held*, he was entitled to admission.

(a) The court did not reach the question whether his false testimony showed unfitness to practice law; its decision was made "on the assumption that this conduct constituted moral turpitude." (67 C.2d 731.)

(b) "[I]t appears from a careful reading of petitioner's testimony before the bar examiners that he has convincingly demonstrated his rehabilitation and that he is morally qualified to become a member of the bar." He was candid, "admitted freely that his prior conduct was unjustifiable," and that his answers before the House Committee were "false." (67 C.2d 731.) He also stated that his study of the law brought a realization "that there are more ethical means of achieving goals than those he had adopted in the past." (67 C.2d 732.) Also, favorable recommendations "by an unusual number of attorneys" were entitled to great weight. (67 C.2d 732.)

(c) Rehabilitation is "a state of mind," and the law favors rewarding persons who achieve it. (67 C.2d 732.) (See *Pacheco v. State Bar* (1987) 43 C.3d 1041, 1057, 239 C.R. 897, 741 P.2d 1138 [rehabilitation established]; *Kwasnik v.*

State Bar (1990) 50 C.3d 1061, 1069, 1072, 269 C.R. 749, 791 P.2d 319 [rehabilitation established where misconduct involved 20-year-old drunk driving incident and wrongful death action against applicant; State Bar could not deny admission solely on basis of applicant's failure to pay judgment despite its discharge in bankruptcy].)

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5. Showing Held Insufficient.

1 *Witkin Cal. Proc. Attys* § 373

[§ 373] Showing Held Insufficient.

In *Bernstein v. Committee of Bar Examiners* (1968) 69 C.2d 90, 70 C.R. 106, 443 P.2d 570, the evidence supported the Committee's findings of forgery, fraud, misleading statements in a pleading, false testimony in a trial, and false testimony in an administrative proceeding. Petitioner contended that his behavior was the result of psychological difficulties, and that psychiatric care had rehabilitated him. The Supreme Court rejected his defense, but only for the present; the opinion holds out hope for better luck the next time: "We think that the burden properly rests on him to prove by sustained conduct over a period of time that he is in fact rehabilitated and of good moral character. In the future he may file with respondent a new application or petition for reconsideration." (69 C.2d 107.)

In *Greene v. Committee of Bar Examiners* (1971) 4 C.3d 189, 93 C.R. 24, 480 P.2d 976, minor false statements were deemed not serious, but concealment of the following justified denial of the application: a separate maintenance action, an annulment, a federal court action seeking a declaration of invalidity of the decrees in this marital litigation, and a nonsupport arrest warrant. Petitioner intentionally withheld the information, and this conduct "was in knowing disregard of the truth and shows a lack of the requisite good moral character." (4 C.3d 201.) (See *Seide v. Committee of Bar Examiners* (1989) 49 C.3d 933, 938, 264 C.R. 361, 782 P.2d 602 [multiple arrests, conviction and prison sentence for drug-related offenses; rehabilitation not shown].)

In *re Menna* (1995) 11 C.4th 975, 47 C.R.2d 2, 905 P.2d 944, involved an applicant with a significant background of compulsive gambling and excessive alcohol use. In 1984, he was permanently disbarred in New Jersey following felony convictions for theft of client funds, failure to file a state income tax return, and manufacture of methamphetamine. After 5 months' incarceration, successful completion of parole, and a failed business, he moved to California for purposes of eventually obtaining admission to practice law. The Committee of Bar Examiners declined to recommend him for admission, but the State Bar Court found that he possessed the good moral character required for admission, and the Committee of Bar Examiners sought review of that decision. *Held*, State Bar Court's recommendation rejected and applicant denied admission.

(a) *Disbarred applicant from another state.* Generally, a disbarred California attorney seeking readmission must

adduce stronger proof of present honesty and integrity than one seeking admission for the first time. Thus, an applicant for reinstatement must show by the most clear and convincing evidence that efforts made toward rehabilitation have been successful. Applicants who have been disbarred in another state stand in essentially identical circumstances to a disbarred California attorney, and the evidence of rehabilitation must be evaluated under the same rigorous standards. Further, having been previously disbarred, the applicant is not entitled to have all reasonable doubts resolved in his favor. (11 C.4th 986.)

(b) *Evidence of good character was insufficient.* Applicant submitted substantial evidence that his previous misconduct resulted from a gambling addiction that he had successfully overcome. He also presented 29 letters of character reference attesting to his good moral character and unblemished record since release from prison, and he called a number of additional witnesses to appear on his behalf. This evidence, although impressive, did not demonstrate overall rehabilitation by clear and convincing evidence. While undoubtedly relevant, character testimony alone does not establish rehabilitation. (11 C.4th 988.)

(c) *Proof required.* Proof of rehabilitation must include a lengthy period of exemplary conduct. Here, applicant had made almost no effort at restitution, and he failed to establish an objectively verifiable effort, reasonably related to his ability to pay, to do so. Restitution is not necessarily determinative of whether rehabilitation has been proved, but it is a substantial factor to be considered. (11 C.4th 990.) Moreover, although the applicant exhibited genuine remorse, remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented by sustained conduct over an extended period of time showing fitness to practice law. (11 C.4th 991.)

In re Gossage (2000) 23 C.4th 1080, 99 C.R.2d 130, 5 P.3d 186, involved an applicant whose history included alcohol and heroin addiction, forgery, theft, and the bludgeoning death of his sister, for which he spent 21/2 years in prison on conviction of voluntary manslaughter. While on parole and probation, applicant engaged in repeated drunk driving and other Vehicle Code violations, thefts, heroin use, and further felonious behavior, for which he was returned to prison for 2 years. On his release, applicant completed college and law school, but his legal problems persisted during his academic years and beyond, primarily involving a civil action against him, repeated Vehicle Code violations, and traffic fines and bench warrants. Moreover, applicant sustained several misdemeanor convictions for mishandling these matters in court. When applicant applied to the Committee of Bar Examiners for a moral character determination, the application contained incomplete and incorrect answers, including circumstances surrounding default on a student loan and the outcome of a lawsuit. Applicant also omitted 13 criminal convictions and other criminal history. At the State Bar Court hearing, applicant presented 20 witnesses, including law school professors, prominent public officials, and attorneys who described applicant as an honest person who had expressed remorse for killing his sister and for his other crimes. Five mental health professionals opined that applicant had overcome his substance abuse and any personality disorder he had at the time he killed his sister. A majority of the Review Department, without discussing whether voluntary manslaughter and forgery involved moral turpitude, adopted the findings of the hearing panel and found clear and convincing evidence that applicant was rehabilitated and possessed good moral character. *Held*, State Bar Court's recommendation rejected and applicant denied admission.

(a) *Moral turpitude.* Cases authorizing admission on the basis of rehabilitation commonly involve a substantial period of exemplary conduct following the applicant's misdeeds. The more serious the misconduct the stronger the applicant's showing of rehabilitation must be. Here, only a compelling showing of reform will suffice, and central to this determination are the circumstances surrounding applicant's brutal killing of his sister. Applicant's repeated bludgeoning of her, conscious failure to obtain medical assistance, flight, and concealment all show extreme moral turpitude. (23 C.4th 1097.) Moral turpitude is further evidenced by applicant's continued dishonesty, thefts, and heroin possession. Thus, applicant can be found morally fit to practice law only if he can show that since these acts he has behaved in an exemplary fashion over a meaningful period of time. (23 C.4th 1098.)

(b) *Rehabilitation was not shown.* The Review Department, in crediting applicant's 14-year period of rehabilitation between the time he became sober during his second prison term and the time he appeared at the hearing, "defined the notion of rehabilitation more broadly than our cases allow." (23 C.4th 1099.) At worst, applicant's conduct suggests a

hopeless refusal or inability to conform to societal rules when considered in light of the moral turpitude and lawlessness he displayed over the preceding 10-year period. At best, any rehabilitative trend is tenuous and the risk too high that he will disregard legal and ethical obligations if permitted to practice law. (23 C.4th 1099.) Nothing in applicant's testimony negated or diminished the unfavorable character inferences raised by his lawless history. Moreover, the defective admissions application confirms that applicant failed to act with the high degree of frankness, truthfulness, and integrity required by the admissions process. (23 C.4th 1102.) Thus, applicant failed to sustain his burden of proving his own rehabilitation. (23 C.4th 1105.)

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d. Revocation for Fraud.

1 *Witkin Cal. Proc. Attys* § 374

[§ 374] Revocation for Fraud.

Even though an applicant has been admitted, false representations or concealment of misconduct may be grounds for revocation of the license, and the State Bar may bring a proceeding to revoke the order of admission. (See *Bailey v. State Bar* (1930) 209 C. 476, 288 P. 433 [concealment, at time of admission, of prior disbarment in another state; recommendation of disbarment approved]; *State Bar v. Turner* (1948) 31 C.2d 842, 192 P.2d 897 [concealment of petty larceny conviction, and use of name and academic record of deceased person to gain admission to law school and in applying to take bar examination]; *State Bar v. Langert* (1954) 43 C.2d 636, 276 P.2d 596 [concealment of charges of misconduct in another state]; *Goldstein v. State Bar* (1989) 47 C.3d 937, 943, 944, 254 C.R. 794, 766 P.2d 560 [Committee denied certification because of failure to prove good moral character and imposed 3-year waiting period before applicant could reapply, but applicant reapplied for admission before expiration of 3-year period and concealed prior inquiry into character; license revoked]; cf. *State Bar v. Rollinson* (1931) 213 C. 36, 1 P.2d 428 [proceeding for revocation of license; showing of good character was sufficient]; *In re Jung* (1939) 13 C.2d 199, 88 P.2d 679 [proceeding for revocation of license; petitioner sufficiently answered charges of concealment of material facts at time of application, and proceeding was dismissed].)

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4. Loyalty Tests.

a. Konigsberg and Anastaplo Cases.

1 *Witkin Cal. Proc. Attys* § 375

[§ 375] Konigsberg and Anastaplo Cases.

The requirement of loyalty (see *supra*, §357), and the procedures for testing applicants for admission on this issue, have been the subject of extensive discussion by the California and United States Supreme Courts. The divided opinions of both courts in the several cases clearly establish the regulatory power of the states, but leave the constitutional limitations in some doubt.

The first important decision was *Konigsberg v. State Bar* (1957) 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (*Konigsberg I*), in which the United States Supreme Court, on certiorari, rejected the view of the State Bar and California court. Petitioner made a strong and uncontradicted showing of general good character, but was denied admission on the ground that he had failed to overcome doubts of his loyalty by a sufficient affirmative showing. Examining the evidence, the Court held that vague testimony of Communist Party membership in 1941, writings criticizing American foreign, economic, and social policy, and refusal to answer questions about political affiliations and beliefs did not justify the inference of bad moral character. On the general problem of the loyalty test for admission, and the role of the United States Supreme Court, the opinion states: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated--free to think, speak, and act as members of an Independent Bar." (77 S.Ct. 733, 1 L.Ed.2d 825.) (See 15 *Stanf. L. Rev.* 500, 507; 5 *U.C.L.A. L. Rev.* 136.)

Konigsberg v. State Bar (1959) 52 C.2d 769, 344 P.2d 777, was a new proceeding before the Committee of Bar Examiners following *Konigsberg I*. No new evidence was introduced on the issue of petitioner's loyalty; but, despite warnings that this would result in a denial of admission, he again refused to answer questions concerning past or present membership in or affiliation with the Communist Party. The Committee denied certification for admission and the court upheld the denial. "Determination whether petitioner was a member of the party which has been legislatively determined to advocate overthrow of the government was blocked by his refusal to answer. Such refusal likewise effectively prevented the committee from reaching the question whether, if he were such a member, his membership was knowing or innocent. The committee's refusal to recommend him for admission was based upon his refusal to

answer inquiries about his relevant activities--not upon those activities themselves." (52 C.2d 773.) (See dissenting opinions, 52 C.2d 774, 778.)

In *Konigsberg v. State Bar* (1961) 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (*Konigsberg II*), a sequel to the California decision, the Court reasoned as follows:

(a) The California decision did not disregard the first *Konigsberg* opinion. That opinion left open the question whether refusal to answer thwarted a full investigation (81 S.Ct. 1002, 6 L.Ed.2d 112), and it was here squarely answered. "We think it clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications." (81 S.Ct. 1003, 6 L.Ed.2d 113.)

(b) There was no Fourteenth Amendment privilege to refuse to answer these questions. The statutory finding of the relationship of membership in the Communist Party to the danger of illegal acts is legitimate, and "[w]e regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented." (81 S.Ct. 1008, 6 L.Ed.2d 118.)

(c) *Speiser v. Randall* (1958) 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, holding unconstitutional the placing of the burden of proof of loyalty on a tax exemption claimant (see 7 *Summary* (10th), *Constitutional Law*, §484), is distinguishable: "[W]e do not now know where, under California law, would rest the ultimate burden of persuasion on the issue of advocacy of violent overthrow. But it is for the Supreme Court of California first to decide this question. Only if and when that burden is placed by the State on a bar applicant can there be drawn in question the distinction made in the *Speiser* Case between penalizing statutes and those merely denying access to positions where unfitness may lead to the abuse of state-given powers or privileges. The issue is not now before us." (81 S.Ct. 1009, 6 L.Ed.2d 119.) Here, the Committee assumed the burden of proving the affirmative of the complex factual elements amounting to forbidden advocacy of violent overthrow, "but was prevented from attempting to discharge that burden by petitioner's refusal to answer relevant questions." (81 S.Ct. 1010, 6 L.Ed.2d 120.) (See dissent of four justices, mainly along lines of dissents in California opinion; 75 *Harv. L. Rev.* 129; 15 *Stanf. L. Rev.* 500, 512.)

In *Schwartz v. Board of Bar Examiners of State of New Mexico* (1957) 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, the decision of the New Mexico Supreme Court was reversed. Petitioner, who made a convincing showing of good moral character, was denied admission to the bar. The state relied on (a) petitioner's use of an alias between 1934 and 1937 (to conceal his race and overcome discrimination and anti-Semitism in employment relations and union organization); (b) two arrests in 1934 on suspicion of criminal syndicalism (during labor disturbances, without formal charge or conviction); (c) arrest in 1940 for violation of the Neutrality Act in recruiting persons to aid Spanish Loyalists (charges later dropped); (d) admitted membership in the Communist Party between 1932 and 1940, when it was a lawful political party with candidates on the ballot in most states, and during time of "Popular Front" against fascism. *Held*, this evidence did not raise substantial doubts about petitioner's present good character, and the refusal to permit him to qualify for the practice of law was a denial of due process. The Court made it unmistakably clear that the Fourteenth Amendment is appropriately invoked to review denials of admission to practice: "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. ... A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. ... Even in applying permissible standards, officers of the State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." (77 S.Ct. 756, 1 L.Ed.2d 801.) (See 14 *Stanf. L. Rev.* 500, 507.)

In *re Anastaplo* (1961) 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135, involved a university instructor who passed the Illinois bar examination but was denied admission because of his refusal to answer questions of the examining

committee about membership in the Communist Party. His showing of good character was exceptional (war veteran, high endorsements), no suggestion of actual membership in the Party or other subversive associations was made, and his refusal to answer was explained at length by him on ideological grounds. The Committee's position was that failure to reply to this proper question obstructed its lawful processes and functions, and that it could not certify an applicant as worthy of the public trust "when we do not know that he is so worthy and when he has prevented us from finding out." *Held, Konigsberg* was controlling, and it was not a valid constitutional distinction that in the other case there was "some, though weak, independent evidence that the applicant had once been connected with the Communist Party, while here there was no such evidence." (81 S.Ct. 983, 6 L.Ed.2d 140.)

Petitioner charged that due process and equal protection were denied, because the real reason for rejecting him was his constitutionally protected views on the right of revolution against any tyrannical government. The Court said that the record did not sustain this theory; denial of admission was based on his refusal to cooperate in the examination. However, the opinion adds a significant dictum: "[C]ontrary to the assumption on which some of the arguments on behalf of Anastaplo seem to have proceeded, we do not understand that Illinois' exclusionary requirement will continue to operate to exclude Anastaplo from the bar any longer than he continues in his refusal to answer. We find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands." (81 S.Ct. 986, 987, 6 L.Ed.2d 144.)

A strong dissent (four justices) reviews the petitioner's high character and presentation of widely accepted philosophical views, and concludes that "[t]he effect of the Court's 'balancing' here is that any State may now reject an applicant for admission to the Bar if he believes in the Declaration of Independence as strongly as Anastaplo and if he is willing to sacrifice his career and his means of livelihood in defense of the freedoms of the First Amendment." (81 S.Ct. 995, 6 L.Ed.2d 153.)

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4. Loyalty Tests.

b. Baird and Subsequent Cases.

1 Witkin Cal. Proc. Attys § 376

[§ 376] Baird and Subsequent Cases.

In *Baird v. State Bar of Arizona* (1971) 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639, petitioner, a graduate of Stanford Law School, passed the Arizona bar examination, and no charge of bad character was made against her. She answered Question 25 by listing all organizations with which she had been associated since age 16, but refused to answer Question 27 on whether she had ever been a member of the Communist Party or any organization advocating the overthrow of the government by force or violence. The Arizona Board refused to recommend her admission, and the Arizona Supreme Court denied relief. On certiorari, *held*, reversed.

(a) In recent years the Court has been sharply divided on the constitutionality of "inquisitions about beliefs and associations," and the cases contain "confusing formulas, refined reasonings, and puzzling holdings." (91 S.Ct. 704, 27 L.Ed.2d 645.)

(b) The First Amendment was violated here. "In effect this young lady was asked by the State to make a guess" whether any organization to which she ever belonged advocated the overthrow of the government. (91 S.Ct. 705, 27 L.Ed.2d 646.) But the First Amendment prohibits a state from excluding a person from a profession because he is a member of a particular political organization or holds certain beliefs. (91 S.Ct. 706, 27 L.Ed.2d 646.) "And whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes." (91 S.Ct. 706, 27 L.Ed.2d 647.)

(c) The present effect of *Konigsberg* and *Anastaplo* need not be determined; "it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law." (91 S.Ct. 707, 27 L.Ed.2d 647.)

Four justices dissented, arguing that (a) petitioner's refusal was reminiscent of obstructionist tactics, that (b) it was her burden to determine which organization listed was of the prohibited class, (c) nothing indicated her affirmative answer would have denied her admission, and (d) the state has a legitimate interest in determining the character of persons seeking admission to the bar. (91 S.Ct. 710, 27 L.Ed.2d 652.)

In re Stolar (1971) 401 U.S. 23, 91 S.Ct. 713, 27 L.Ed.2d 657, is similar. Petitioner, a graduate of New York University Law School, was admitted to the New York Bar in 1968, giving satisfactory answers to detailed questions about organizations and loyalty. In 1969 he applied for admission to the Ohio Bar. He offered all the information previously given in New York and orally made an unequivocal denial of any subversive associations. But he refused to give written answers to the key questions (membership in organization advocating overthrow, list all names of organizations) on the ground that they infringed his First and Fifth Amendment rights. He was denied admission by the Ohio committee and the Ohio Supreme Court approved the recommendation. *Held*, judgment reversed.

(a) The requirement that petitioner list all of the organizations joined since age 16 is impermissible. "Law students who know they must survive this screening process before practicing their profession are encouraged to protect their future by shunning unpopular or controversial organizations." (91 S.Ct. 716, 27 L.Ed.2d 663.)

(b) The requirement that petitioner state whether he has been a member of an organization advocating overthrow is also impermissible. (91 S.Ct. 717, 27 L.Ed.2d 664.) "Here, as in *Baird* ... , it was a denial of a Bar applicant's First Amendment rights to refuse him admission simply because he declined to answer questions about his beliefs and associations." (91 S.Ct. 717, 27 L.Ed.2d 665.)

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5. Admission and Oath.

1 Witkin Cal. Proc. Attys § 377

[§ 377] Admission and Oath.

(1) *Certification and Order.* An applicant successful in the examination is certified by the Committee and admitted to practice by order of the Supreme Court. (*B. & P.C. 6064.*)

(2) *Oath.* The applicant must take an oath "to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability." (*B. & P.C. 6067*; see *Law Students Civil Rights Research Council v. Wadmond* (1971) 401 U.S. 154, 91 S.Ct. 720, 726, 27 L.Ed.2d 749, 760 [oath requirement is valid].) The applicant is then entitled to practice law in any court of the state unless suspended or disbarred for misconduct (*infra*, §466 et seq.) or enrolled as an inactive member (*supra*, §348 et seq.).

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6. Fees.

1 *Witkin Cal. Proc. Attys* § 378

[§ 378] Fees.

(1) *Membership Fee Requirement.* An annual membership fee is imposed to provide revenue for carrying out the purposes of the State Bar Act. (*B. & P.C. 6140*; see *Carpenter v. State Bar* (1931) 211 C. 358, 360, 295 P. 23; *Abraham v. State Bar* (1941) 17 C.2d 625, 111 P.2d 317; *Herron v. State Bar* (1944) 24 C.2d 53, 64, 147 P.2d 543.) Failure to pay the fee is a ground for suspension from practice, and reinstatement requires the payment of delinquent fees and penalties. (*B. & P.C. 6143*; see *Carpenter v. State Bar*, *supra*, 211 C. 359.)

B. & P.C. 6140 has been extended by the Legislature on an annual or biannual basis. The current statute is effective until January 1, 2009, unless a later enacted statute deletes or extends the date. (*B. & P.C. 6140(d)*.)

The membership fee is payable on or before February 1, but the board may authorize installment payments with interest, by credit card or other means, and may charge an additional fee to defray the costs incurred by the alternative payment method. (*B. & P.C. 6140(b)* [active members], *B. & P.C. 6141(a)* [inactive members].)

Costs assessed in a disciplinary proceeding and penalties imposed under *B. & P.C. 6143* must be paid with the annual membership fee. (*B. & P.C. 6140.7, 6142, 6143*; on assessment of disciplinary costs, see *infra*, §602.)

The membership fee invoice must provide the option of deducting \$ 5 from the annual fee if the member elects not to support lobbying and related activities outside the parameters established by *Keller v. State Bar* (1990) 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1, *supra*, §355. (*B. & P.C. 6140.05(a), (c)*.) (On permissible spending for support or defense of lobbying outside *Keller* parameters and related litigation expenses, see *B. & P.C. 6140.05(b)*.)

(2) *Fee for Active Members.* The base annual active membership fee is fixed by the board and may not exceed a specified statutory amount. Thus, the annual fee in 2008 is \$ 315. (*B. & P.C. 6140(a)*.) Added to the base fee are specified amounts for (a) the disciplinary system, (b) the building fund, (c) the Client Security Fund, and for (d) the Lawyer Assistance Program. (See *infra*, this section.)

(3) *Discount for Low Income Members.* Active members qualify for a waiver of 25% of the annual fee where annual individual total gross income from all sources is less than \$ 40,000. (*B. & P.C. 6141.1(b)*; State Bar Rules and

Regulations, Art. I, §7.1(B).)

(4) *Fee for Inactive Members.* The fee for inactive members may not exceed \$ 75. (*B. & P.C. 6141(a).*) Inactive members who have reached 70 years are exempt from the fee requirement. (*B. & P.C. 6141(b).*)

(5) *Board's Power To Increase Fees.* The board may increase the annual fee as follows:

(a) The annual fee for all members may be increased by no more than \$ 10 for maintaining and upgrading of the board's computerized information technology. (*B. & P.C. 6140.35.*)

(b) The annual fee for active members may be increased by no more than \$ 40 to finance the Client Security Fund (see *supra*, §17); for inactive members, the maximum amount is \$ 10. (*B. & P.C. 6140.55.*)

(c) The annual fee for all members may be increased by no more than \$ 25 to finance costs of the disciplinary system. (*B. & P.C. 6140.6.*)

(d) The annual fee may be increased by \$ 10 per active member, and \$ 5 per inactive member, to pay the costs of the Attorney Diversion and Assistance Program (*B. & P.C. 6230 et seq.*; see *supra*, §356) and related programs. (*B. & P.C. 6140.9.*)

(6) *Voluntary Fees.* The State Bar may collect, in conjunction with its collection of annual membership dues, voluntary fees to fund the California Supreme Court Historical Society, an entity that "advances the science of jurisprudence by preserving and disseminating to the general public the history of the Supreme Court and the Judicial Branch." (*B. & P.C. 6032.*) In addition, the State Bar is authorized to collect annually voluntary financial support for nonprofit organizations that provide free legal services to persons of limited means. (*B. & P.C. 6033.*)

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(1) *Membership Fee Requirement.* *B. & P.C. 6140(d)* was relettered *B. & P.C. 6140(c)* in 2008 and amended to extend *B. & P.C. 6140* until January 1, 2010, unless a later enacted statute deletes or extends that date. (2) *Fee for Active Members.* *B. & P.C. 6140(a)* was amended in 2008 to permit the board to fix the 2009 membership fee for active members at \$ 315.

(5) *Board's Power To Increase Fees.*

(a) *Maintenance and upgrading of computerized information technology:* *B. & P.C. 6140.36* was added in 2008 to impose reporting requirements on the board regarding use of the funds authorized under *B. & P.C. 6140.35* for the maintenance and upgrading of the board's computerized information technology. (*B. & P.C. 6140.36(a).*) *B. & P.C. 6140.36* is effective until January 1, 2012, unless a later enacted statute deletes or extends the date. (*B. & P.C. 6140.36(b).*)

(e) *(New) State Bar facilities:* *B. & P.C. 6140.3* was added in 2008 to authorize the annual fee for all members to be increased by an additional amount of no more than \$ 10 to be used for the construction, purchase, lease or major capital improvements of State Bar facilities. Funds collected between January 1, 2009, and December 31, 2013, must be used for facilities in southern California. If the earmarked funds are not used for southern California facilities, and the Legislature does not later authorize use of the funds for the construction or lease of a facility, the funds must be applied as a one-time credit to each member's annual dues in the amount paid by the member. (*B. & P.C. 6140.3(a), (b).*)

B. & P.C. 6140.3 is effective until January 1, 2014, unless a later enacted statute deletes or extends the date. (*B. & P.C. 6140.3(c).*)



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1. Prohibitions Against Unlawful Practice.

a. Unlicensed Persons.

1. General Prohibitions.

1 Witkin Cal. Proc. Attys § 379

[§ 379] General Prohibitions.

(1) *Active State Bar Members.* The practice of law is restricted to *active members* of the State Bar. (*B. & P.C. 6125*; see *B. & P.C. 6006* [inactive member status and privileges]; *B. & P.C. 6117* [effect of disbarment or suspension]; *Benninghoff v. Superior Court* (2006) 136 C.A.4th 61, 70, 38 C.R.3d 759, supra, §83 [attorney who resigns with charges pending or who is disbarred may not represent parties in state administrative hearings]; *Rest.3d, The Law Governing Lawyers*, §4; 54 Cal. L. Rev. 1331 [unlicensed persons]; 36 Cal. Western L. Rev. 157 [legal software and the unauthorized practice of law]; 8 *Hastings Const. L. Q.* 220 [review of Supreme Court decisions on constitutionality of state regulations on practice of law]; 40 *Hastings L. J.* 577 [Nonlawyers in the Business of Law]; 26 *Pepperdine L. Rev.* 543 [unlicensed practice of law in securities arbitration]; 34 *Stanf. L. Rev.* 1 [constitutional and empirical analysis of prohibition]; 23 Western State L. Rev. 281 [limitations on state regulation of federal practitioners]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §119 et seq.; 7 A.L.R.4th 1146 [unauthorized practice of law by party or attorney as basis of defense or counterclaim]; 25 A.L.R.6th 323 [drafting of documents by nonattorneys as unauthorized practice of law]; on law clerks, see *infra*, §380; on law students, see *infra*, §383 et seq.; on paralegals, see *infra*, §381; on *Rules of Professional Conduct, Rule 1-300*, prohibiting aiding in unauthorized practice of law, see *infra*, §413.)

(2) *Spouses.* Where a husband and wife who are not licensed attorneys bring an action, either may appear in pro. per., but neither may appear as the representative of the other. (*Abar v. Rogers* (1981) 124 C.A.3d 862, 865, 177 C.R. 655; see *In the Matter of Tady* (1992) 2 Cal. State Bar Ct. Rptr. 121, 127 [rendering legal services to wife while inactive constituted unauthorized practice].)

(3) *Power of Attorney.* A power of attorney does not authorize an attorney in fact to act as an attorney at law. (See *People v. Malone* (1965) 232 C.A.2d 531, 537, 42 C.R. 888, *infra*, §401; *Drake v. Superior Court* (1994) 21 C.A.4th 1826, 1830, 1831, 26 C.R.2d 829.)

(4) *Conservator, Executor, or Personal Representative.* A conservator, executor, or personal representative who is not a licensed attorney may not appear in pro. per. on behalf of the estate in matters outside probate proceedings. (*Hansen v. Hansen* (2003) 114 C.A.4th 618, 621, 7 C.R.3d 688 [party claiming to be personal representative of estate

attempted to bring civil complaint in pro. per. on behalf of deceased mother's estate].)

(5) *Trustee*. A trustee who is not a licensed attorney may not represent the trust in an action to protect trust property. In *Ziegler v. Nickel* (1998) 64 C.A.4th 545, 75 C.R.2d 312, plaintiff trustee sued defendant sellers for failure to disclose material defects in a mobilehome sold to the trust. Defendant sought an order to compel plaintiff to withdraw as attorney for the trust on the ground that his representation constituted unauthorized practice of law under B. & P.C. 6125. The trial judge ordered plaintiff to withdraw and retain an attorney to represent the trust. *Held*, affirmed. Under B. & P.C. 6125, one who is not a licensed attorney cannot appear in court for another person. (64 C.A.4th 547.) A trustee must always act solely in the beneficiaries' interest. The actions of the trustee affect the trust estate and therefore affect the interest of the beneficiaries. A nonattorney trustee who represents the trust in court is representing and affecting the interests of the beneficiary and is thus engaged in the unauthorized practice of law. (64 C.A.4th 549.)

However, a different result was reached and *Ziegler* was distinguished in *Finkbeiner v. Gavid* (2006) 136 C.A.4th 1417, 39 C.R.3d 871, where the trustee, F, petitioned the court, in pro. per., to modify and terminate the trust. In ruling that F could not continue without counsel, the trial court relied on *Ziegler*. *Held*, reversed. Unlike the trustee in *Ziegler*, F was not suing a third party, but simply fulfilling her duties as trustee by filing a petition as part of her fiduciary responsibility to the court. Thus, "[s]he was not engaged in the unauthorized practice of law." (136 C.A.4th 1421.)

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1. Prohibitions Against Unlawful Practice.

a. Unlicensed Persons.

2. Law Clerks.

1 Witkin Cal. Proc. Attys § 380

[§ 380] Law Clerks.

Law clerks not admitted to practice in California may do research and perform administrative tasks in a law office. (See *Johnson v. Davidson* (1921) 54 C.A. 251, 257, 202 P. 159; *In re McKelvey* (1927) 82 C.A. 426, 429, 255 P. 834.) However, they are not entitled to do any of the acts that constitute law practice. (See *Crawford v. State Bar* (1960) 54 C.2d 659, 668, 7 C.R. 746, 355 P.2d 490, *infra*, §531; 13 A.L.R.3d 1137 [activities of law clerks as illegal practice of law].)

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a. Unlicensed Persons.

3. Paralegals.

1 Witkin Cal. Proc. Attys § 381

[§ 381] Paralegals.

(1) *In General.* *B. & P.C. 6450* et seq. regulate paralegals. A paralegal is a person who represents himself or herself as a paralegal and is so qualified by education, training, or work experience, and who performs "substantial legal work" under the direction and supervision of an active member of the State Bar or an attorney practicing in the federal courts in California where the work has been "specifically delegated" by the attorney. (*B. & P.C. 6450(a)*.) For this purpose, the terms "paralegal," "legal assistant," "attorney assistant," "freelance paralegal," "independent paralegal," and "contract paralegal" are synonymous. (*B. & P.C. 6454*.)

(2) *Exclusions.* Nonlawyers who provide legal services directly to the public as legal document assistants or unlawful detainer assistants (*B. & P.C. 6450(e)*) and paralegals employed by the state (*B. & P.C. 6456*) are not subject to *B. & P.C. 6450* et seq. (On legal document assistants, see *infra*, §382; on unlawful detainer assistants, see 12 *Summary* (10th), *Real Property*, §705.)

(3) *Authorized Activities.* "Tasks performed by a paralegal include, but are not limited to, case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is permitted by statute, court rule, or administrative rule or regulation." (*B. & P.C. 6450(a)*.)

(4) *Prohibited Practices.* *B. & P.C. 6450(b)* prohibits a paralegal from engaging in the following practices:

(a) Providing legal advice.

(b) Representing a client in court.

(c) Selecting, explaining, drafting, or recommending a legal document to someone other than the paralegal's

supervising attorney.

(d) Acting as a runner or capper.

(e) Engaging in the unlawful practice of law.

(f) Contracting with someone other than an attorney to perform paralegal services.

(g) Inducing someone in connection with paralegal services to invest, purchase a financial product or service, or enter into a transaction for income or profit.

(h) Establishing the fees for the paralegal services provided to the attorney's client.

It is also unlawful to perform services for a consumer except when performed under the direction and supervision of an attorney or other entity that employs or contracts with a paralegal. (*B. & P.C. 6451.*) (See *109 A.L.R.5th 275* [what constitutes unauthorized practice of law by paralegal].)

(5) *Educational Requirements.* *B. & P.C. 6450(c)* and (d) set forth educational requirements. It is unlawful for a person to identify himself or herself as a paralegal unless the educational requirements are met. (*B. & P.C. 6452(a).*)

Every 2 years paralegals are required to complete 8 hours of mandatory continuing legal education, consisting of 4 hours in legal ethics and 4 hours in general law or in an area of specialization. (*B. & P.C. 6450(d).*)

(6) *Attorney Liability.* An attorney who uses a paralegal is liable for harm that results from the paralegal's negligence, misconduct, or violation of *B. & P.C. 6450* et seq. (*B. & P.C. 6452(b).*)

(7) *Consumer Cause of Action.* A consumer injured by a violation of *B. & P.C. 6450* et seq. may bring a civil action. (*B. & P.C. 6455(a).*)

(8) *Criminal Penalties.* First-time violators of *B. & P.C. 6451* or *6452* are guilty of an infraction punishable by a fine of up to \$ 2,500 for each consumer involved. A subsequent violation is a misdemeanor punishable by a fine of \$ 2,500 for each consumer involved, imprisonment in a county jail for up to 1 year, or both. A convicted violator must also pay restitution. (*B. & P.C. 6455(b).*)

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VII. REGULATION OF PRACTICE

D. Unlawful Practice of Law.

1. Prohibitions Against Unlawful Practice.

a. Unlicensed Persons.

4. Legal Document Assistants.

1 Witkin Cal. Proc. Attys § 382

[§ 382] Legal Document Assistants.

(1) *In General.* *B. & P.C. 6400* et seq. govern "legal document assistants," i.e., persons who provide, for compensation, self-help services to members of the public who represent themselves in legal matters. (*B. & P.C. 6400(c)(1)*.) (On "unlawful detainer assistants" also governed by *B. & P.C. 6400* et seq., see 12 *Summary* (10th), *Real Property*, §705; on cases construing preparation of legal documents as constituting practice of law, see *Smallberg v. State Bar* (1931) 212 C. 113, 120, 297 P. 916 [litigation forms: complaints, process, appointment of guardian ad litem]; *Gray v. Justice's Court* (1937) 18 C.A.2d 420, 423, 63 P.2d 1160 [pleadings, instructions]; *People v. Sipper* (1943) 61 C.A.2d Supp. 844, 846, 142 P.2d 960.)

(2) *Exemptions.* The following are exempt from the statutory requirements: (a) government employees; (b) members of the State Bar and their employees, paralegals, or independent contractors; (c) employees of nonprofit, tax-exempt corporations who either assist clients without charge, or are supervised by a member of the State Bar who has malpractice insurance; (d) licensed real estate brokers or salespersons; (e) immigration consultants; (f) registered process servers; (g) persons providing services in the preparation of security instruments or conveyance documents as part of a title or escrow service; (h) persons providing services regulated by federal law; and (i) persons employed by and providing services to a supervised financial institution or holding company. (*B. & P.C. 6401*.)

(3) *Registration and Bond Requirements.* Legal document assistants must register with the county clerk of the county where the principal place of business is located (primary registration) and in any county where the legal document assistant performs acts for which registration is required (secondary registration) (*B. & P.C. 6402*), and post a \$ 25,000 bond or deposit the cash equivalent (*B. & P.C. 6405(a)(1)*). An application for secondary registration need only be accompanied by a certified copy of the bond or cash deposit that is posted with the primary registration. (*B. & P.C. 6405(a)(1)*.) The required bond must be in favor of the State of California for the benefit of persons damaged as a result of specified violations, and must indicate the county in which the bond is filed. (*B. & P.C. 6405(h)*.) The statute specifies various other requirements and prohibitions. (*B. & P.C. 6408* et seq.) (On required contents of registration applications, see *B. & P.C. 6403*; on special bond requirements for partnerships and corporations, see *B. & P.C. 6405*; on renewal of registration, see *B. & P.C. 6406*; on penalties for noncompliance with specified provisions, see *B. & P.C.*

6415.)

(4) *Self-Help Service*. "Self-help service" includes providing the following services to a person representing himself or herself in a legal matter:

(a) Completing legal documents in a ministerial manner at the specific direction of the person engaging in self-representation when the documents are selected by that person. (*B. & P.C. 6400(d)(1).*)

(b) Providing general published factual information that has been written or approved by an attorney regarding legal procedures, rights, or obligations. (*B. & P.C. 6400(d)(2).*)

(c) Making published legal documents available. (*B. & P.C. 6400(d)(3).*)

(d) Filing and serving legal forms and documents at the specific direction of the person engaging in self-representation. (*B. & P.C. 6400(d)(4).*)

(5) *Legal Advice and Recommendations Prohibited*. Legal document assistants may not provide advice, explanations, opinions, or recommendations about possible legal rights, remedies, defenses, options, selection of forms, or strategies. (*B. & P.C. 6400(g).*)

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5. Certified Law Students.

aa. Nature of Program.

1 Witkin Cal. Proc. Attys § 383

[§ 383] Nature of Program.

To provide practical training for law students and increased representation for indigent persons, C.R.C., Rule 9.42, and the State Bar's Rules Governing the Practical Training of Law Students authorize certified law students to engage in a variety of legal activities under the guidance and supervision of licensed attorneys. (See C.R.C., Rule 9.42(d); Rules Governing the Practical Training of Law Students, Rule 5; *infra*, §385; on definition of certified law student, see C.R.C., Rule 9.42(a); Rules Governing the Practical Training of Law Students, Rule 2.1.)

Protection for the client and the public is afforded by requirements that the supervising attorney assume personal professional responsibility for the student's work (Rules Governing the Practical Training of Law Students, Rule 7.3), and that the supervising attorney be personally present during certain proceedings and activities. (See *infra*, §385.)

In *People v. Perez* (1979) 24 C.3d 133, 155 C.R. 176, 594 P.2d 1, defendant, charged with burglary, gave written consent to representation by a certified law student acting under the supervision of a deputy public defender. On appeal his contention that the law student's participation was an impairment of the constitutional right to effective assistance of counsel was rejected, with one justice dissenting. (24 C.3d 138, 145.)

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bb. Student and Attorney Participants.

1 Witkin Cal. Proc. Attys § 384

[§ 384] Student and Attorney Participants.

(1) *Eligibility for Certification.* To be eligible to become a certified law student, the student must meet the following requirements:

(a) Have successfully completed 1 full year of studies (minimum of 270 hours) at an accredited law school, or have passed the First-Year Law Students' Examination (*supra*, §360). (C.R.C., Rule 9.42(c)(1); Rules Governing the Practical Training of Law Students, Rule 3.1.)

(b) Be duly enrolled and in good academic standing in, or have graduated from, law school. (C.R.C., Rule 9.42(c)(2); Rules Governing the Practical Training of Law Students, Rule 3.2.) If a graduate, the student must take and pass the first general bar examination for which the graduate is eligible. (Rules Governing the Practical Training of Law Students, Rules 8.5, 8.6.)

(c) Be enrolled in or have successfully completed academic courses in evidence and civil procedure. (C.R.C., Rule 9.42(c)(3); Rules Governing the Practical Training of Law Students, Rule 3.3.)

(2) *Application.* The student's application for certification must be submitted on a form provided by the State Bar. (Rules Governing the Practical Training of Law Students, Rule 4.1.) The application must include an attestation by a dean of the student's law school that the student meets the requirements of Rule 3.0, that the dean will immediately notify the State Bar in the event that the student no longer meets those requirements, and that the dean has no knowledge indicating the student's lack of ability, training, or character. (Rules Governing the Practical Training of Law Students, Rule 4.2.2.) The student must attest that he or she meets the requirements of Rule 3.0, that the student will immediately notify the committee in the event that he or she no longer meets those requirements, and that the student has read, is familiar with, and will abide by the State Bar's Rules of Professional Conduct and the Rules Governing the Practical Training of Law Students. (Rules Governing the Practical Training of Law Students, Rule 4.2.1.) The supervising attorney must specify the period of supervision and must attest that he or she has read, is familiar with, will

abide by, and will assume responsibility under Rule 7.0 (infra, this section). (Rules Governing the Practical Training of Law Students, Rule 4.2.3.)

(3) *Duration of Certification.* Certification continues for a period specified in the notice of certification but is terminated sooner on the following occurrences:

- (a) The student requests termination. (Rules Governing the Practical Training of Law Students, Rule 8.1.)
- (b) The student or the law school dean notifies the committee that the student no longer meets the requirements of Rule 3.0. (Rules Governing the Practical Training of Law Students, Rules 8.2, 8.4.)
- (c) The supervising attorney terminates supervision. (Rules Governing the Practical Training of Law Students, Rule 8.3.)
- (d) The student fails to take or does not pass the first general bar examination for which he or she is eligible. (Rules Governing the Practical Training of Law Students, Rules 8.5, 8.6.)

Certification may also be withdrawn by the State Bar, but the student must be given 10 days' notice of withdrawal of certification and, if requested within 15 days of the notice, a hearing to show good cause for decertification. (Rules Governing the Practical Training of Law Students, Rules 8.7, 9.0 et seq.; see C.R.C., Rule 9.42(e) [certification to be withdrawn if student fails to comply with requirements of program].)

(4) *Attorney Participants.* The supervising attorney must be an active member of the State Bar and must have practiced law or taught in a law school full-time for at least 2 years. (Rules Governing the Practical Training of Law Students, Rule 7.1.) An attorney who supervises law students full-time as part of a law school or government agency training program may supervise up to 25 students; other attorneys may supervise no more than 5 students concurrently. (Rules Governing the Practical Training of Law Students, Rule 7.2.) The attorney is generally required to assist and counsel the student in authorized activities and to review those activities with the student. (Rules Governing the Practical Training of Law Students, Rule 7.4.) (On definition of "supervising attorney," see Rules Governing the Practical Training of Law Students, Rule 2.2.)

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5. Certified Law Students.

cc. Activities.

1 Witkin Cal. Proc. Attys § 385

[§ 385] Activities.

(1) *Activities Requiring Prior or Final Approval.* A certified law student may (a) enter into negotiations, subject to the supervising attorney's final approval and that attorney's prior approval of the negotiation plan; and (b) give legal advice to a client, subject to the attorney's prior approval of the advice to be given. (C.R.C., Rule 9.42(d)(1); Rules Governing the Practical Training of Law Students, Rule 5.1.1.)

(2) *Activities Requiring Direct Supervision.* In the personal presence and under the direct and immediate supervision of the supervising attorney, and with the client's written consent, a certified law student may appear (a) at the taking of depositions; and (b) at a trial, hearing, arbitration, or proceeding or before an arbitrator, court, public agency, referee, magistrate, commissioner, or hearing officer, to the extent approved by that court, body, or person. (C.R.C., Rule 9.42(d)(2), (d)(3); Rules Governing the Practical Training of Law Students, Rules 5.1.2, 5.1.3; on definition of "personal presence," see Rules Governing the Practical Training of Law Students, Rule 2.4.) The student must first file a copy of the client's consent form. (C.R.C., Rule 9.42(d)(3)(D); Rules Governing the Practical Training of Law Students, Rule 5.1.3.4.)

The student may appear on behalf of a government agency, without the supervising attorney's personal appearance, in the prosecution, including public trial, of criminal infractions or other minor offenses with a maximum punishment equal to that for infractions, subject to court approval. However, the attorney must give prior written approval and must be immediately available to attend the proceeding. (C.R.C., Rule 9.42(d)(4); Rules Governing the Practical Training of Law Students, Rule 5.2.)

(3) *Other Activities.* The student may use the title "Certified Student" in connection with activities performed under the program, but may not otherwise use the title or hold himself or herself out as a member of the State Bar. (Rules Governing the Practical Training of Law Students, Rule 6.0.) The supervising attorney must read and approve documents prepared by the student and must also personally sign pleadings or other papers prior to their filing. (Rules Governing the Practical Training of Law Students, Rule 7.5.)

The student is not prevented from performing advisory or representational activities that a person who is not a member of the State Bar could perform. (Rules Governing the Practical Training of Law Students, Rule 5.3.)

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1. Prohibitions Against Unlawful Practice.

b. Corporations.

1 Witkin Cal. Proc. Attys § 386

[§ 386] Corporations.

(1) *In General.* Traditionally, a corporation cannot practice law; i.e., it cannot represent a client directly or furnish representation by employees who are licensed attorneys. The objection is that the highly personal and fiduciary relationship cannot be established between the client and the corporate representative. "The essential relation of trust and confidence between attorney and client cannot be said to arise where the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel and professional services. The attorney in such a case owes his first allegiance to his immediate employer, the corporation, and owes, at most, but an incidental, secondary and divided loyalty to the clientele of the corporation." (*People v. Merchants Protective Corp.* (1922) 189 C. 531, 538, 209 P. 363; see *People v. California Protective Corp.* (1926) 76 C.A. 354, 360, 244 P. 1089 ["[t]hough all the directors and officers of the corporation be duly licensed members of the legal profession, the practice of law by the corporation would be illegal nevertheless"]; 15 Cal. L. Rev. 243; 44 Harv. L. Rev. 1114; 72 Harv. L. Rev. 1334; 32 So. Cal. L. Rev. 426; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §131 et seq.)

The picture has changed in two important respects:

(a) The judicial attitude toward group legal services has led to the adoption of rules by the State Bar of California and the American Bar Association, authorizing certain nonprofit organizations to provide legal services to their members, under conditions that do not permit the group or its agents or members to interfere with the attorney's duties to his or her client. (See *supra*, §14; *infra*, §§420, 535.)

(b) Statutes now authorize the formation of professional law corporations, which are entitled to practice law. (See *supra*, §24 et seq.) The objection of *People v. California Protective Corp.*, *supra*, is overcome by requiring directors, officers, and shareholders to be licensed attorneys, and by requiring shares of deceased, ineligible, or disqualified persons to be sold to the corporation or its shareholders. (See *supra*, §26.)

(2) *Insurance Company Attorneys.* The common use of in-house or staff counsel by insurers to represent insureds raises the issue whether the mere fact of an employment relationship between counsel and insurer gives rise to the unauthorized practice of law by the insurer. In *Gafcon v. Ponsor & Associates* (2002) 98 C.A.4th 1388, 120 C.R.2d 392,

plaintiff construction firm tendered the underlying litigation to its general liability insurer, T, who accepted the defense under a reservation of rights, and assigned one of its staff counsel, P, to represent plaintiff. When a potential conflict of interest was discovered, P arranged for one of T's outside panel counsel to represent plaintiff. In spite of the substitution, plaintiff sued T and P seeking a judicial declaration that an insurer's use of employee attorneys to defend its insured constitutes the unauthorized practice of law. The trial court found that T was not engaged in unauthorized practice. *Held*, affirmed.

(a) It is too broad a proposition that insurers employing lawyers to defend their insureds against third party claims are engaged in the unauthorized practice of law. The argument ignores the tripartite relationship between insurer, insured, and counsel retained or employed by the insurer to act on the insured's behalf. When an insurer in California arranges for either in-house counsel or retained counsel to defend an insured because of a contractual (insurance policy) duty to do so, counsel is acting on the insurer's behalf and representing the insurer's own rights and interests as well as the insured's. (98 C.A.4th 1406.)

(b) This does not violate the corporate practice doctrine, which itself has given way to judicial and statutory exceptions. That doctrine generally prohibits a corporation from employing attorneys for customers where the corporation has no direct interest in the dispute. The early cases involving the corporate practice of law, on which plaintiff primarily relied, dealt with just those circumstances. However, where the insurer has a direct pecuniary interest in the underlying third party action, the insurer is entitled to have counsel represent the insurer's interests as well as those of the insured, as long as those interests are aligned. (98 C.A.4th 1408, 1414.)

(c) Under the circumstances here, T was not engaged in the practice of law during P's brief representation of plaintiff. T merely designated P to handle the defense. T did not influence or interfere with P's professional judgment or attempt to limit or restrict other attorneys associated with P. P did not participate in an investigation or determination regarding coverage, and there is no evidence that T directed or controlled P's representation in any way. These undisputed facts established that plaintiff was not entitled to a judicial declaration that T was impermissibly engaged in the practice of law. (98 C.A.4th 1415.) (See 2 A.L.R.6th 537 [propriety of insurers' use of staff attorneys to represent insureds].)

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c. Out-of-State Attorneys.

1. In General.

1 Witkin Cal. Proc. Attys § 387

[§ 387] In General.

(1) *Practice in California Courts.* An out-of-state attorney, not licensed to practice in California, may be permitted, by consent of the trial judge, to appear and take part in a particular pending action. (See *In re McCue* (1930) 211 C. 57, 67, 293 P. 47; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §23.) Also, an appearance may be authorized as counsel pro hac vice. (See *infra*, §389.) In addition, foreign legal consultants may render some legal services. (See *infra*, §391.)

Apart from consent or authorization, local practice by out-of-state attorneys is prohibited. (See *Rest.3d, The Law Governing Lawyers* §3; A.B.A. Model Rules of Professional Conduct, Rule 5.5 [multijurisdictional practice of law]; 78 *Harv. L. Rev.* 1651 [out-of-state attorney advising on single case, proper]; 39 *Santa Clara L. Rev.* 447 [risks when representing out-of-state clients]; 11 *A.L.R.3d* 907 [right of out-of-state attorney to recover compensation for services]; 81 *A.L.R.3d* 1281 [disbarment or suspension of attorney in one state as affecting right to practice in another state]; 83 *A.L.R.5th* 497 [what constitutes unauthorized practice of law by out-of-state-attorney].)

(2) *Arbitration.* *C.C.P. 1282.4* authorizes nonresident attorneys who are not licensed in California to appear in California arbitration proceedings (other than workers' compensation proceedings). (*C.C.P. 1282.4(i), (j)(1).*) (See *C.R.C.*, Rule 9.43 [out-of-state arbitration counsel].)

An attorney admitted to the bar of another state may represent parties in an arbitration in California provided that the attorney follows the certificate requirements in *C.C.P. 1282.4(c)*, the appearance is approved in writing on the certificate by the arbitrator or arbitral forum, and the certificate is filed with the State Bar and served on the parties, as specified. (*C.C.P. 1282.4(b).*) Moreover, an attorney in good standing with the bar of another state may render legal services in California in connection with an arbitration pending in another state. (*C.C.P. 1282.4(g).*) In addition, a party to an arbitration arising under a collective bargaining agreement governed by California or federal law may be represented by any person, regardless of whether that person is licensed to practice law in California. (*C.C.P. 1282.4(h), (j)(2).*)

Falsification of the necessary certificate, failing to file or serve the certificate as required, or failing to comply with

State Bar professional conduct standards will subject the offending attorney to discipline by the California State Bar with respect to any of the attorney's acts occurring in the course of the arbitration. (*C.C.P. 1282.4(f)*.)

(3) *Practice in Federal Courts.* The State Bar Act does not regulate practice before federal courts. Hence a Chicago lawyer, engaged to render services in bankruptcy proceedings in California, was entitled to collect for his services. (*Cowen v. Calabrese* (1964) 230 C.A.2d 870, 872, 41 C.R. 441.) (See 80 Harv. L. Rev. 1711 [interstate and federal practice]; 11 A.L.R.3d 907 [right of out-of-state attorney to recover compensation for services rendered in state where not admitted to bar].)

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2. Meaning of "In California."

1 Witkin Cal. Proc. Attys § 388

[§ 388] Meaning of "In California."

"No person shall practice law in California unless the person is an active member of the State Bar." (*B. & P.C. 6125.*) In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 C.4th 119, 70 C.R.2d 304, 949 P.2d 1, a New York law firm (Firm) countersued its California client (Client) for attorneys' fees earned for work performed in California and New York. The trial judge granted Client's motion for summary adjudication of the fees claim, finding that the fee agreement, which stipulated that California law governed, was unenforceable because Firm and its attorneys were not licensed to practice law in California as required by *B. & P.C. 6125. Held*, affirmed as to the unlawful practice of law in California and fees for those services; reversed and remanded to permit Firm to argue that the fee agreement might authorize payment for limited services performed in New York.

(a) *Sufficient contact for unlawful practice.* Today's legal practice requires asking whether the phrase "practice law" refers to the nature of the legal services, or restricts the application of the State Bar Act (*B. & P.C. 6000 et seq.*) to out-of-state attorneys who are physically present in California. "In our view, the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations." Thus, it is too narrow an interpretation of the term "practice law" to limit *B. & P.C. 6125* to those cases in which an out-of-state-lawyer appears in a California courtroom without permission (see *supra*, §387). (*17 C.4th 128, 129.*)

(b) *Physical presence is not required.* This definition does not necessarily depend on or require the unlicensed lawyer's physical presence in California. For example, one may practice law in violation of *B. & P.C. 6125*, even though not physically present in the state, by advising a California client on California law in connection with a California legal dispute by modern technological means, such as computer or fax. However, a person does not *automatically* practice law in California whenever that person practices California law anywhere, or "virtually" enters the state by electronic means. (*17 C.4th 129.*)

(c) *Firm's contacts.* Firm's attorneys traveled to California extensively to discuss matters pertaining to Client's California software development and marketing contract dispute. Moreover, while here, they met with Client's adversary, made demands for damages, worked on a settlement agreement with Client, and attempted to initiate arbitration proceedings. Thus, Firm's in-state activities clearly constituted the unauthorized practice of law in California. (17 C.4th 131.)

(d) *Attorneys and nonattorneys.* Firm contends that B. & P.C. 6125 is intended solely to prevent nonattorneys from practicing law. However, the plain language of the statute refers to *any person* and does not differentiate between attorneys and nonattorneys; nor does the statute exempt a person who is a member of another state bar. Moreover, an arbitration exception, as defendant requests, is best left to the Legislature. (17 C.4th 131, 132.)

(e) *Fees for work in New York.* Firm may be able to recover under the fee agreement for the limited legal services it performed in New York, to the extent those services did not constitute practicing law in California, even though those services were performed for a California client. B. & P.C. 6125 does not regulate law practice in other states. Thus, the severability doctrine (see 1 Summary (10th), Contracts, §§421, 422) may allow Firm to receive its New York fees if the illegal compensation portion of the fee agreement can be severed. (17 C.4th 139.)

One justice dissented, arguing for adherence to the more narrowly drawn definition of the practice of law articulated in *Baron v. Los Angeles* (1970) 2 C.3d 535, 86 C.R. 673, 469 P.2d 353, supra, §341: the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Applying that definition here, the trial judge should not have granted summary adjudication based on Firm's California activities. That some or all of those activities related to arbitration does not necessarily establish that they constituted the practice of law. (17 C.4th 140, 145.) (See 39 Santa Clara L. Rev. 447 [Birbrower]; 36 San Diego L. Rev. 871 [need for reform of unauthorized practice of law provisions; Birbrower].)

In *Estate of Condon* (1998) 65 C.A.4th 1138, 76 C.R.2d 922, a probate judge denied a Colorado attorney his fees for services rendered on behalf of a coexecutor who lived in Colorado. The Colorado attorney was not a member of the California State Bar, nor had he applied to appear pro hac vice (infra, §389). *Held*, reversed.

(a) *Probate Code.* Prob.C. 8570 et seq. (see 14 Summary (10th), Wills and Probate, §431) specifically permit a nonresident to serve as the executor of a will subject to probate in California, and the executor clearly has the right to choose independent counsel to render services to the estate. Moreover, there is nothing in the Probate Code or prior cases that disqualifies out-of-state attorneys from receiving statutory compensation under Prob.C. 10810 and 10811 (see 14 Summary (10th), Wills and Probate, §528 et seq.). (65 C.A.4th 1143.)

(b) *Birbrower case.* Implicit in the rule formulated in *Birbrower* is that the client is a "California client," and either resides in or has the principal place of business in California. This conclusion is logical and comports with the reason underlying the proscription of unauthorized practice in B. & P.C. 6125: to protect California citizens from incompetent attorneys. (65 C.A.4th 1145.) Thus, the client's residence or principal place of business in California is determinative of whether the practice is proscribed by B. & P.C. 6125. (65 C.A.4th 1146.)

(c) *Out-of-state client.* The client here is an out-of-state resident. An out-of-state attorney practicing law on behalf of a resident of the attorney's home state does not violate B. & P.C. 6125 when that attorney either physically or virtually (by electronic means) enters California and practices law for that client. The attorney represented his client in the client's capacity as coexecutor of an estate in California. The negotiations and discussions with beneficiaries of the estate and their attorneys in California occurred generally by phone, fax, and mail while the attorneys were physically located in Colorado. (65 C.A.4th 1147.) Under *Birbrower*, one factor bearing on the applicability of B. & P.C. 6125 is whether the practitioner is applying California law. However, *Birbrower* instructs that merely practicing California law somewhere does not mean that an attorney automatically practices law in California. This is the situation here. Because the Colorado attorney did not practice law "in California," he was entitled to statutory fees. (65 C.A.4th 1148.)

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3. Counsel Pro Hac Vice.

1 Witkin Cal. Proc. Attys § 389

[§ 389] Counsel Pro Hac Vice.

(1) *Eligibility.* On written application, out-of-state attorneys may appear as counsel pro hac vice ("for this occasion"), provided that local counsel is associated as the attorney of record. The applicant (1) must be a member of the bar of a United States court or the highest court of another state, territory, or insular possession of the United States, and (2) must not be a resident of California or regularly employed or regularly engaged in "substantial business, professional, or other activities in the State of California. Absent special circumstances, repeated appearances ... is a cause for denial of an application." (C.R.C., Rule 9.40(a), (b).)

(2) *Trial Court.* In trial courts, a verified application and notice of hearing must be served on all parties and the State Bar at the time prescribed in *C.C.P. 1005* (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §15). (C.R.C., Rule 9.40(c).) Applications in the Supreme Court and the Courts of Appeal are governed by C.R.C., Rule 8.54. (Rule 9.40(c)(2).) (On contents of application, see C.R.C., Rule 9.40(d).)

(3) *Fee.* An applicant to appear pro hac vice must pay a reasonable fee to the State Bar; the fee is fixed by the State Bar but may not exceed \$ 50. (C.R.C., Rule 9.40(e).)

(4) *Argument Before Supreme Court or Court of Appeal.* The Supreme Court and Courts of Appeal may also permit persons who are not admitted to the State Bar to argue before them when they are licensed to practice in another jurisdiction and possess special expertise in the particular field affected by the proceeding. (C.R.C., Rule 9.40(g).)

(5) *Sanctions.* Persons permitted to appear under Rule 9.40 are subject to normal court sanctions, are required to know and abide by the Rules of Professional Conduct, and are subject to the disciplinary jurisdiction of the State Bar. (C.R.C., Rule 9.40(f).) (See *Walter E. Heller Western v. Superior Court* (1980) 111 C.A.3d 706, 711, 168 C.R. 785 [on issue whether attorney was ineligible because regularly engaged in activities in California, trial judge's determination of eligibility may be upheld in a close case]; 20 *A.L.R.4th* 855 [attorney's right to appear pro hac vice in state court]; 64 *A.L.R.4th* 1217 [revocation of admission to appear pro hac vice]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §22.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Eligibility.* In *Daybreak Group v. Three Creeks Ranch, LLC* (2008) 162 C.A.4th 37, 75 C.R.3d 365, plaintiff brought an action against a Montana defendant. Defendant filed a motion to quash service for lack of personal jurisdiction and acted through its counsel P, who was an attorney with a Montana law firm but was licensed to practice law in California. Plaintiff opposed the motion, asserting that although P was eligible to practice in California, the law firm was not admitted to the California State Bar and was required to obtain pro hac vice status. The trial judge quashed service. *Held*, affirmed. Defendant was properly represented by an attorney who was licensed to practice law in California. C.R.C., Rule 9.40 limits eligibility for pro hac vice designation to a person who is a member in good standing and eligible to practice before another recognized bar. It does not apply to a law firm, nor are there "bars within the United States, whether federal, state, territorial or insular possessory, which admit *law firms* as 'members'." (162 C.A.4th 41.)

(3) *Fee.* Govt.C. 70617(e) was added in 2008 to provide that in addition to any other required fee, the fee for filing an application to appear as counsel pro hac vice is \$ 250.

(5) *Sanctions.* See *Sheller v. Superior Court* (2008) 158 C.A.4th 1697, 1716, 71 C.R.3d 207, Supp., *infra*, §556 [superior court's inherent power includes authority to revoke attorney's pro hac vice status when that attorney has engaged in conduct that would be sufficient to disqualify California attorney].



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4. Military Counsel.

1 Witkin Cal. Proc. Attys § 390

[§ 390] Military Counsel.

A judge advocate who is not a member of the California State Bar, but is a member in good standing of a United States court or the highest court of another state, territory, or insular possession of the United States, may be permitted to appear and represent a person in military service under the Soldiers' and Sailors' Civil Relief Act of 1940 (*50 U.S.C. Appx., §501 et seq.*), if retention of civilian counsel likely would cause substantial hardship. (C.R.C., Rule 9.41(a).)

The clerk of a court considering appointment of a judge advocate must provide written notice to all parties who have appeared. A party who has appeared may file a written objection to the appointment within 10 days of the date notice is given. If a hearing is held, notice of the hearing must be given at least 10 days before the hearing. (C.R.C., Rule 9.41(b).)

A judge advocate permitted to appear is subject to the jurisdiction of California courts with respect to the laws governing the conduct of attorneys and to the disciplinary jurisdiction of the State Bar of California. (C.R.C., Rule 9.41(c).) With respect to the attorney-client, work product, and other professional privileges, a judge advocate is subject to the same rights and obligations as a member of the State Bar of California. (C.R.C., Rule 9.41(d).)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 9.41(a) was amended in 2007 to refer to the Servicemembers Civil Relief Act (*50 U.S.C. Appx., §501 et seq.*; formerly the Soldiers' and Sailors' Civil Relief Act of 1940).



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5. Foreign Legal Consultants.

1 Witkin Cal. Proc. Attys § 391

[§ 391] Foreign Legal Consultants.

The State Bar may review applications from attorneys outside the United States and certify as registered foreign legal consultants applicants of good character and of good standing in a foreign country in which they have practiced law. (C.R.C., Rule 9.44(a), (c); see Registered Foreign Legal Consultants Rules and Regulations, §1.0 et seq. [detailed procedures for requesting, approving, denying, or revoking certification]; *37 Santa Clara L. Rev.* 757 [proposing that rule be amended to allow greater scope of practice to foreign lawyers].)

A registered foreign legal consultant is authorized to advise on the law of the foreign jurisdiction in which the consultant is admitted. Under Rule 9.44(d), a registered foreign legal consultant may "render legal services" in California, but may not do the following:

- (1) Appear as an attorney before a court or judicial officer.
- (2) Prepare pleadings or other papers or issue subpoenas in an action or proceeding.
- (3) Prepare instruments, including deeds, mortgages, assignments, or leases, affecting title to real property located in the United States.
- (4) Prepare an instrument relating to the administration of a decedent's estate in the United States or a will or trust instrument affecting the disposition on death of property located in the United States and owned by a resident.
- (5) Prepare an instrument regarding marital rights and relations of a resident of the United States or the custody or care of the children of a resident.
- (6) Render legal advice on the law of California, any other state, the United States, or any other jurisdiction except the foreign jurisdiction in which the consultant is admitted.

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6. Registered Legal Services Attorneys.

1 Witkin Cal. Proc. Attys § 392

[§ 392] Registered Legal Services Attorneys.

(1) *In General.* Out-of-state attorneys who are licensed in other jurisdictions may practice in California under a registration system without becoming members of the State Bar. (C.R.C., Rule 9.45.) Once registered, an attorney may practice in California for up to 3 years (C.R.C., Rule 9.45(e)) for a qualified legal services provider under specified supervision. The State Bar may set initial and annual fees (C.R.C., Rule 9.45(f)), and may establish a registration program (C.R.C., Rule 9.45(g)). The rule neither affects the California Supreme Court's inherent jurisdiction over the practice of law in California (C.R.C., Rule 9.45(i)), nor limits the scope of activities permissible under existing law by attorneys who are not members of the State Bar (C.R.C., Rule 9.45(j)). (See State Bar Rules of California Registered Legal Services Attorney Program.)

(2) *Qualifying Legal Services Provider.* A qualifying legal services provider is either of the following:

(a) A nonprofit corporation operating exclusively in California for the primary purpose of providing free legal services in civil matters to persons who are indigent, elderly, disabled, juveniles, or non-English speaking. (C.R.C., Rule 9.45(a)(1)(A).)

(b) A program operated exclusively in California by an approved nonprofit law school that has operated for at least 2 years at a minimum yearly cost of \$ 20,000 to provide free legal services to indigent persons. (C.R.C., Rule 9.45(a)(1)(B).)

(3) *Scope and Requirements.* The attorney may practice only at a qualifying legal services provider, and only on behalf of the provider's clients. Under supervision, the attorney may practice law to the same extent as a member of the State Bar. (C.R.C., Rule 9.45(b).) To be eligible, the attorney must satisfy the following conditions:

(a) Be an active member in good standing of the bar of another state or of a U.S. jurisdiction, possession, territory, or dependency. (C.R.C., Rule 9.45(c)(1); see C.R.C., Rule 9.45(a)(2) [definition of "active member in good standing"].)

(b) Register with the State Bar and file an Application for Determination of Moral Character. (C.R.C., Rule 9.45(c)(2), (c)(1).) The attorney may practice while the application is pending. (C.R.C., Rule 9.45(c)(3)(B).)

(c) Be eligible for admission to the bar, except that the attorney need not take the California bar exam or the Multistate Professional Responsibility Examination. (C.R.C., Rule 9.45(c)(3).)

(d) Follow the rules adopted by the Board of Governors for the registration program. (C.R.C., Rule 9.45(c)(4).) (See State Bar Rules of California Registered Legal Services Attorney Program, Rule 4.)

(e) Practice exclusively for a single qualifying legal services provider. However, if qualified, the attorney may also practice as registered in-house counsel (*infra*, §393). (C.R.C., Rule 9.45(c)(5).)

(f) Practice under the supervision of an attorney in good standing who is employed by the provider. (C.R.C., Rule 9.45(c)(6).)

(g) Comply with all governing rules and laws of the State Bar, including Minimum Continuing Legal Education (MCLE) (C.R.C., Rule 9.45(c)(7)), and satisfy in the first year of practice all MCLE requirements, including ethics education, that State Bar members must complete every 3 years (C.R.C., Rule 9.45(c)(8)).

(h) Not have failed the California bar exam within 5 years immediately preceding the registration application. (C.R.C., Rule 9.45(c)(9).)

(4) *Declarations*. In addition to registering and filing an Application for Determination of Moral Character, the attorney must also submit the following declarations to the State Bar:

(a) A declaration in which the attorney agrees to submit to the disciplinary authority of the California Supreme Court and the State Bar, and agrees not to practice law in California except as permitted by C.R.C., Rule 964. (C.R.C., Rule 9.45(d)(2).)

(b) A declaration signed by a supervisor on behalf of the qualifying provider attesting to the applicant's position with the provider under the conditions of C.R.C., Rule 964, and stating that the provider and supervising attorney assume professional responsibility for the applicant's work. (C.R.C., Rule 9.45(d)(3).)

(5) *Supervision*. An attorney who supervises an applicant must satisfy the following conditions:

(a) Be an active member in good standing of the State Bar. (C.R.C., Rule 9.45(h)(1).)

(b) Have practiced law in California for at least 2 years immediately preceding the time of supervision. (C.R.C., Rule 9.45(h)(2).)

(c) Have practiced law full-time for at least 4 years. (C.R.C., Rule 9.45(h)(3).)

(d) Supervise no more than two attorneys concurrently. (C.R.C., Rule 9.45(h)(4).)

(e) Assume professional responsibility for the applicant's work. (C.R.C., Rule 9.45(h)(5).)

(f) Provide direct supervision, support, and review of the supervised attorney (C.R.C., Rule 9.45(h)(6)), and personally sign documents prepared by that attorney for execution or use by a person who is not an attorney (C.R.C., Rule 9.45(h)(7)).

The supervising attorney may designate another qualified attorney to act in the supervising attorney's absence. (C.R.C., Rule 964(h)(8).)

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7. Registered In-House Counsel.

1 Witkin Cal. Proc. Attys § 393

[§ 393] Registered In-House Counsel.

(1) *In General.* Attorneys who reside in California but are licensed in other jurisdictions may register to practice as in-house counsel for qualifying institutions in California without becoming members of the State Bar. (C.R.C., Rule 9.46.) The State Bar may set initial and annual fees (C.R.C., Rule 9.46(g)), and may establish a registration program (C.R.C., Rule 9.46(h)). The rule neither affects the California Supreme Court's inherent jurisdiction over the practice of law in California (C.R.C., Rule 9.56(i)), nor limits the scope of activities permissible under existing law by attorneys who are not members of the State Bar (C.R.C., Rule 9.46(j)). (See State Bar Rules of California Registered In-House Counsel Program.)

(2) *Qualifying Institution.* A qualifying institution is a corporation, partnership, association, or other legal entity, including subsidiaries and affiliates. Excluded are governmental entities or entities that provide legal services to others. (C.R.C., Rule 9.46(a)(1).) The institution must satisfy the following conditions:

(a) It must employ in California at least 10 full-time employees. (C.R.C., Rule 9.46(a)(1)(A).)

(b) It must employ in California an attorney who is an active member in good standing with the State Bar. (C.R.C., Rule 9.46(a)(1)(B); see C.R.C., Rule 9.46(a)(2) [definition of "active member in good standing"].)

(3) *Scope of Practice.* Registered in-house counsel may provide legal services in California only to the qualifying institution. Thus, counsel may not make court appearances in California, or provide personal or individual representation to customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution. (C.R.C., Rule 9.46(b).)

(4) *Registration.* Registered in-house counsel must register annually, but there is no limitation on the number of years counsel may do so. Counsel leaving the employment of a qualifying institution must notify the State Bar within 30 days, and counsel wishing to practice under C.R.C., Rule 9.46 for a new employer must first register as in-house counsel for that employer. (C.R.C., Rule 9.46(e).) (See State Bar Rules of California Registered In-House Counsel

Program, Rule 4.)

(5) *Requirements.* An attorney wishing to practice under C.R.C., Rule 9.46 must satisfy the following conditions:

(a) Reside in California. (C.R.C., Rule 9.46(c)(8).)

(b) Be an active member in good standing of the bar of another state or of a U.S. jurisdiction, possession, territory, or dependency. (C.R.C., Rule 9.46(c)(1).)

(c) Register with the State Bar and file an Application for Determination of Moral Character. (C.R.C., Rule 9.46(c)(2), (d)(1).) The attorney may practice while the application is pending. (C.R.C., Rule 9.46(c)(3)(B).)

(d) Be eligible for admission to the bar, except that the attorney need not take the California bar exam or the Multistate Professional Responsibility Examination. (C.R.C., Rule 9.46(c)(3).)

(e) Follow the rules adopted by the Board of Governors for the registration program. (C.R.C., Rule 9.46(c)(4).)

(f) Practice exclusively for a single qualifying institution. However, if qualified, the attorney may also practice as a registered legal services attorney (*supra*, §392). (C.R.C., Rule 9.46(c)(5).)

(g) Comply with all governing rules and laws of the State Bar, including Minimum Continuing Legal Education (MCLE) (C.R.C., Rule 9.46(c)(6)), and satisfy in the first year of practice all MCLE requirements, including ethics education, that State Bar members must complete every 3 years (C.R.C., Rule 9.46(c)(7)).

(6) *Declarations.* In addition to registering and filing an Application for Determination of Moral Character, the attorney must also submit the following declarations to the State Bar:

(a) A declaration in which the attorney agrees to submit to the disciplinary authority of the California Supreme Court and the State Bar, and agrees not to practice law in California except as permitted by C.R.C., Rule 9.46. (C.R.C., Rule 9.46(d)(2).)

(b) A declaration signed by an officer, director, or general counsel of the applicant's employer attesting to the applicant's position with the employer under the conditions of C.R.C., Rule 9.46, and stating that the employer will notify the State Bar within 30 days of the cessation of the applicant's employment in California. The declarant must also attest to the applicant's qualifications and moral character. (C.R.C., Rule 9.46(d)(3).)

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8. Temporary Practice as Part of Litigation.

1 Witkin Cal. Proc. Attys § 394

[§ 394] Temporary Practice as Part of Litigation.

(1) *In General.* Out-of-state attorneys who are licensed in other jurisdictions, and who are in California temporarily as part of a formal legal proceeding, may perform related tasks in California under specified circumstances without engaging in the unauthorized practice of law. (C.R.C. 9.47(c).) A "formal legal proceeding" includes litigation, arbitration, mediation, and administrative hearings. (C.R.C., Rule 9.47(a)(1).)

(2) *Restrictions on California Connections.* To qualify under C.R.C., Rule 9.47, an attorney may not be a California resident, regularly employed in California, or engaged in substantial business or professional activities in California. In addition, the attorney may neither maintain an office or other "systematic or continuous presence" in California for the practice of law, nor represent that he or she is admitted to practice law in California. (C.R.C., Rule 9.47(d).)

(3) *Requirements.* The qualifying attorney must (a) maintain an office in a United States jurisdiction other than California in which the attorney is licensed to practice law and be an active member in good standing with that jurisdiction's bar, (b) already be retained in the legal proceeding, except when only providing legal advice sought by a potential client about retaining the attorney, and (c) indicate in advertising that is accessible in California either that the attorney is not a member of the State Bar or that the attorney is admitted to practice law only in specified jurisdictions. (C.R.C., Rule 9.47(b); see C.R.C., Rule 9.47(a)(3) [definition of "active member in good standing"].) The attorney must not have been disbarred, resigned with charges pending, or suspended from practicing law in another jurisdiction. (C.R.C., Rule 9.47(d)(6).)

(4) *Permissible Activities.* A qualifying attorney may render services in California in connection with the following activities:

(a) Pending or anticipated formal legal proceedings in another jurisdiction in which the attorney is authorized to appear or reasonably expects to be so authorized. (C.R.C., Rule 9.47(c)(1), (c)(3).)

(b) Anticipated formal legal proceedings in California in which the attorney reasonably expects to be authorized to

appear. (C.R.C., Rule 9.47(c)(2).)

(c) Pending or anticipated formal legal proceedings in which the attorney's supervisor is authorized to appear or reasonably expects to be so authorized. (C.R.C., Rule 9.47(c)(4).)

An attorney anticipating authorization to appear in a proceeding must seek that authorization promptly. Failure to do so, or denial of authorization, ends eligibility under C.R.C., Rule 9.47. (C.R.C., Rule 9.47(c).)

"Authorized to appear" means permission to appear under the rules of the jurisdiction in which the proceedings are or will be taking place. (C.R.C., Rule 9.47(a)(2).)

(5) *Implied Agreement*. By practicing law in California under C.R.C., Rule 9.47, an attorney agrees to be subject to the jurisdiction of the State Bar, California courts, and all laws and rules relating to the practice of law, to the same extent as a member of the State Bar. (C.R.C., Rule 9.47(e).)

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c. Out-of-State Attorneys.

9. Temporary Practice To Provide Legal Services.

1 Witkin Cal. Proc. Attys § 395

[§ 395] Temporary Practice To Provide Legal Services.

(1) *In General.* Out-of-state attorneys who are licensed in other jurisdictions, and who are in California temporarily other than as part of litigation, may engage in limited law practice in California without engaging in unauthorized practice. (C.R.C., Rule 9.48.) The requirements and restrictions on California connections are the same as those for out-of-state attorneys seeking temporary practice as part of litigation (*supra*, §394). (C.R.C., Rule 9.48(b), (c).) The attorney's implied agreement to be subject to the jurisdiction of California courts, the State Bar, and rules and regulations relating to the practice of law is also the same. (C.R.C., Rule 9.48(e).)

(2) *Permissible Activities.* An attorney qualifying under C.R.C., Rule 9.48 may provide legal assistance or services in California concerning only transactional matters, which include legal matters other than litigation, arbitration, mediation, and administrative hearings. (C.R.C., Rule 9.48(f), (a)(1).) Thus, the attorney may engage in the following activities:

(a) Provide legal assistance or advice to a client concerning a transactional matter, a material aspect of which is taking place in a jurisdiction outside California in which the attorney is licensed to provide legal services. (C.R.C., Rule 9.48(c)(1).)

(b) Provide legal assistance or advice on an issue of federal law or of the law of a jurisdiction outside California to attorneys licensed to practice law in California. (C.R.C., Rule 9.48(c)(2).)

(c) As an employee of a client, provide legal assistance or advice to the client or to the client's subsidiaries or affiliates. (C.R.C., Rule 9.48(c)(3).)

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1. Prohibitions Against Unlawful Practice.

d. Other Persons.

1 *Witkin Cal. Proc. Attys* § 396

[§ 396] Other Persons.

(1) *Judges*. A judge of a court of record may not practice law. (Cal. Const., Art. VI, §17; see 2 *Cal. Proc.* (5th), *Courts*, §62.)

(2) *Court Commissioners, Executives, and Administrative Officers*. Court commissioners (see 2 *Cal. Proc.* (5th), *Courts*, §343), and court executive or administrative officers may not practice law. For purposes of this prohibition, unlawful practice includes "being in partnership or sharing fees, commissions, or expenses in the practice of law with any person acting as an attorney in this state." (*Govt.C.* 68082.)

(3) *Sheriffs, Clerks, and Deputies*. Sheriffs, clerks, and their deputies are prohibited from practicing law. (*Govt.C.* 24004.) However, a deputy sheriff who is an attorney may give legal advice to his or her employer in the course and scope of employment and may represent clients in civil matters, unless the representation concerns an event or transaction that requires the deputy's performance of public duties, or will be adverse to the employing agency. (*Govt.C.* 24004.5.) Similarly, a reserve or auxiliary deputy sheriff who is an attorney may practice law in matters unrelated to the sheriff's duties. (*Govt.C.* 24004(b).)

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2. What Constitutes Practice of Law.

a. In General.

1 Witkin Cal. Proc. Attys § 397

[§ 397] In General.

The term "practice of law" is not defined by statute, but the cases on illegal practice have given it a most comprehensive meaning, as is indicated by the following repeatedly quoted portion of an Indiana case: "[A]s the term is generally understood, the practice of the law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court." (*People v. Merchants Protective Corp.* (1922) 189 C. 531, 535, 209 P. 363; see *Bluestein v. State Bar* (1974) 13 C.3d 162, 174, 118 C.R. 175, 529 P.2d 599, *infra*, §531 [advice about foreign country's law]; *Gray v. Justice's Court* (1937) 18 C.A.2d 420, 63 P.2d 1160 [trial of case]; *People v. Ring* (1937) 26 C.A.2d Supp. 768, 770, 771, 70 P.2d 281 [term "practice law" is sufficiently certain; one act is enough]; *People v. Sipper* (1943) 61 C.A.2d Supp. 844, 846, 142 P.2d 960 [advice about proper instrument to secure a loan]; *Benninghoff v. Superior Court* (2006) 136 C.A.4th 61, 68, 38 C.R.3d 759, *supra*, §83 [representing parties before state administrative bodies]; 87 A.L.R.3d 279 [nature of law-related services which may be performed by disbarred or suspended attorney]; 12 A.L.R.4th 656 [assistance to party in divorce proceeding as unauthorized practice of law]; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §119 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See 32 A.L.R.6th 531 [matters constituting unauthorized practice of law in bankruptcy proceedings].



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2. What Constitutes Practice of Law.

b. Eviction Services.

1 Witkin Cal. Proc. Attys § 398

[§ 398] Eviction Services.

In *People v. Landlords Professional Services* (1989) 215 C.A.3d 1599, 264 C.R. 548, the Orange County district attorney filed a complaint against defendant LPS and five other eviction services, alleging unauthorized practice of law, unfair competition, and false or misleading advertising. Defendant's advertisement stated: "One low price \$ 65 plus costs uncontested or contested in pro per. Attorney for trial extra if needed." Landlords who answered the ad were told to bring their documents to the LPS office, where they were given a booklet describing an unlawful detainer action as carried out by the service, and containing several bits of advice, e.g., the effect of the tenant reentering after eviction, and acceptance of money after service of the notice to pay rent or quit. The trial judge found that defendant was engaged in the unauthorized practice of the law, imposed penalties, and granted an injunction against the illegal acts. *Held*, affirmed.

(a) "The eviction service offered by LPS was designed to assist clients in the preparation, filing and resolution of unlawful detainer actions. LPS, therefore, offered to assist clients in advancing their legal rights in a court of law. We believe general California law and the approach taken by other states with respect to divorce services teach that such services do not amount to the practice of law as long as the service offered by LPS was merely clerical, e.g., the service did not engage in the practice of law if it made forms available for the client's use, filled the forms in at the specific direction of the client and filed and served those forms as directed by the client. Likewise, merely giving a client a manual, even a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidents of an eviction would not be the practice of law if the service did not personally advise the client with regard to his specific case." (215 C.A.3d 1608.)

(b) LPS was engaged in unauthorized practice of law. (1) The advertisement implied that the services were not limited to clerical functions but accomplished evictions: "Call & talk to us" was a general invitation to get expert advice on evictions. (215 C.A.3d 1608.) (2) LPS provided specific information and advice in personal interviews on the specific problems of its clients. "Given the aura of expertise created by the business practices of LPS such advice would undoubtedly be relied upon by its clients, perhaps to their serious detriment." (215 C.A.3d 1609.) (On regulation of "unlawful detainer assistants," see *B. & P.C. 6400 et seq.*, 12 Summary (10th), *Real Property*, §705.)

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c. Collection of Assigned Claims.

1 Witkin Cal. Proc. Attys § 399

[§ 399] Collection of Assigned Claims.

An assignee for collection may sue in the assignee's own name as the real party in interest. (See 4 *Cal. Proc.* (5th), *Pleading*, §127.) Accordingly, a collection agency, operated by individuals or by a corporation, usually may take assignments of claims for collection, and engage licensed attorneys to bring suit. (See C.E.B., 1 *Debt Collection Practice* 2d, Chap. 1.)

In substance and effect the collection agency is offering an attorney-representation service for creditors. However, the arrangement is legal because the collection agency is the owner of the claim for the purpose of the suit, and the relation of attorney and client between itself and its employed attorney is proper. "The assignee merely contracts to file suit in his own name, if necessary to make the collection. But he does not agree to furnish any legal services whatever to the assignor. The assignee employs the attorney and controls his action. No legal services are performed for the assignor. The only duty of the assignee is to account to the assignor after the collection has been made. In making the agreement to bring suit the assignee merely agrees to do that which he can legally do without any agreement, by virtue of the assignment." (*Cohn v. Thompson* (1932) 128 C.A. Supp. 783, 788, 16 P.2d 364; see *Le Doux v. Credit Research Corp.* (1975) 52 C.A.3d 451, 454, 456, 125 C.R. 166 [following *Cohn*]; 27 A.L.R.3d 1152 [operation of collection agency as unauthorized practice of law].)

A small-scale application of the same principle allows an unlicensed person to take an assignment of a claim for collection and prosecute it without an attorney, appearing in pro. per. This is subject to the exception that a disbarred or suspended attorney may not take and prosecute the claim. (*B. & P.C.* 6130; *Wilde v. Superior Court* (1942) 53 C.A.2d 168, 177, 127 P.2d 560; cf. *Gresham v. Superior Court* (1941) 44 C.A.2d 664, 112 P.2d 965 [resigned attorney is neither disbarred nor suspended and may appear as assignee of claim].)

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d. Heir Hunting.

1 *Witkin Cal. Proc. Attys* § 400

[§ 400] Heir Hunting.

"Probate research" or heir-hunting is a legal activity if confined to the investigation of the claims of prospective heirs. But when the business involves solicitation of contracts with heirs to furnish counsel and prosecute their claims, it constitutes the unauthorized practice of law. (*Estate of Butler* (1947) 29 C.2d 644, 647, 177 P.2d 16; *Estate of Collins* (1968) 268 C.A.2d 86, 92, 73 C.R. 599; see *Estate of Wright* (2001) 90 C.A.4th 228, 234, 108 C.R.2d 572 [assignment of percentage of inheritance and limited power of attorney to order and receive documentation relating to heir's identity and identity of parents did not empower heir hunter to represent heir or to control probate litigation; thus, it did not constitute unlawful practice of law]; 1 *Summary* (10th), *Contracts*, §637.) (On assignments to heir hunters, see 14 *Summary* (10th), *Wills and Probate*, §723 et seq.)

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e. Legal Steps Under Power of Attorney.

1 Witkin Cal. Proc. Attys § 401

[§ 401] Legal Steps Under Power of Attorney.

The unlawful practice of law is usually considered from the standpoint of regulation. (See *supra*, §379 et seq.) It may, however, present a problem of the validity and effect of legal steps taken by an unlicensed person on behalf of another.

In *People v. Malone* (1965) 232 C.A.2d 531, 42 C.R. 888, a condemnation action was brought against two brothers, P and C. P, expecting to be absent from the area, gave C his power of attorney. C, without an attorney, filed an answer for both, participated in the pretrial hearing, appeared at the trial and helped select the jury, and then, in chambers, stipulated to a compromise settlement, following which the jury was discharged. When P learned of the settlement he disapproved it, withdrew C's power of attorney, and engaged an attorney at law to represent him and oppose entry of judgment. *Held*, judgment for plaintiff reversed. What C purported to do for P "in place of an attorney was a nullity, and that fact should have been known to the court and to opposing counsel." (232 C.A.2d 537.)

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f. Practice Before Administrative Agencies.

1 Witkin Cal. Proc. Attys § 402

[§ 402] Practice Before Administrative Agencies.

(1) *Workers' Compensation Appeals Board.* The Workers' Compensation Act allows representation by a layperson in proceedings before the Workers' Compensation Appeals Board. (See *Lab.C. 5501, 5700; Eagle Indem. Co. v. Industrial Acc. Com. of Calif.* (1933) 217 C. 244, 247, 18 P.2d 341; 2 *Summary* (10th), *Workers' Compensation*, §353; 58 A.L.R.5th 449 [handling, preparing, presenting, or trying workers' compensation claims or cases as practice of law]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §127.)

(2) *Patent Office.* Registered patent attorneys, not admitted to the practice of law, have been permitted to practice before the Patent Office since its inception. Their activities in preparing and arguing patent applications, although clearly involving the preparation of legal documents and the giving of legal advice, went unchallenged for many years. (See *Sperry v. Florida* (1963) 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 [Florida Supreme Court injunction against patent attorney practicing in Florida who was not member of any bar was vacated; under Supremacy Clause, federal statutes and regulations governed]; *Schroeder v. Wheeler* (1932) 126 C.A. 367, 14 P.2d 903 [registered patent attorney's contract with inventor to prosecute patent and trademark applications for contingent fee payable out of future gross profits and to protect inventor against infringement or unfair competition by employing counsel when necessary was legal]; 15 *Hastings L. J.* 332.)

(3) *Treasury Department.* In *Agran v. Shapiro* (1954) 127 C.A.2d Supp. 807, 273 P.2d 619, plaintiff was a certified public accountant admitted to practice as an enrolled agent before the Treasury Department. He prepared federal income tax returns and tax refund claims for defendants. *Held*, this was illegal practice of law, and a \$ 2,000 judgment for the value of the services was reversed. (127 C.A.2d Supp. 826.)

(a) Tax practice presents a difficult problem in which questions of law and accounting are often inextricably intermingled. Concededly, an accountant may prepare returns except where substantial questions of law arise. However, here the taxpayer sought a carry-back of a net operating loss deduction, the question being a difficult one of law with no accounting problem involved. (127 C.A.2d Supp. 813, 819, 820.)

(b) The Treasury Department regulation that allows an enrolled agent the rights and privileges of an enrolled

attorney did not legalize activity contrary to state law, particularly in view of the proviso in the regulation that nothing therein "shall be construed as authorizing persons not members of the bar to practice law." (127 C.A.2d Supp. 821.) (See 15 Hastings L. J. 321, 332, 338 [discussing *Agran* and suggesting that *Sperry v. Florida*, *supra*, dissipates the holding]; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §128.)

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3. Penalties and Remedies.

a. Criminal Penalties.

1 Witkin Cal. Proc. Attys § 403

[§ 403] Criminal Penalties.

(1) *Misdemeanor*. A person who practices law but is not a member of the State Bar is guilty of a misdemeanor (*B. & P.C. 6126(a)*; *People v. Ring* (1937) 26 C.A.2d Supp. 768, 770, 70 P.2d 281) and a contempt of court (*B. & P.C. 6127(b)*; *In re Carpenter* (1931) 213 C. 122, 1 P.2d 983). Duly certificated law corporations (*supra*, §24) are exempt. (*B. & P.C. 6127.5*.) (See 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §136.)

A first violation of *B. & P.C. 6126(a)* is punishable by up to 1 year of confinement in county jail, or a fine of up to \$ 1,000, or both. Subsequent convictions require a mandatory 90-day confinement in county jail, except in unusual cases. (*B. & P.C. 6126(a)*.)

(2) *Felony/Misdemeanor*. A member of the State Bar who has been involuntarily enrolled as an inactive member, suspended, or disbarred, or has resigned with charges pending, and who practices or attempts to practice law, is guilty of a crime punishable by imprisonment in state prison or the county jail. (*B. & P.C. 6126(b)*.) A member of the State Bar, or a person who has resigned or been disbarred, who wilfully fails to comply with an order of the Supreme Court under C.R.C., Rule 9.20 (duties of disbarred, suspended or resigned attorneys; *supra*, §82), is also guilty of a crime punishable by imprisonment in state prison or the county jail. (*B. & P.C. 6126(c)*.)

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(1) *Misdemeanor.Contempt*: See 40 *A.L.R.6th* 463 [unauthorized practice of law as contempt].



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3. Penalties and Remedies.

b. Civil Penalties and State Bar Action.

1 Witkin Cal. Proc. Attys § 404

[§ 404] Civil Penalties and State Bar Action.

(1) *Civil Liability.* A violation of *B. & P.C. 6126* (supra, §403) creates a civil liability. (*Biakanja v. Irving* (1958) 49 C.2d 647, 651, 320 P.2d 16, 6 Summary (10th), *Torts*, §1179 [negligent notary public was liable to beneficiary under an improperly drawn will; disapproving *Mickel v. Murphy* (1957) 147 C.A.2d 718, 722, 305 P.2d 993, which held otherwise]; see *McKay v. Longworth* (1989) 211 C.A.3d 1592, 1595, 1596, 260 C.R. 250 [following *Biakanja*].)

B. & P.C. 6126.5 provides additional relief in enforcement actions for persons who obtained services or purchased goods arising from a violation of *B. & P.C. 6125* (supra, §379 et seq.) or *B. & P.C. 6126*. Under *B. & P.C. 6126.5(a)*, the court must consider awarding the following:

- (a) Actual damages.
- (b) Restitution of all amounts paid.
- (c) The amount of penalties and tax liabilities incurred.
- (d) Reasonable attorneys' fees and costs.
- (e) Prejudgment interest.
- (f) Equitable relief including rescission of sales.

These remedies are cumulative to each other and to other remedies and penalties, and do not affect claims, rights, or remedies held by persons or entities not specified in the statute. (*B. & P.C. 6126.5(d)*.)

(2) *Investigation and Action by State Bar.* The Board of Governors "with or without the filing or presentation of any complaint," may investigate the acts or practices of a person whom the board has reason to believe has violated the statutory prohibitions. (*B. & P.C. 6044*.) A violation or threatened violation may be enjoined in a civil action brought by the State Bar. (*B. & P.C. 6030*.) (See *Hill v. State Bar* (1939) 14 C.2d 732, 735, 97 P.2d 236 [attorney who practices

while suspended for nonpayment of dues may be given additional suspension].)

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c. Court Jurisdiction Over Practice.

1 Witkin Cal. Proc. Attys § 405

[§ 405] Court Jurisdiction Over Practice.

(1) *Initiation of Action.* *B. & P.C. 6126.3* authorizes the superior court to assume jurisdiction over the practice of a person where *B. & P.C. 6126* (supra, §403) has been violated. (*B. & P.C. 6126.3(a).*) The action may be initiated by the superior court on its own motion, or on an application by the State Bar. (*B. & P.C. 6126.3(b).*) The application must show (a) probable cause to believe that *B. & P.C. 6126(a)* has been violated, (b) the interest of the applicant, and (c) probable cause to believe that the interests of a client or an interested person or entity will be prejudiced if the action is not maintained. (*B. & P.C. 6126.3(c).*) (On assumption of jurisdiction over practice on death, disability, or disqualification of attorney, see supra, §85.)

The application is set for hearing and an order to show cause is issued to the affected person. (*B. & P.C. 6126.3(d).*) If the person ordered to show cause fails to appear or the court finds that the facts set forth in the application exist, the court may assume jurisdiction over the person's practice. (*B. & P.C. 6126.3(e).*) (On service of application, order to show cause, and interim orders, see *B. & P.C. 6126.3(d)*; on immunity for acts done under *B. & P.C. 6126.3*, see *B. & P.C. 6126.3(k).*)

(2) *Duties of Court-Appointed Attorney.* On assuming jurisdiction, the court must appoint and direct one or more attorneys to mail a notice of cessation of practice to the affected party (*B. & P.C. 6126.3(e)* and (g)), and to act as necessary to effectuate *B. & P.C. 6126.3* (*B. & P.C. 6126.3(e)(8)*), including performance of the following duties:

(a) Examination of the files and records of the practice for information on pending matters that require attention. (*B. & P.C. 6126.3(e)(1).*)

(b) Notification to the clients of the affected party that *B. & P.C. 6126* has been violated and that it is in their best interests to obtain other legal counsel. (*B. & P.C. 6126.3(e)(2).*) The attorney may apply for time extensions pending employment of other legal counsel (*B. & P.C. 6126.3(e)(3)*), and with the consent of a client, may file notices, motions, or pleadings on the client's behalf to preserve jurisdictional time limits where other legal counsel has not yet been obtained (*B. & P.C. 6126.3(e)(4).*)

(c) Notification to depositors and persons and entities, other than clients, who may be affected. (*B. & P.C. 6126.3(e)(5).*)

(d) Arranging for clients to receive their papers or property. (*B. & P.C. 6126.3(e)(6).*)

(e) Arranging for the appointment of a receiver, if applicable, to take possession and control of bank accounts relating to the affected person's practice. (*B. & P.C. 6126.3(e)(7).*)

Neither the court nor its appointed attorneys are authorized to approve or disapprove the employment of legal counsel, fix terms of employment, or conduct the practice of the affected person except as permitted by *B. & P.C. 6126.3(e)(3)* and *(e)(4)*. (*B. & P.C. 6126.3(h).*) Moreover, an appointed attorney may not accept employment as an attorney by a client of the affected person on a matter pending at the time of appointment, unless approved by the court. (*B. & P.C. 6126.3(i).*) Appointed attorneys serve without compensation, except that an attorney may receive reasonable compensation from the State Bar for necessary "extraordinary time and services," and for reimbursement of necessary expenses. (*B. & P.C. 6126.3(m).*)

(3) *Attorney-Client Privilege.* During examination of the files and records, the attorney-client privilege must be observed and maintained, and disclosures may be made "only to the extent necessary to carry out the purposes" of *B. & P.C. 6126.3*, and only as is "reasonably necessary for the accomplishment of the purpose for which" the affected person was consulted. (*B. & P.C. 6126.3(f).*)

(4) *Orders.* If the court finds that an application is more likely than not to be granted and that delay in making the orders under *B. & P.C. 6126.3(e)* will result in substantial injury to clients or others, the court may, with or without notice, make appropriate interim orders. (*B. & P.C. 6126.3(j).*) Orders made under *B. & P.C. 6126.3* are not appealable and may not be stayed by writ petition "except as ordered by the superior court or by the appellate court." (*B. & P.C. 6126.3(l).*)

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VII. REGULATION OF PRACTICE
E. Mandatory Continuing Legal Education.

1 Witkin Cal. Proc. Attys § 406

[§ 406] Mandatory Continuing Legal Education.

(1) *Establishment of MCLE Program.* The 1989 Legislature enacted *B. & P.C. 6070* requiring a mandatory continuing legal education (MCLE) program administered by the State Bar. Pursuant to the statute, the Supreme Court authorized the State Bar to establish and administer an MCLE program, and the State Bar adopted Minimum Continuing Legal Education Rules and Regulations (MCLE Rules) in 1990.

(2) *Requirements.* Within designated 36-month compliance periods, all active State Bar members must complete at least 25 hours of legal education activities approved by the State Bar or offered by a State Bar-approved provider. (*B. & P.C. 6070(a)*; C.R.C., Rule 9.31(c); MCLE Rules, §2.0.) At least 4 hours must relate to legal ethics, and at least 1 hour must relate to substance abuse and emotional distress and at least 1 hour must relate to elimination of bias in the legal profession. (MCLE Rules, §§2.0, 2.1.2, 2.1.3.) At least 12.5 hours must be in participatory activity (i.e., educational activity that may be verified by the provider), and 12.5 hours may be by self-study. (MCLE Rules, §§2.3, 4.1, 4.2.)

(3) *Compliance Groups.* Members are permanently assigned to the following Compliance Groups based on the first initial of the member's last name on the date of admittance: Group 1, A-G; Group 2, H-M; and Group 3, N-Z. (MCLE Rule, §3.1.) Bar membership cards note the MCLE Group number on the face of the card. Current compliance information is available on the State Bar's website: www.calbar.ca.gov.

(4) *Certification of Approved Providers.*

(a) *Public Agencies and Professional Associations.* Statewide associations of public agencies and incorporated, nonprofit professional associations of attorneys must be certified as State Bar approved providers on completion of an appropriate application process. (*B. & P.C. 6070(b)*.)

(b) *District Attorneys and Public Defenders Associations.* Programs provided by the California District Attorneys Association, the California Public Defenders Association, or both, including programs provided under P.C. 11500 et seq. (statewide programs of education, training, and research for local public prosecutors and public defenders), are considered legal education activities approved by the State Bar or offered by a State Bar approved provider. (*B. & P.C. 6070(b)*.)

(5) *Exemptions.* The following are exempt from the MCLE requirements:

- (a) Officers and elected officials of the state. (*B. & P.C. 6070(c)*; MCLE Rules, §§6.1.1, 6.1.2.)
- (b) Full-time professors at accredited law schools. (*B. & P.C. 6070(c)*; MCLE Rules, §6.1.2.)
- (c) Full-time employees of the state, acting within the scope of their employment. (*B. & P.C. 6070(c)*; MCLE Rules, §6.1.3.)
- (d) Full-time employees of the federal Government, acting within the scope of their employment. (MCLE Rules, §6.1.4.)

Other exemptions may be granted for good cause. (MCLE Rules, §§6.2, 6.3.)

Nothing in the statute prohibits the state or any political subdivision from establishing or maintaining its own continuing education requirements for its employees. (*B. & P.C. 6070(c)*.)

(6) *Internet.* The State Bar must focus on programs and materials designed for Internet capabilities and computer technology and ensure that members having Internet access or specified computer technology can satisfy the full self-study portion of the MCLE requirement at a cost of \$ 15 per hour or less. (*B. & P.C. 6070(d)*.)

(7) *Constitutionality.* In *Warden v. State Bar* (1999) 21 C.4th 628, 88 C.R.2d 283, 982 P.2d 154, plaintiff, an active attorney, challenged the constitutional validity of the MCLE program, asserting, among other claims, that the MCLE program violated his right to equal protection by exempting specified categories of attorneys from its requirements. *Held*, the challenged exemptions are constitutional. "Although it may be that the wisdom of some or all of these exemptions is debatable *as a matter of policy*," there are two plausible reasons that rationally support each of the exemptions in question. (21 C.4th 645.)

(a) *Representing clients on full-time basis.* It is rational to assume that attorneys in each of the exempted categories, as a general matter, are less likely than other attorneys to represent clients on a full-time basis, thus rendering the need for continuing education less vital as a matter of consumer protection. (21 C.4th 645.)

(b) *Less likely to need continuing education courses.* It is rational to conclude that, in view of their particular professional roles and experience, the attorneys in each of the exempt classes (again, as a general matter) are less likely than attorneys in general to need continuing education courses in order to be familiar with recent legal developments or to remain competent practitioners. (21 C.4th 645.) (See *Greenberg v. State Bar* (2000) 78 C.A.4th 39, 41, 92 C.R.2d 493 [MCLE program does not violate equal protection or First Amendment protection against "compulsory governmental reeducation programs"; following *Warden*]; 97 A.L.R.5th 457 [constitutional validity of MCLE requirements; *Greenberg*].)

(8) *Penalty for Noncompliance.* A State Bar member who fails to satisfy the MCLE requirements must be enrolled as an inactive member. (*B. & P.C. 6070(a)*; MCLE Rules, §13.1; on reinstatement, see MCLE Rules, §14.0.) (See 96 A.L.R.5th 23 [discipline of attorney for failure to comply with MCLE requirements].)

(9) *Confidentiality.* A member's status, as it relates to compliance or exempt status, is *not* confidential and will be disclosed to interested parties on request. (MCLE Rules, §15.0.)

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VIII. RULES OF PROFESSIONAL CONDUCT

A. A.B.A. Model Rules.

1. In General.

1 Witkin Cal. Proc. Attys § 407

[§ 407] In General.

(1) *Adoption of Model Rules.* In 1977, the American Bar Association (A.B.A.) appointed a Commission on Evaluation of Professional Standards to consider problems of professional ethics and legal practice. In 1981, the Commission released its proposed Final Draft of the Model Rules of Professional Conduct (Model Rules), to replace the A.B.A. Code of Professional Responsibility. (See 66 A.B.A.J. 46; 66 A.B.A.J. 1074; 67 A.B.A.J. 1116; 68 A.B.A.J. 1019; 13 *Pacific L. J.* 273; 18 *San Diego L. Rev.* 251.)

The Final Draft, incorporating amendments adopted by the A.B.A. House of Delegates, was published in 1982; but additional amendments were made before the rules were adopted in August 1983. Most jurisdictions have adopted new professional standards based on the Model Rules. (See Preface, A.B.A., Model Rules of Professional Conduct.)

The Rules, Comments, and Comparisons were published and copyrighted by the A.B.A. in 1983. The Model Rules are available in Annotated Model Rules of Professional Conduct published by the Center for Professional Responsibility, A.B.A., and at the ABA's website: www.abanet.org/cpr. (See also Dzienkowski, Professional Responsibility Standards, Rules and Statutes.)

(2) *Nature and Scope of Rules.* The Model Rules "are intended to serve as a national framework for implementation of standards of professional conduct. ... Viewed as a whole ... , the Model Rules represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other law, such as constitutional, corporate, tort, fiduciary, and agency law." (Chair's Introduction, A.B.A. Model Rules of Professional Conduct.)

"Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. ... Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role." (Preamble to A.B.A., Model Rules of Professional Conduct.)

(3) *Effect on California Rules.* Although California has not adopted the Model Rules, courts and attorneys find the

rules helpful and persuasive in situations where the California rules are unclear or inadequate. (See, e.g., *State Comp. Ins. Fund v. WPS* (1999) 70 C.A.4th 644, 82 C.R. 799, *infra*, §539.) (For complete discussion of the California Rules of Professional Conduct, see *infra*, §409 et seq.)

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A. A.B.A. Model Rules.

2. Organizatio

1 Witkin Cal. Proc. Attys § 408

[§ 408] Organizatio

A "Preamble and Scope" provides a general orientation to the Model Rules, and extensive Comments following each rule serve as guides to interpretation. The Rules are organized in terms of an attorney's role and relationships as follows:

(1) *Client-Lawyer Relationship.*

(a) Terminology. (Rule 1.0.)

(b) Competence. (Rule 1.1.)

(c) Scope of Representation and Allocation of Authority. (Rule 1.2.)

(d) Diligence. (Rule 1.3.)

(e) Communication. (Rule 1.4.)

(f) Fees. (Rule 1.5.)

(g) Confidentiality of Information. (Rule 1.6.)

(h) Conflict of Interest: Current Clients. (Rule 1.7.)

(i) Conflict of Interest: Current Clients: Specific Rules. (Rule 1.8.)

(j) Duties to Former Clients. (Rule 1.9.)

(k) Imputation of Conflicts of Interest: General Rule. (Rule 1.10.)

(l) Special Conflicts of Interest for Former and Current Government Officers and Employees. (Rule 1.11.)

(m) Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral. (Rule 1.12.)

- (n) Organization as Client. (Rule 1.13.)
- (o) Client with Diminished Capacity. (Rule 1.14.)
- (p) Safekeeping Property. (Rule 1.15.)
- (q) Declining or Terminating Representation. (Rule 1.16.)
- (r) Sale of Law Practice. (Rule 1.17.)
- (s) Duties to Prospective Client. (Rule 1.18.)
- (2) *Counselor*.
 - (a) Advisor. (Rule 2.1.)
 - (b) Former Rule 2.2 (Intermediary) was deleted in 2002.
 - (c) Evaluation for Use by Third Persons. (Rule 2.3.)
 - (d) Lawyer Serving as Third-Party Neutral. (Rule 2.4.)
- (3) *Advocate*.
 - (a) Meritorious Claims and Contentions. (Rule 3.1.)
 - (b) Expediting Litigation. (Rule 3.2.)
 - (c) Candor Toward the Tribunal. (Rule 3.3.)
 - (d) Fairness to Opposing Party and Counsel. (Rule 3.4.)
 - (e) Impartiality and Decorum of the Tribunal. (Rule 3.5.)
 - (f) Trial Publicity. (Rule 3.6.)
 - (g) Lawyer as Witness. (Rule 3.7.)
 - (h) Special Responsibilities of Prosecutor. (Rule 3.8.)
 - (i) Advocate in Nonadjudicative Proceedings. (Rule 3.9.)
- (4) *Transactions With Persons Other Than Clients*.
 - (a) Truthfulness in Statements to Others. (Rule 4.1.)
 - (b) Communication with Person Represented by Counsel. (Rule 4.2.)
 - (c) Dealing with Unrepresented Persons. (Rule 4.3.)
 - (d) Respect for Rights of Third Persons. (Rule 4.4.)
- (5) *Law Firms and Associations*.
 - (a) Responsibilities of Supervisory Lawyers and Law Firms. (Rule 5.1.)

- (b) Responsibilities of a Subordinate Lawyer. (Rule 5.2.)
- (c) Responsibilities Regarding Nonlawyer Assistant. (Rule 5.3.)
- (d) Professional Independence of a Lawyer. (Rule 5.4.)
- (e) Unauthorized Practice of Law; Multijurisdictional Practice of Law. (Rule 5.5.)
- (f) Restrictions on Right to Practice. (Rule 5.6.)
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- (6) *Public Service.*
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- (7) *Information About Legal Services.*
 - (a) Communications Concerning A Lawyer's Services. (Rule 7.1.)
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B. California Rules.

1. In General.

a. Adoption.

1 Witkin Cal. Proc. Attys § 409

[§ 409] Adoption.

(1) *Background.* California's original Rules of Professional Conduct were adopted in 1928, and revised Rules of Professional Conduct were adopted in 1975. Some states had accepted the former A.B.A. Code of Professional Responsibility as the local code of ethics, but California had a 45-year body of case law based on its own statutes and rules, and the Board of Governors decided to retain most of the existing rules, revised and augmented in the light of the A.B.A. Code and a few significant decisions of the California Supreme Court. (See 7 Southwestern U. L. Rev. 603 [1975 revisions]; *Jeffrey v. Pounds* (1977) 67 C.A.3d 6, 12, 136 C.R. 373, supra, §110 [criticizing California Rules for departing from format and language of A.B.A. Code].)

The State Bar Commission for the Revision of the Rules of Professional Conduct engaged in a 4-year study of the 1975 California Rules in the light of the A.B.A. Model Rules and other sources. The resulting revised rules were adopted by the Board of Governors on August 27, 1988, and approved by the Supreme Court on November 28, 1988. The rules became effective May 27, 1989, and may be cited as "Rules of Professional Conduct of the State Bar of California." (*Rules of Professional Conduct, Rule 1-100(E)*.) The rules have been amended frequently.

(2) *Intention.* "The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. ... The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. ... These rules are not intended to supercede existing law relating to members in non-disciplinary contexts." (Discussion to *Rules of Professional Conduct, Rule 1-100.*)

(3) *Geographic Scope of Rules.*

(a) *Members of State Bar.* The rules govern the activities of California attorneys both within and outside California, except where attorneys lawfully practicing outside California are required by that jurisdiction to follow different rules of professional conduct. (*Rules of Professional Conduct, Rule 1-100(D)(1).*)

(b) *Attorneys From Other Jurisdictions.* The rules also govern the activities of attorneys from other jurisdictions when they perform attorney functions in California. However, nothing contained in the rules authorizes the performance

of attorney functions by persons in California except as otherwise permitted by law. (*Rules of Professional Conduct, Rule 1-100(D)(2).*) (See 113 Harv. L. Rev. 2080 [requirement that federal prosecutors are subject to ethics rules of each state in which prosecutor engages in duties].)

(4) *Comments on Particular Rules (Discussions)*. The Committee's comments are labeled "Discussions." "Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them." (*Rules of Professional Conduct, Rule 1-100(C).*)

(5) *Ethics Compendium and Hot Line*. The State Bar publishes the Compendium on Professional Responsibility, which includes State Bar ethics opinions, ethics opinions of the San Francisco, San Diego, and Los Angeles bar associations, the California Rules of Professional Conduct, and the A.B.A. Model Code and Model Rules. The State Bar also maintains an "Ethics Hotline," for telephone calls on questions involving the Rules. Attorneys may also access a wide range of ethics information through the Ethics Hotline on the State Bar's website: www.calbar.ca.gov.

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1. In General.

b. Rules Proposed by Members.

1 Witkin Cal. Proc. Attys § 410

[§ 410] Rules Proposed by Members.

With Supreme Court approval, members of the State Bar may formulate by initiative rules of professional conduct for all bar members in the state. (*B. & P.C. 6076.5(a).*)

Proposals for rules must be filed with the clerk of the Supreme Court and the secretary of the State Bar. (*B. & P.C. 6076.5(c).*) Within 30 days, the secretary must prepare a summary of the proposal to be placed, along with the full text, on the initiative petitions. (*B. & P.C. 6076.5(d), (e), (g).*) Petitions must be signed by 20% of the members in each State Bar district from which board members are elected. (*B. & P.C. 6076.5(l).*) The measure is then submitted within 90 days to the active membership for mail vote. (*B. & P.C. 6076.5(m).*) If a majority approves, the measure is "submitted to the Supreme Court for its consideration as a rule of professional conduct." (*B. & P.C. 6076.5(o).*)

As an alternative to this initiative procedure, the Board of Governors may submit proposed rules to the membership for mail vote. (*B. & P.C. 6076.5(n).*)

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2. Professional Integrity.

a. In General (Rules 1-100 to 1-120).

1 Witkin Cal. Proc. Attys § 411

[§ 411] In General (Rules 1-100 to 1-120).

(1) *Purpose and Function of Rules.* The Rules of Professional Conduct are intended to regulate professional conduct of members of the State Bar through discipline. They were adopted to protect the public and to promote respect and confidence in the legal profession. (*Rules of Professional Conduct, Rule 1-100(A).*) The rules together with any standards adopted by the Board of Governors pursuant to the rules are binding on all members of the State Bar. Accordingly, the Board of Governors is empowered to discipline members as provided by law for any wilful breach of a rule. (*B. & P.C. 6076, 6077; Rules of Professional Conduct, Rule 1-100(A).*)

Prohibitions in the rules are not exclusive; members are also bound by applicable laws including the State Bar Act (*B. & P.C. 6000 et seq.*) and opinions of California courts. (*Rules of Professional Conduct, Rule 1-100(A).*) (See *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1317, footnote 9, 64 C.R.2d 705, *infra*, §463 [law of legal ethics includes unwritten as well as written aspect; under *Rules of Professional Conduct, Rule 1-100(A)*, prohibition of certain conduct is not exclusive].)

The rules do not create a new civil causes of action, and nothing in the rules is "deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers" or the nondisciplinary consequences of violating a duty. (*Rules of Professional Conduct, Rule 1-100(A).*)

(2) *Definitions.* *Rules of Professional Conduct, Rule 1-100(B)*, defines a number of terms:

(a) "Law firm" means any of the following:

(1) Two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.

(2) A law corporation that employs more than one lawyer.

(3) A division, department, office, or group within a business entity that includes more than one lawyer who performs legal services for the business entity.

(4) A publicly funded entity that employs more than one lawyer to perform legal services.

"Law firm" is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. Further, the definition is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law (supra, §379 et seq.). (Discussion to *Rules of Professional Conduct, Rule 1-100.*)

(b) "Member" means a member of the State Bar of California.

(c) "Lawyer" means a member of the State Bar of California or a person admitted in good standing and eligible to practice before the bar of (1) any United States court, (2) the highest court of the District of Columbia or any state, territory, or possession of the United States, or (3) the highest court of a foreign country or a political subdivision.

(d) "Associate" means an employee or fellow employee who is employed as a lawyer.

(e) "Shareholder" means a shareholder in a professional corporation pursuant to *B. & P.C. 6160* et seq. (supra, §24 et seq.).

(3) *Disciplinary Authority of State Bar.* A member must comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to *B. & P.C. 6077*, *B. & P.C. 6078* (infra, §601), and *C.R.C., Rule 9.19* (infra, §601). (*Rules of Professional Conduct, Rule 1-110.*)

(4) *Assisting, Soliciting, or Inducing Violations.* A member must not knowingly assist in, solicit, or induce any violation of the Rules of Professional Conduct or of the State Bar Act. (*Rules of Professional Conduct, Rule 1-120.*)

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2. Professional Integrity.

b. False Statements Regarding Admission (Rule 1-200).

1 Witkin Cal. Proc. Attys § 412

[§ 412] False Statements Regarding Admission (Rule 1-200).

A member must not knowingly (1) make a false statement regarding a material fact or (2) fail to disclose a material fact in connection with an application for admission to the State Bar. Nor may a member further an application for admission to the State Bar of a person whom the member knows to be unqualified in relevant attributes. (*Rules of Professional Conduct, Rule 1-200.*) However, these prohibitions do not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to the admission. (*Rules of Professional Conduct, Rule 1-200(C).*) For purposes of Rule 1-200, "admission" includes readmission. (Discussion to *Rules of Professional Conduct, Rule 1-200.*) (See *In the Matter of Pasyanos* (2005) 4 Cal. State Bar Ct. Rptr. 746, 753 [attorney's preadmission failure to update moral character application to disclose misdemeanor charges of battery and violation of restraining order was deemed inadvertent and without intent to deceive; thus, this was proper case for public reproof rather than cancellation of license to practice].)

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c. Unauthorized Practice of Law (Rule 1-300).

1 Witkin Cal. Proc. Attys § 413

[§ 413] Unauthorized Practice of Law (Rule 1-300).

An attorney must not aid a person or entity in the unauthorized practice of law. Nor may an attorney practice law in a jurisdiction where to do so would violate regulations in that jurisdiction. (*Rules of Professional Conduct, Rule 1-300.*) (See *In the Matter of Wells* (2006) 4 Cal. State Bar Ct. Rptr. 896, 902 [Rule 1-300 was violated by attorney licensed in California only but residing in South Carolina and representing clients there].) (On regulation of practice and unlawful practice of law, see *supra*, §379 et seq.)

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d. Dealings With Nonlawyer (Rules 1-310, 1-320).

1 Witkin Cal. Proc. Attys § 414

[§ 414] Dealings With Nonlawyer (Rules 1-310, 1-320).

(1) *Forming Partnership.* An attorney may not form a partnership with a layperson if any of the activities of that partnership consist of the practice of law. (*Rules of Professional Conduct, Rule 1-310.*) Rule 1-310 is not intended to govern an attorney's activities not constituting the practice of law. It is intended solely to preclude an attorney from being involved in the practice of law with a person who is not a lawyer. (Discussion to *Rules of Professional Conduct, Rule 1-310.*) (See A.B.A. Model Rules of Professional Conduct, Rule 5.4 [professional independence of lawyer].)

(2) *Sharing Legal Fees.* Neither an attorney nor a law firm may directly or indirectly share legal fees with a nonattorney. (*Rules of Professional Conduct, Rule 1-320(A).*) (See *In the Matter of Nelson* (1990) 1 Cal. State Bar Ct. Rptr. 178, 182 [partnership with nonattorney, fee-splitting and capping arrangement]; *McIntosh v. Mills* (2004) 121 C.A.4th 333, 343, 346, 17 C.R.3d 66 [agreement between attorney and nonattorney consultant to pay consultant 15% of attorneys' fees to assist in preparing civil action against financial institution violated *Rules of Professional Conduct, Rule 1-320(A)*; agreement was unenforceable on its face under illegality of contract doctrine]; 43 A.L.R.5th 793 [propriety and enforcement of attorney's obligation to share fee award with public interest organization].) The following exceptions apply:

(a) An agreement between an attorney and a law firm, partner, or associate may provide for a money payment after the attorney's death to the attorney's estate or to one or more specified persons over a reasonable period of time. (*Rules of Professional Conduct, Rule 1-320(A)(1).*)

(b) An attorney or law firm completing unfinished legal business of a deceased attorney may pay to the deceased attorney's estate, or other person legally entitled to payment, that proportion of the total compensation that fairly represents the services rendered by the deceased attorney. (*Rules of Professional Conduct, Rule 1-320(A)(2).*)

(c) An attorney or law firm may include nonattorney employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if the plan does not circumvent the Rules of Professional Responsibility or B. & P.C. 6000 et seq. (*Rules of Professional Conduct, Rule 1-320(A)(3).*)

(d) An attorney may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar's Minimum Standards for a Lawyer Referral Service in California (supra, §12). (*Rules of Professional Conduct, Rule 1-320(A)(4).*)

(3) *Compensation or Gift for Employment.* An attorney must not give or promise anything of value to a person or entity as inducement to recommend or secure employment, or as a reward for having made a recommendation resulting in employment, of the attorney or the attorney's law firm. However, an attorney's offering or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the attorney or the law firm does not of itself violate this rule if not offered or given in consideration of any promise, agreement, or understanding that the gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future. (*Rules of Professional Conduct, Rule 1-320(B).*)

(4) *Compensation or Gift to Media.* An attorney may not give or promise anything of value to a media representative in anticipation of or in return for publicity in a news item. However, incidentally providing food or beverage does not of itself violate this rule. (*Rules of Professional Conduct, Rule 1-320(C).*) Similarly, Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising professional services. (Discussion to *Rules of Professional Conduct, Rule 1-320.*)

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e. Employment of Disbarred or Suspended Lawyer (Rule 1-311).

1 Witkin Cal. Proc. Attys § 415

[§ 415] Employment of Disbarred or Suspended Lawyer (Rule 1-311).

(1) *Prohibited Employment.* An attorney, on behalf of a client, may not "employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member" to (a) give legal consultation or advice; (b) appear in a proceeding or "before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer"; (c) appear at a deposition or other discovery matter; (d) negotiate or transact a matter with third parties; (e) handle the client's funds; or (f) engage in activities that constitute the practice of law. (*Rules of Professional Conduct, Rule 1-311(B)*; on activities that constitute practice of law, see Discussion to *Rules of Professional Conduct, Rule 1-311.*)

(2) *Authorized Employment.* An attorney may employ, associate with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting, or clerical activities, including (a) preparatory legal work (e.g., legal research, compiling information, drafting pleadings and other documents); (b) direct communication with the client or third parties on matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or (c) accompanying an attorney to a deposition or other discovery matter to provide clerical assistance. (*Rules of Professional Conduct, Rule 1-311(C).*)

(3) *Required Notice.* An attorney, on employing a disbarred, etc., lawyer, must give the State Bar written notice of the employment. The notice must include a full description of the affected person's current bar status, list the activities prohibited by *Rules of Professional Conduct, Rule 1-311(B)*, and state that the affected attorney will not perform those activities. Similar written notice must be given to each client on whose specific matter the person will work, before or at the time the person is employed to work on the matter. The notice and proof of service of the notice must be retained for 2 years after termination of the member's employment with the client. (*Rules of Professional Conduct, Rule 1-311(D)*; see Discussion to *Rules of Professional Conduct, Rule 1-311* [Rule 1-311(D) not intended to discourage member from discussing with client activities that disbarred, etc., lawyer will perform].) The State Bar must be given written notice on termination of the affected attorney. (*Rules of Professional Conduct, Rule 1-311(F).*)

(4) *Exceptions.* An attorney may, without client or State Bar notification, employ an involuntarily inactive lawyer whose sole function is to provide support activities, such as maintenance of the office or equipment, courier or delivery

services, catering, reception, or typing or transcription, etc. (*Rules of Professional Conduct, Rule 1-311(E).*)

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2. Professional Integrity.

f. Advertising and Solicitation (Rule 1-400).

1. Definitions.

1 Witkin Cal. Proc. Attys § 416

[§ 416] Definitions.

(1) *Communication*. For purposes of *Rules of Professional Conduct, Rule 1-400*, "communication" means a message or offer made by or on behalf of an attorney concerning the availability for professional employment of an attorney or a law firm directed to a former, present, or prospective client (*Rules of Professional Conduct, Rule 1-400(A)*), and includes, but is not limited to, the following:

(a) Use of firm name, trade name, fictitious name, or other professional designation of the attorney or law firm. (*Rules of Professional Conduct, Rule 1-400(A)(1)*.)

(b) Stationery, letterhead, business card, sign, brochure, or other comparable written material describing the attorney, law firm, or lawyers. (*Rules of Professional Conduct, Rule 1-400(A)(2)*.)

(c) Advertisements (regardless of medium) of the attorney or law firm directed to the general public. (*Rules of Professional Conduct, Rule 1-400(A)(3)*.)

(d) Unsolicited correspondence from an attorney or law firm directed to a person or entity. (*Rules of Professional Conduct, Rule 1-400(A)(4)*.)

(2) *Solicitation*. For purposes of Rule 1-400, "solicitation" means communications concerning the availability for professional employment of an attorney or a law firm in which a significant motive is pecuniary gain, and the communication is (a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter that is a subject of the communication. (*Rules of Professional Conduct, Rule 1-400(B)*.) (See *Best Buy Stores, L.P. v. Superior Court* (2006) 137 C.A.4th 772, 776, 40 C.R.3d 575 [letter from attorney, who was also class representative, to potential class members to locate potential substitute plaintiffs was not solicitation under *Rules of Professional Conduct, Rule 1-400(B)*].) (On statutory regulation of advertising, see *supra*, §37 et seq.; on A.B.A. Model Rules governing advertising, see A.B.A. Model Rules of Professional Conduct, Rules 7.1 et seq.)

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f. Advertising and Solicitation (Rule 1-400).

2. Prohibited Solicitation.

1 Witkin Cal. Proc. Attys § 417

[§ 417] Prohibited Solicitation.

(1) *No Family or Professional Relationship.* A solicitation may not be made by or on behalf of an attorney or law firm to a prospective client with whom the attorney or law firm has no family or prior professional relationship, unless the solicitation is constitutionally protected from abridgment. However, a solicitation to a former or present client in the discharge of an attorney's or law firm's professional duties is not prohibited. (*Rules of Professional Conduct, Rule 1-400(C).*) (See A.B.A. Model Rules of Professional Conduct, Rule 7.3 [direct contact with prospective clients]; on what constitutes solicitation, see *supra*, §416.)

(2) *Content and Form of Solicitation.* A communication or solicitation must not do any of the following:

(a) Contain an untrue statement. (*Rules of Professional Conduct, Rule 1-400(D)(1).*)

(b) Contain a matter, or present or arrange a matter in a manner or format, that is false, deceptive, or tends to confuse, deceive, or mislead the public. (*Rules of Professional Conduct, Rule 1-400(D)(2).*)

(c) Omit a fact necessary to make the statements not misleading to the public. (*Rules of Professional Conduct, Rule 1-400(D)(3).*)

(d) Fail to indicate clearly, expressly, or by context that it is a communication or solicitation. (*Rules of Professional Conduct, Rule 1-400(D)(4).*)

(e) Be transmitted in a manner that involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct. (*Rules of Professional Conduct, Rule 1-400(D)(5).*)

(f) State that an attorney is a "certified specialist" unless the attorney is currently certified as a specialist by the Board of Legal Specialization or another entity accredited by the State Bar to designate specialists. The complete name of the entity that granted certification must be stated. (*Rules of Professional Conduct, Rule 1-400(D)(6).*) (On false and misleading communications, see *Leoni v. State Bar* (1985) 39 C.3d 609, 217 C.R. 423, 704 P.2d 183, *infra*, §518)

[discussing similar former rule]; *In re Morse* (1995) 11 C.4th 184, 44 C.R.2d 620, 900 P.2d 1170, *infra*, §518 [discussing *Rules of Professional Conduct*, Rule 1-400(D)(2)].)

(3) *Retention of Communication*. True and correct copies or recordings of communications made by written or electronic media must be retained for 2 years and, on written request, made available to the State Bar. Evidence to support factual or objective claims contained in the communication may also be required. (*Rules of Professional Conduct*, Rule 1-400(F).)

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f. Advertising and Solicitation (Rule 1-400).

3. State Bar Standards.

1 Witkin Cal. Proc. Attys § 418

[§ 418] State Bar Standards.

The Board of Governors has adopted standards regarding communications presumed to violate *Rules of Professional Conduct, Rule 1-400* (supra, §417). The standards are used only as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of the rules. They are effective and binding on all members. For this purpose, "presumption affecting the burden of proof" means "presumption" as defined by *Ev.C. 605, 606* (see *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §56 et seq.*). (*Rules of Professional Conduct, Rule 1-400(E)*.) The following forms of communication are presumed to violate Rule 1-400 (Standards to *Rules of Professional Conduct, Rule 1-400*):

- (1) A communication containing guarantees, warranties, or predictions regarding the result of the representation.
- (2) A communication containing testimonials about or endorsements of a member unless the communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
- (3) A communication delivered to a potential client whom the member knows, or reasonably should know, is in such a physical, emotional, or mental state as to not be expected to exercise reasonable judgment about retaining counsel.
- (4) A communication that is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.
- (5) A communication, except professional announcements, seeking professional employment for pecuniary gain that is transmitted by mail or equivalent means and does not bear the word "Advertisement," "Newsletter," or words of similar import on the first page. If the communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the outside of the envelope must bear the word "Advertisement," "Newsletter" or a similar identification.

(6) A communication in the form of a firm name, trade name, fictitious name, or other professional designation that states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or nonprofit legal services organization.

(7) A communication in the form of a firm name, trade name, fictitious name, or other professional designation that states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to *B. & P.C. 6160* et seq. unless the relationship in fact exists.

(8) A communication that states or implies that a member or law firm is "of counsel" to another lawyer or a law firm, unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to *B. & P.C. 6160* et seq.) that is close, personal, continuous, and regular.

(9) A communication in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice that differs materially from any other designation used by the member or law firm at the same time in the same community.

(10) A communication implying that the member or law firm is participating in a lawyer referral service that has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) A communication, except professional announcements, in the form of an advertisement primarily seeking professional employment for pecuniary gain, transmitted to all or a substantial portion of the general public by mail or equivalent means or by commercial mass media, that does not state the name of the member responsible for the communication. If made on behalf of a law firm, the communication must state the name of at least one member.

(12) A communication containing a dramatization, unless it contains a disclaimer stating "this is a dramatization" or words of similar import.

(13) A communication that states or implies "no fee without recovery" unless it expressly discloses whether the client will be liable for costs.

(14) A communication that states or implies that a member can provide legal services in a language other than English unless the member can actually do so, or the communication states, in the language of the communication, the employment title of the person who speaks the language and that the person is not a State Bar member, if that is the case.

(15) An unsolicited communication transmitted to all or a substantial portion of the general public primarily seeking professional employment for pecuniary gain and setting forth a specific fee or range of fees for a particular service, if the member charges a greater fee within 90 days after the communication, unless the communication expressly specifies a shorter period. If the communication is published in the telephone "yellow pages" or other directories published at yearly intervals, the member must conform to the advertised fee for 1 year, unless the communication expressly specifies a shorter period.

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g. Agreements Restricting Practice (Rule 1-500).

1 Witkin Cal. Proc. Attys § 419

[§ 419] Agreements Restricting Practice (Rule 1-500).

An attorney must not enter into or participate in an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the attorney's right to practice law. (*Rules of Professional Conduct, Rule 1-500(A)*.) For example, the practice, in connection with settlement agreements, of proposing that an attorney refrain from representing other clients in similar litigation, is prohibited. (Discussion to *Rules of Professional Conduct, Rule 1-500(A)*.) However, this rule does not prohibit the following:

(1) An agreement that is part of an employment, shareholder, or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship. (*Rules of Professional Conduct, Rule 1-500(A)(1)*.)

(2) An agreement that requires payments to an attorney on retirement from the practice of law. (*Rules of Professional Conduct, Rule 1-500(A)(2)*.)

(3) An agreement that is authorized by *B. & P.C. 6092.5(i)* [agreement in lieu of disciplinary proceedings] or *B. & P.C. 6093* [conditions of probation]. (*Rules of Professional Conduct, Rule 1-500(A)(3)*.)

Rule 1-500(A) does permit a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, when the relationship terminates, whether voluntary or involuntary, the member is free to practice law without any contractual restriction. (Discussion to *Rules of Professional Conduct, Rule 1-500*.)

An attorney may not participate in an agreement that precludes reporting a violation of the Rules of Professional Conduct. (*Rules of Professional Conduct, Rule 1-500(B)*.) (See A.B.A. Model Rules of Professional Conduct, Rule 5.6 [restrictions on right to practice].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. California Rules.

2. Professional Integrity.

h. Legal Service Programs (Rule 1-600).

1 Witkin Cal. Proc. Attys § 420

[§ 420] Legal Service Programs (Rule 1-600).

An attorney must not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services that permits any of the following (*Rules of Professional Conduct, Rule 1-600(A)*):

(1) A third person or organization to interfere with the attorney's independence of professional judgment, or with the client-lawyer relationship.

(2) Unlicensed persons to practice law.

(3) A third person or organization to receive directly or indirectly a part of the consideration paid to the attorney except as permitted by the Rules of Professional Conduct. (See *Gafcon v. Ponsor & Associates (2002) 98 C.A.4th 1388, 1416, 120 C.R.2d 392*, supra, §386 [where multiple companies insure same entity, insurer's staff counsel's practice of billing other insurers for legal services and then forwarding money to employer insurer was not illegal fee splitting under Rule 1-600 but merely cost-sharing between insurers for respective defense cost obligations].)

For purposes of Rule 1-600(A), a "nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, and organizations. (Discussion to *Rules of Professional Conduct, Rule 1-600*.)

The Board of Governors is charged with formulating and enforcing Minimum Standards for Lawyer Referral Services (see supra, §12) that are binding on all members. (*Rules of Professional Conduct, Rule 1-600(B)*.) The Rules of Professional Conduct encourage attorneys to participate in a lawyer referral service properly established and operated in conformity with the Minimum Standards. (Discussion to *Rules of Professional Conduct, Rule 1-600*.)

Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services. Nor is it intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public. (Discussion to *Rules of Professional Conduct, Rule 1-600*.) (See A.B.A. Model Rules of Professional Conduct, Rule 6.3 [membership in legal services organization].)

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2. Professional Integrity.

i. Attorney as Judicial Candidate or Acting in Judicial Capacity (Rules 1-700, 1-710).

1 Witkin Cal. Proc. Attys § 421

[§ 421] Attorney as Judicial Candidate or Acting in Judicial Capacity (Rules 1-700, 1-710).

An attorney who is a candidate for judicial office in California must comply with Canon 5 of the Code of Judicial Ethics (see 2 *Cal. Proc.* (5th), *Courts*, §59). (*Rules of Professional Conduct*, *Rule 1-700*.)

An attorney serving as a temporary judge, referee, or court-appointed arbitrator is subject to the ethical obligations under Canon 6D of the Code of Judicial Ethics (see 2 *Cal. Proc.* (5th), *Courts*, §60). (*Rules of Professional Conduct*, *Rule 1-710*.) This rule is intended to permit the State Bar to discipline members who violate applicable provisions of the Code of Judicial Ethics while acting in a judicial capacity under court order or appointment. (Discussion to *Rules of Professional Conduct*, *Rule 1-710*.)

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B. California Rules.

3. Relationship Among Members.

a. Communications With Represented Party (Rule 2-100).

1. Prohibited and Authorized Activity.

1 Witkin Cal. Proc. Attys § 422

[§ 422] Prohibited and Authorized Activity.

(1) *Prohibited Activity.* While representing a client, an attorney must not communicate directly or indirectly about the subject of the representation with a party the attorney knows to be represented by another attorney in the matter, unless the other attorney consents. (*Rules of Professional Conduct, Rule 2-100(A).*) (See A.B.A. Model Rules of Professional Conduct, Rule 4.2 [communication with person represented by counsel]; on communication with adverse party as cause for discipline, see *infra*, §536 et seq.)

For purposes of Rule 2-100, a "party" includes the following:

(a) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership. (*Rules of Professional Conduct, Rule 2-100(B)(1).*)

(b) An association member or an employee of an association, corporation, or partnership, (1) if the subject of the communication is an act or omission of the person in connection with the matter that may be binding on, or imputed to, the organization, or (2) whose statement may constitute an admission on the part of the organization. (*Rules of Professional Conduct, Rule 2-100(B)(2).*)

(2) *Authorized Activity.* Rule 2-100 does not prohibit the following:

(a) Communications with a public officer, board, committee, or body. (*Rules of Professional Conduct, Rule 2-100(C)(1).*)

(b) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice. (*Rules of Professional Conduct, Rule 2-100(C)(2).*)

(c) Communications otherwise authorized by law. (*Rules of Professional Conduct, Rule 2-100(C)(3).*)

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3. Relationship Among Members.

a. Communications With Represented Party (Rule 2-100).

2. Nature and Scope of Rule.

1 *Witkin Cal. Proc. Attys* § 423

[§ 423] Nature and Scope of Rule.

(1) *Intent.* As used in *Rules of Professional Conduct, Rule 2-100(A)* (supra, §422), "the subject of the representation," "matter," and "party" are not limited to litigation. Rule 2-100 is intended to control communications between an attorney and persons the attorney knows to be represented by counsel unless a statutory scheme or case law overrides the rule. (Discussion to *Rules of Professional Conduct, Rule 2-100*; see *Jorgensen v. Taco Bell Corp. (1996) 50 C.A.4th 1398, 1401.*, 58 C.R.2d 178 [prelitigation investigative interviews with unrepresented employees conducted before claim against employer was filed did not violate Rule 2-100; interviewed employees were not represented by counsel in matter, because no matter had been asserted against corporation].)

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents an attorney from advising the client that the communication can be made. Moreover, the rule does not prohibit an attorney who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. The attorney has independent rights as a party that should not be abrogated because of his or her professional status. To prevent any possible abuse in these situations, counsel for the opposing party may advise that party (a) about the risks and benefits of communications with a lawyer-party, and (b) not to accept or engage in communications with the lawyer-party. (Discussion to *Rules of Professional Conduct, Rule 2-100.*)

(2) *Actual Knowledge Requirement.* An attorney may not, either before or after the commencement of litigation, communicate about a matter ex parte with an employee of a corporation covered by *Rules of Professional Conduct, Rule 2-100*, where the attorney *actually* knows that the corporation and its employees are represented by an attorney in the matter *at the time of the ex parte communication*. Constructive or presumptive knowledge of the representation is insufficient to invoke the ex parte contact prohibition. (*Truitt v. Superior Court (1997) 59 C.A.4th 1183, 1190*, 69 C.R.2d 558 [attorney's investigator properly acquired statement from defendant's employee between time of filing complaint and time of defendant's answer; there was no evidence that attorney actually knew of representation].)

(3) *Party.* In *Snider v. Superior Court (2003) 113 C.A.4th 1187, 7 C.R.3d 119*, S resigned from Q, a corporation,

and began his own design and construction company. Q sued S, alleging causes of actions involving trade secrets, breach of contract, and unfair competition. L, attorney for S, contacted two employees of Q--a sales manager, and a director of production. Because S told L that both employees were salespersons with no corporate responsibility, L concluded that they were not within Q's management "control group," and they could not bind or make an admission on Q's behalf. L informed the employees that he represented S and that they did not have to speak with him. Both stated that Q's counsel had not talked to them about trial testimony. L wanted only to ask them about matters of which they had percipient knowledge and specifically about a meeting in which the viability of Q's business was discussed. On Q's petition, the trial court disqualified L for violating *Rules of Professional Conduct, Rule 2-100*. *Held*, reversed.

(a) Neither employee was an officer or director, as required by Rule 2-100(B)(1), nor did they come within the ambit of "managing agent," as defined in *White v. Ultramar* (1999) 21 C.4th 563, 88 C.R.2d 19, 981 P.2d 944, 6 Summary (10th), *Torts*, §1585. *White* held, for purposes of organizational liability for punitive damages, that "managing agent" included only those employees who exercised "substantial discretionary authority over decisions that ultimately determined corporate policy." The definition applies equally to Rule 2-100(B)(1). (113 C.A.4th 1208.)

(b) Neither employee falls within the first category of Rule 2-100(B)(2) because there is nothing to indicate that L's contact with them concerned an act or omission of either employee in connection with the lawsuit. As to the rule's second category involving statements that might constitute an admission on the part of the organization, this category applies only to "high-ranking executives and spokespersons" who are authorized to speak for the organization. Neither employee had that status. (113 C.A.4th 1210.)

(c) Had Q's employees been subject to Rule 2-100, L still would not have violated the rule because actual knowledge of an employee's status is necessary. Here, nothing suggests that L knew the employees were either part of Q's "control group," or were "managing-speaking agents." (113 C.A.4th 1216.)

Under certain conditions, Rule 2-100 might not bar attorneys from contacting *directors* in a corporation represented by corporate counsel. *La Jolla Cove Motel & Hotel Apartments v. Superior Court* (2004) 121 C.A.4th 773, 17 C.R.3d 467, involved an action for corporate dissolution by minority shareholders (J), in which J obtained declarations from directors D and B to support J's application for receivership. D and B were represented by separate rather than corporate counsel, and although corporate counsel objected to J's use of the declarations, the separate counsel did not. Corporate counsel sought disqualification of J's attorneys, asserting that the attorneys had contacted D and B in violation of *Rules of Professional Conduct, Rule 2-100*. The trial court denied the disqualification motion, finding that Rule 2-100 permitted contact where, as here, separate counsel did not object. Also, even without permission, there was no evidence that plaintiffs obtained confidential attorney-client communications during contact that would require the drastic measure of disqualification. The corporation petitioned for a writ of mandamus to overturn the trial court. *Held*, petition denied.

(a) Although directors are normally deemed to be represented members of a corporation who may not be contacted, Rule 2-100 makes an exception when the represented party's separate counsel consents. (121 C.A.4th 784.)

(b) Here, the dissolution action was brought by minority shareholders. D and B, elected by the minority shareholders, represented the minority shareholders' interests in the corporation and thus were adverse to the corporation regarding the subject of the litigation. Also, D and B alleged improprieties by the majority shareholders' representatives and exclusion from corporate activities. Accordingly, D and B retained separate counsel to represent their interests. Under these circumstances, because corporate counsel's duties lies with the entity, not its directors, and an actual conflict existed between the corporation and D and B, corporate counsel's representation of D and B would have violated ethical rules. Therefore, to comply with Rule 2-100, J's counsel needed only the permission of D and B's separate counsel. (121 C.A.4th 784, 786.) (See *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798, 806 [strictly construing rule to find that plaintiff's attorney in negligence action against building owner following arson did not violate rule by contacting criminal defendant in arson prosecution, who was not "party" to civil action].)

(4) *Former Employees*. Rule 2-100(B) is intended to apply only to persons employed *at the time of the communication*. (Discussion to *Rules of Professional Conduct, Rule 2-100*.) Rule 2-100 "permits opposing counsel to initiate ex parte contacts with unrepresented former employees, and present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability." (*Triple A Machine Shop v. California* (1989) 213 C.A.3d 131, 140, 261 C.R. 493; see *Nalian Truck Lines v. Nakano Warehouse & Trans. Corp.* (1992) 6 C.A.4th 1256, 1263, 8 C.R.2d 467 [following *Triple A Machine Shop*]; *Continental Ins. Co. v. Superior Court* (1995) 32 C.A.4th 94, 119, 37 C.R. 2d 843 [following *Nalian Truck Lines*]; 57 A.L.R.5th 633 [right of attorney to conduct ex parte interviews with former corporate employees; discussing *Rules of Professional Conduct, Rule 2-100* and *Triple A Machine Shop*].)

(5) *Member Contacted by Opposing Party*. Rule 2-100 applies when member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Because A is employed by the opposition, the member cannot give independent advice. (Discussion to *Rules of Professional Conduct, Rule 2-100*.)

(6) *Party Seeking New Counsel*. Rule 2-100(C)(2) (supra, §422) is intended to permit an attorney to communicate with a party seeking new counsel or a second opinion. An attorney so contacted continues to be bound by other Rules of Professional Conduct. (See, e.g., *Rules of Professional Conduct, Rule 1-400*, supra, §416 et seq., and Rule 3-310, infra, §438 et seq.) (Discussion to *Rules of Professional Conduct, Rule 2-100*.)

(7) *Former Party*. In *Jackson v. Ingersoll-Rand Co.* (1996) 42 C.A.4th 1163, 50 C.R.2d 66, plaintiff J sued defendants for injuries caused by use of their pneumatic tools. J's wife joined as a plaintiff seeking recovery for loss of consortium, but she dismissed her action after the couple's separation. Over 2 years later, defendant's attorney contacted the wife to schedule her deposition. On plaintiff's motion, the trial court disqualified defense counsel under *Rules of Professional Conduct, Rule 2-100*. *Held*, reversed.

(a) Rule 2-100 is not limited to litigants, so the wife's dismissal from the case in August 1992 does not conclusively settle the question. However, it does raise serious doubts about whether plaintiff's counsel continued to represent her over 2 years later, and there was no evidence that the firm had provided legal counsel to her after November 1992. (42 C.A.4th 1167.)

(b) The overwhelming weight of the evidence was that plaintiff's counsel was not representing the wife when defense counsel contacted her. Her interest in the case, and her need for legal representation, ended on dissolution of her marriage and dismissal of her only cause of action, and she herself repudiated any attorney-client relationship with plaintiff's counsel. (42 C.A.4th 1167, 1168.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Intent*. In *Myerchin v. Family Benefits* (2008) 162 C.A.4th 1526, 76 C.R.3d 816, M sought payment from defendant for services rendered. G, an attorney with defendant and close coworker with M when M rendered his services, attempted to negotiate payment for M. Agreement failed, and M retained an attorney and brought a breach of contract action. On learning of the action, G sent M personally a proposed settlement agreement to which M agreed. M signed the agreement, accepted payment, and spent the money without informing his attorney. However, M refused to dismiss the action as agreed and argued that G's direct communication with him rendered the settlement agreement unenforceable. The trial court granted defendant's motion for summary judgment based on the settlement agreement being a complete defense. *Held*, affirmed.

(a) M sought relief from his bargain based solely on the theory that G's conduct violated *Rules of Professional Conduct, Rule 2-100*, and that to enforce the agreement would violate public policy. However, the policy of preserving the attorney-client relationship, which is the intent of Rule 2-100, was only one of several public policies implicated in the case; the strong policies favoring the settlement of disputes and the enforcement of contracts freely entered into

were also implicated here. (162 C.A.4th 1538.)

(b) Even assuming that G violated Rule 2-100, there was no evidence that G's direct communication with M after M had retained counsel rendered M unable to make a reasoned decision about settlement. Thus, "the trial court properly rejected the assertion that the mere *fact* of that improper communication would be sufficient to nullify the agreement." (162 C.A.4th 1539.)(3) *Party*.

(New) *Certified class member in class action*: In a class action, a class member is a "party" within the scope of Rule 2-100 once the court has conditionally certified the class and has appointed and designated class counsel. In *Hernandez v. Vitamin Shoppe Industries* (2009) 174 C.A.4th 1441, 95 C.R.3d 734, involving labor law violations, attorney S represented a party plaintiff in one class that was part of a consolidation of class actions against defendant employer. Defendant's counsel approached plaintiffs' counsel in the different putative classes and offered to settle on a classwide basis if plaintiffs would participate in mediation. S declined to participate. Mediation was conducted and a settlement reached. After a hearing, which included objections by S, the trial court granted preliminary approval of the settlement, conditionally certified a class for settlement purposes, and designated counsel and class representatives. S then sent letters to various employees of defendant urging them to "protect" themselves by opting out of the settlement, to retain him as counsel, and to join his action. *Held*, the letters violated Rule 2-100.

(a) Although no California case has directly addressed the issue of whether a conditional class certification invokes the no contact provisions of Rule 2-100, several federal cases have and these cases support the conclusion that the rule is triggered by a court's conditional certification of a class, as was done here. (174 C.A.4th 1459.)

(b) The argument that S lacked knowledge of representation fails. S knew that he was writing to represented parties because the court order conditionally certifying the class indicated that the class members were represented by class counsel. This includes absent class members, who are also deemed "parties" represented by the designated counsel. (174 C.A.4th 1460.)

(c) Rule 2-100 is not limited to communications by opposing counsel, as argued by S. There is no reason to limit the rule, especially here where S's letters were antagonistic to the views of other class counsel. S "plainly intruded upon the attorney-client relationship between class members and class counsel, threatening the integrity of that relationship." (174 C.A.4th 1460.)

(d) Unnamed class members are represented parties for purposes of Rule 2-100. "Just because class counsel may have heightened obligations to named representatives in such matters as settlement offer communications does not necessarily mean that counsel does not represent the entire class." (174 C.A.4th 1461.)(8) (New) *Contact With Party Appearing In Pro. Per.* In *McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.* (2008) 165 C.A.4th 960, 81 C.R.3d 550, after dismissing two previous attorneys, plaintiff substituted herself as attorney of record in pro. per. Attorney S informed defendant's counsel P that S would be assisting plaintiff, but would not be an attorney of record or acting as trial counsel. As trial approached, P contacted plaintiff to advise her of a pending ex parte motion to compel the depositions of plaintiff's designated experts, and discussed other issues related to the case, including S's formal entry into the action and the possibility of settlement. Plaintiff said she was the attorney of record and that S was not planning to substitute in. During the discussion, S advised plaintiff not to disclose anything that she had discussed with her other attorneys. Later, S, although not formally substituted into the case, filed a motion seeking disqualification of P by asserting that P's conversation with plaintiff had violated Rule 2-100. The trial court denied the motion and found that the conversation between P and plaintiff was appropriate because plaintiff was the attorney of record, no privileged information was disclosed, and there was no prejudicial effect on the litigation. *Held*, affirmed.

(a) C.C.P. 284 and 285 permit a party to change attorneys at any time as long as other parties are advised of the change or that a party is appearing in pro. per. The purpose is to have a clear record of representation so that the parties are certain about whom they are authorized to deal with. Litigants and courts have the right to rely on court records as binding on both litigants and the attorneys of record. At the time P spoke with plaintiff, the court record showed

plaintiff as her own attorney, and although plaintiff had the right to be assisted by S, neither plaintiff nor S could limit the ability of opposing counsel to confer with plaintiff as attorney of record. (165 C.A.4th 966.)

(b) A party appearing in pro. per. may divide the duties or representation as would an attorney, but may not insulate himself or herself from contact by the court or adversary counsel. Rule 2-100 is intended to preserve the attorney-client relationship, and where a party appears in pro. per. this relationship is achieved by the party declining to speak with an adversary or by referring the adversary to associated counsel, if the party appearing pro. per. wishes to do so. (165 C.A.4th 967.)

(c) The communication involved here is not within the ambit of Rule 2-100, but even if it were, the result would be the same. The communication that plaintiff found objectionable was the purported divulging of a settlement figure. However, the trial court correctly found that nothing occurred in the conversations that would have an effect on either the outcome of the litigation or on the way in which the litigation would proceed. (165 C.A.4th 968.)



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3. Relationship Among Members.

b. Financial Arrangements (Rule 2-200).

1. Dividing Fees for Legal Services.

aa. In General.

1 Witkin Cal. Proc. Attys § 424

[§ 424] In General.

An attorney may divide a fee for legal services with an attorney who is not a partner, associate, or fellow shareholder under the following circumstances:

(1) The client has given written consent to the division after a full written disclosure that explains a division of fees will be made and sets forth the terms of the division. (*Rules of Professional Conduct, Rule 2-200(A)(1).*)

(2) The total fee charged by all attorneys is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in Rule 4-200 (fees; *infra*, §454). (*Rules of Professional Conduct, Rule 2-200(A)(2).*)

In *Margolin v. Shemaria* (2000) 85 C.A.4th 891, 102 C.R.2d 502, a contract action between two attorneys, plaintiff sought recovery of attorneys' fees for a tort case she referred to defendant. Plaintiff alleged that she and defendant agreed to share equally in fees that defendant recovered in the referred case, and that defendant agreed to disclose the referral agreement to the referred client and to obtain the client's written consent in compliance with *Rules of Professional Conduct, Rule 2-200*. The trial court granted defendant's motion for a directed verdict because of plaintiff's failure to satisfy the requirements of Rule 2-200. *Held*, affirmed.

(a) An attorney's clients are consumers of the attorney's expertise, and Rule 2-200 protects these clients as consumers, thus furthering the intent of the rules to protect the public and to promote respect and confidence in the legal profession. In that regard, the rule also furthers the Legislature's preference for written consumer agreements. (85 C.A.4th 901.)

(b) Plaintiff may not rely on equitable estoppel to overcome defendant's assertion of Rule 2-200 as a defense. Plaintiff's reliance on defendant's promise to provide the referred client with a written disclosure of the fee-sharing agreement and to obtain the client's written consent was not sufficiently reasonable to relieve plaintiff from complying

with Rule 2-200. As an attorney, plaintiff is presumed to know that Rule 2-200 requires actual written disclosure and written consent, not a promise by the receiving attorney to provide that disclosure and secure that consent. Plaintiff assumed the risk that defendant would not keep his promise, thus there is no unconscionable injury to plaintiff. Defendant's refusal to share the fee under the alleged agreement does not constitute his unjust enrichment sufficient to apply equitable estoppel. Plaintiff could have protected herself by providing the required written fee-sharing disclosure and obtaining the written consent. (85 C.A.4th 902.)

(c) A client has a right to know the extent of and basis for fee-sharing by attorneys. This assures that the client will not be charged unwarranted fees solely to provide sufficient compensation for fee-sharing. Disclosure should be in writing because the client should not be expected to simply remember this information while a case is pending. The written disclosure also ensures that the attorneys truly agree on the terms of the fee-sharing, thus reducing the likelihood of a disagreement that will lead to litigation or have a negative impact on the client. (85 C.A.4th 903.) (See *Scolinos v. Kolts* (1995) 37 C.A.4th 635, 640, 44 C.R.2d 31 [under similar former rule; referral agreement without disclosure and without written consent of client was void as against public policy]; *Anderson, McPharlin & Connors v. Yee* (2005) 135 C.A.4th 129, 133, 37 C.R. 627 [Rule 2-200(A) is not applicable to agreement between partner and his or her own law firm; thus, agreement requiring departing partner who took clients from firm to pay firm according to formula was valid].)

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b. Financial Arrangements (Rule 2-200).

1. Dividing Fees for Legal Services.

bb. Quantum Meruit Recovery.

1 Witkin Cal. Proc. Attys § 425

[§ 425] Quantum Meruit Recovery.

Rules of Professional Conduct, Rule 2-200 (supra, §424) does not preclude quantum meruit recovery when the rule's client disclosure and consent requirements are not met. In *Huskinson & Brown, LLP v. Wolf* (2004) 32 C.4th 453, 9 C.R.3d 693, 84 P.3d 379, plaintiff law firm referred client S to defendant law firm. In exchange for the referral, defendant orally agreed to pay plaintiff 25% of attorneys' fees recovered. The fee-sharing agreement was not disclosed to S. Following judgment for S, defendant received fees but failed to pay 25% to plaintiff. The trial court denied recovery on plaintiff's breach of contract action, finding the fee-sharing agreement unenforceable because it failed to comply with the disclosure and consent requirements of *Rules of Professional Conduct, Rule 2-200*. The trial court awarded plaintiff \$ 5,800 in quantum meruit for legal services and costs rendered on behalf of S, but the Court of Appeal found the award improper to the extent the award represented fees for legal work. *Held*, Court of Appeal reversed.

(a) Although recovery in quantum meruit does not require proof of a contract, the circumstances must show that services were rendered with an understanding or expectation by both parties that compensation would follow. By awarding quantum meruit here, the trial court implicitly determined that plaintiff did not gratuitously offer the services for S, and that all parties expected that plaintiff would be compensated for the work should attorneys' fees be recovered. (32 C.4th 458.)

(b) A quantum meruit award for services rendered under a fee-sharing agreement that lacks written client consent does not constitute a division of fees as contemplated by Rule 2-200. Such an award is based on the reasonable value of those services, and involves no apportionment of the fees that the client paid or has agreed to pay. Thus, this is not a fee division subject to the rule's disclosure and consent requirements. (32 C.4th 459.)

(c) Permitting recovery in quantum meruit would not discourage compliance with Rule 2-200, because compliance with the rule ensures that an attorney will receive the negotiated fee rather than the far lesser amount in quantum meruit recovery. Here, had there been compliance, plaintiff would be entitled to \$ 18,497 rather than the \$ 5,800 actually

awarded. (32 C.4th 460.)

(d) Analogous statutory and case law allowing attorneys to recover the reasonable value of their legal services when the fee agreements are found to be invalid or unenforceable supports the holding here. For example, *B. & P.C. 6147(b)*, requiring written fee agreements for contingent fee cases, and *B. & P.C. 6148(c)*, requiring written fee agreements when it is foreseeable that fees will exceed \$ 1,000, both provide that, although noncompliance renders the agreement voidable, the attorney remains entitled to collect a reasonable fee. Thus, permitting quantum meruit recovery when a negotiated fee-sharing agreement does not comply with Rule 2-200 is "consistent with the Legislature's policy determination that, even if a particular fee or compensation agreement is not in writing or signed by the client, a law firm laboring under such an agreement nonetheless deserves reasonable compensation for its services." (32 C.4th 460.) (See *Mink v. Maccabee* (2004) 121 C.A.4th 835, 838, 17 C.R.3d 486 [Rule of Professional Conduct, Rule 2-200 does not require that fee-splitting agreement be in writing or that client's written consent be obtained before division of fees; *Huskinson & Brown* establishes that defendant's quantum meruit claim survives demurrer].)

SUPPLEMENT: [This section is current through the latest supplement]

Although an attorney may maintain an action for quantum meruit against another attorney when there has not been compliance with *Rules of Professional Conduct, Rule 2-200*, the attorney may not maintain a similar action against clients absent their agreement to the fee arrangement. In *Strong v. Beydoun* (2008) 166 C.A.4th 1398, 83 C.R.3d 632, plaintiff attorney S was asked by attorney B to assist in prosecuting several actions brought by B's clients A and E. S agreed, and entered into a fee-sharing agreement. S stated he would get the signatures of the clients as required by *Rules of Professional Conduct, Rule 2-200* approving the agreement, but never did. S worked on one case for over a year until her services were abruptly terminated. A and E recovered damages in the case, but S received no fees from B. In her complaint, S alleged several claims against B specifically, and causes of action for quantum meruit, unjust enrichment, and declaratory relief against B, A, and E. The trial court sustained demurrers in favor of A and E, finding that S could not maintain a claim against them because she failed to comply with Rule 2-200. The case against B continued. *Held*, affirmed.

(a) *Huskinson & Brown, LLP v. Wolf* (2004) 32 C.4th 453, 9 C.R.3d 693, 84 P.3d 379, text, p. 542, permits S to pursue her quantum meruit claims against B, notwithstanding a failure to comply with Rule 2-200. However, neither *Huskinson*, nor any other reported California case, answers the question of whether S can bring a quantum meruit claim against the client under these circumstances. (166 C.A.4th 1404.)

(b) Allowing an attorney to recover the reasonable value of his or her services from a client is premised on the services being requested by the client. Here, although S claims that A and E knew she was working on their case, she does not allege that they asked her to do so, or that they agreed to pay her. Her financial arrangement was with B, and her only recourse is against B. Rule 2-200 is for the client's protection. "It makes no sense to allow an attorney whose only connection to the client is through an unenforceable fee-sharing agreement to recover fees directly from that client." (166 C.A.4th 1404.)

See *Cohen v. Brown* (2009) 173 C.A.4th 302, 320, 93 C.R.3d 24 [noncompliance with Rule 2-200 did not preclude plaintiff attorney from recovering from defendant attorney reasonable value of services under other theories; also, because Rule 2-200 does not require client's consent prior to commencement of work by associated attorney, recovery under fee-sharing agreement was still possible here if plaintiff were to acquire client's consent in writing that included terms of original agreement; following *Huskinson & Brown, LLP*].



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1. Dividing Fees for Legal Services.

cc. Outside Attorney as Associate.

1 Witkin Cal. Proc. Attys § 426

[§ 426] Outside Attorney as Associate.

In *Sims v. Charness* (2001) 86 C.A.4th 884, 103 C.R.2d 619, plaintiff sued defendant under several theories arising out of the parties' agreement to divide fees earned on several cases. Defendant had the original retainer agreement with the clients and brought plaintiff in for his trial expertise. The trial court found that Rule 2-200 (*supra*, §424) was applicable to the agreement, but entered judgment for plaintiff on equitable grounds. *Held*, affirmed as to the result, but *Rules of Professional Conduct*, Rule 2-200 does not apply.

(a) Whether Rule 2-200 applies depends on whether plaintiff was an associate of defendant; if so, their fee-sharing agreement was not subject to the rule. Rule 2-200 is only implicated when a case referral is made by one attorney to another and the referring attorney relinquishes involvement in the case. There, written disclosure to and approval by the client is required. But the rule does not define "associate," and neither the rules nor the State Bar Formal Opinion pertaining to Rule 2-200 provides greater specificity. (86 C.A.4th 890.)

(b) A "pure referral" is where one lawyer is compensated with a percentage of a contingent fee for essentially doing nothing more than obtaining the signature of a client on a retainer agreement. However, mindful of the consumer/client protection objective of Rule 2-200, where an outside lawyer is employed for that lawyer's expertise and is paid for those services, whether based on a contingency or other mode of payment, no pure referral is implicated. Instead, the outside lawyer is deemed an associate for purposes of the rule and is functioning as an employee of the law firm. (86 C.A.4th 891.)

(c) Here, defendant did not refer the cases to plaintiff as a pure referral. Rather than relinquishing the cases, defendant continued his involvement and simply brought plaintiff in with his trial expertise to try the cases. In that capacity, plaintiff functioned as defendant's employee or associate. (86 C.A.4th 891.) Although the trial court ruled that the fee-sharing agreement failed to comply with Rule 2-200, but that the agreement was enforceable on equitable grounds, the better rationale is that the agreement between plaintiff and defendant was never subject to the requirements of the rule. Nevertheless, because the trial court's decision enforcing the agreement is correct in result, it is upheld. (86

C.A.4th 892.)

However, in *Chambers v. Kay* (2002) 29 *C.4th* 142, 126 *C.R.2d* 536, 56 *P.3d* 645, the Supreme Court disagreed to the extent that *Sims* viewed Rule 2-200 as applicable only to pure referral fees, and construed the rule as extending to all divisions of fees except in cases of partners, associates, or employees. At K's request, C served as cocounsel in a sexual harassment action filed by K, and the names of both attorneys were listed in the pleadings as counsel. It was agreed that C would receive a percentage of K's contingent fee under K's agreement with the client. K never sought or obtained written or oral consent from his client regarding the fee arrangement with C. After a dispute arose during discovery, K removed C from the case, but reaffirmed the fee arrangement with C. The underlying case resulted in a large award and significant attorneys' fees for K. K's counsel notified C that K considered the fee arrangement abrogated and offered instead an hourly sum as compensation. C declined, sued for breach of contract, and also sought quantum meruit recovery. The trial court granted summary judgment in favor of K, finding that the fee-sharing agreement was unenforceable because it violated Rule 2-200, and that the quantum meruit recovery was time-barred. *Held*, affirmed as to the contract claim, but reversed as to quantum meruit.

(a) K and C shared no indicia of partnership or coownership of a law firm. Moreover, even if C correctly characterizes the relationship as a joint venture, the rule's exemption for a partnership does not imply an additional exemption for joint venturers. (29 *C.4th* 150.)

(b) C was not K's associate within the meaning of Rule 2-200. C was never K's salaried employee nor did C expect K to provide wages as compensation for his work. The parties agreed that C would be compensated solely by a percentage of K's contingent fee. Thus, the "uncontroverted facts" establish a "division of fees" governed by Rule 2-200, not an agreement to employ C as an associate. (29 *C.4th* 152.)

(c) Although the primary aim of Rule 2-200 is to address concerns related to referral fees, that is not its *sole* aim, and nothing in the rule's history or language implies that arrangements involving the division of work and fees, as here, fall outside its scope. (29 *C.4th* 154.)

(d) "Rule 2-200 unambiguously directs that a member of the State Bar 'shall not divide a fee for legal services' unless the rule's written disclosure and consent requirements and its restriction on the total fee are met." (29 *C.4th* 156.) Thus, disclosure and written consent are mandatory where, as here, fees are to be shared between professionally unrelated attorneys. This was not done. "Because attorneys who negotiate fee divisions without fulfilling their obligations under rule 2-200 undermine the public's respect and confidence in the legal profession by failing to put the best interests of their clients first, and because attorneys are fully capable of safeguarding their own interests simply by obtaining the requisite client consent," no reason exists under the circumstances here to disregard the rule. (29 *C.4th* 159.)

(e) Although recovery is possible in quantum meruit for the reasonable value of the legal services C provided, the value may not be based on the invalid fee-sharing agreement. (29 *C.4th* 162.)

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1 *Witkin Cal. Proc. Attys* § 427

[§ 427] Inducements To Recommend Employment.

Except as permitted in *Rules of Professional Conduct, Rule 2-200(A)* (supra, §424) or *Rules of Professional Conduct, Rule 2-300* (sale or purchase of law practice; infra, §§428, 429), an attorney must not give or promise anything of value to any attorney as an inducement to recommend or secure employment, or as a reward for having made a recommendation resulting in employment of the attorney or the attorney's law firm. (*Rules of Professional Conduct, Rule 2-200(B).*) However, a gift or gratuity to another attorney who has made a recommendation resulting in employment does not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise or agreement that the gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future. (*Rules of Professional Conduct, Rule 2-200(B).*)

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c. Sale of Law Practice (Rule 2-300).

1. Sale to Attorney or Law Firm.

1 Witkin Cal. Proc. Attys § 428

[§ 428] Sale to Attorney or Law Firm.

(1) *In General.* All or substantially all of a living or deceased attorney's law practice, including goodwill, may be sold to another attorney or law firm, subject to specified conditions. (*Rules of Professional Conduct, Rule 2-300*). "All or substantially all" means, for example, that an attorney may retain one or two clients who have such a long-standing personal and professional relationship with the attorney that transfer of those clients' files is not feasible. Conversely, Rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by Rule 2-300(B)(1)(a) (*infra*, §429) or Rule 2-300(D) (*infra*, this section). (Discussion to *Rules of Professional Conduct, Rule 2-300*.) Rule 2-300 overturned the result in *Geffen v. Moss* (1975) 53 C.A.3d 215, 125 C.R. 687, *supra*, §36, holding the sale of good will illegal.

Fees charged to clients may not be increased solely by reason of the sale. (*Rules of Professional Conduct, Rule 2-300(A)*.) Thus, a purchaser is prohibited from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients. (Discussion to *Rules of Professional Conduct, Rule 2-300*.) (See A.B.A. Model Rules of Professional Conduct, Rule 1.17 [sale of law practice]; on transfer of individual client matters, where permitted, see Rule 2-200, *supra*, §424 et seq.)

(2) *Conditions.* Rule 2-300 adds the following conditions:

(a) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute an attorney must be taken. (*Rules of Professional Conduct, Rule 2-300(C)*.)

(b) All activity of a purchaser or potential purchaser is subject to compliance with Rule 3-300 (avoiding interests adverse to client; *infra*, §§436, 437) and Rule 3-310 (avoiding representation of adverse interests; *infra*, §438 et seq.) where applicable. (*Rules of Professional Conduct, Rule 2-300(D)*.)

(c) Confidential information must not be disclosed to a nonlawyer in connection with a sale. (*Rules of Professional Conduct, Rule 2-300(E)*.)

(d) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice are not deemed a sale or purchase under this rule. (*Rules of Professional Conduct, Rule 2-300(F).*)

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2. Transfer of Responsibility for Work or Files.

1 *Witkin Cal. Proc. Attys* § 429

[§ 429] Transfer of Responsibility for Work or Files.

(1) *In General. Rules of Professional Conduct, Rule 2-300(B)* governs a sale that contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by *B. & P.C. 6068(e)* (duty to preserve client's secrets; see *supra*, §90). Separate conditions are stated for (a) situations in which the seller is deceased, or has a conservator or other person acting in a representative capacity, and no attorney has been appointed to act for the seller under *B. & P.C. 6180.5* (court assuming jurisdiction over law practice; see *supra*, §86), and (b) all other circumstances.

(2) *Seller Is Deceased or Has Conservator or Representative.* If the seller is deceased or has a conservator or representative, the purchaser must do the following:

(a) Notify the client in writing that (1) the interest in the law practice is being transferred to the purchaser; (2) the client has the right to retain other counsel; (3) the client may take possession of any client papers and property, as required by Rule 3-700(D) (*infra*, §450); and (4) if no response is received to the notification within 90 days, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. The notice must comply with the requirements in Rule 1-400(D) (*supra*, §417) and provisions relating to attorney-client fee arrangements. (*Rules of Professional Conduct, Rule 2-300(B)(1)(a).*)

(b) Obtain the client's written consent. However, consent will be presumed until otherwise notified by the client if (1) no response is received within 90 days, or (2) the client's rights would be prejudiced by a failure to act during this 90-day period. (*Rules of Professional Conduct, Rule 2-300(B)(1)(b).*)

(3) *Other Circumstances.* Not less than 90 days prior to the transfer, the seller, or the attorney appointed to act for the seller pursuant to *B. & P.C. 6180.5* (*supra*, §86) must do the following:

(a) Notify the client in writing that (1) the interest in the law practice is being transferred to the purchaser; (2) the client has the right to retain other counsel; (3) the client may take possession of any client papers and property, as

required by Rule 3-700(D) (infra, §450); and (4) if no response is received to the notification within 90 days, the purchaser may act on behalf of the client until otherwise notified by the client. The notice must comply with the requirements in Rule 1-400(D) and any provisions relating to attorney-client fee arrangements. (*Rules of Professional Conduct, Rule 2-300(B)(2)(a).*)

(b) Obtain the client's written consent prior to the transfer. Consent will be presumed until otherwise notified by the client if no response is received within 90 days. (*Rules of Professional Conduct, Rule 2-300(B)(2)(b).*)

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d. Discriminatory Conduct in Law Practice (Rule 2-400).

1 Witkin Cal. Proc. Attys § 430

[§ 430] Discriminatory Conduct in Law Practice (Rule 2-400).

(1) *Unlawful Discrimination.* In the management or operation of a law practice, an attorney must not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age, or disability in the following:

(a) Hiring, promoting, discharging, or otherwise determining the conditions of employment of any person. (*Rules of Professional Conduct, Rule 2-400(B)(1).*)

(b) Accepting or terminating representation of clients. (*Rules of Professional Conduct, Rule 2-400(B)(2).*)

(2) *Definitions.* For purposes of *Rules of Professional Conduct, Rule 2-400*, the following definitions apply:

(a) "Law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities that employ attorneys to practice law. (*Rules of Professional Conduct, Rule 2-400(A)(1).*)

(b) "Knowingly permit" means a failure to advocate corrective action when the attorney knows of a discriminatory policy or practice that results in the prohibited unlawful discrimination. (*Rules of Professional Conduct, Rule 2-400(A)(2).*)

(c) "Unlawfully" and "unlawful" are determined by applicable state or federal statutes or decisions that make discrimination in employment, and in offering goods and services to the public, unlawful. (*Rules of Professional Conduct, Rule 2-400(A)(3).*)

(3) *Disciplinary Proceedings.* The State Bar may initiate a disciplinary investigation or proceeding under Rule 2-400 only after the discriminatory conduct is found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. (*Rules of Professional Conduct, Rule 2-400(C); Discussion to Rules of Professional Conduct, Rule 2-400.*)

In the disciplinary proceeding, the tribunal's finding is admissible evidence of the occurrence or nonoccurrence of the alleged discrimination. To impose discipline, the finding of unlawfulness must be upheld and final after appeal, after expiration of the time for appeal, or after dismissal of the appeal. (*Rules of Professional Conduct, Rule 2-400(C).*) However, a complaint of misconduct may be filed after a finding of unlawfulness even though the finding is appealed. Further, a disciplinary investigation or proceeding for conduct within Rule 2-400 may be maintained if the conduct warrants discipline under (a) *B. & P.C. 6106* and *6108*, (b) the Supreme Court's inherent authority to impose discipline, or (c) some other disciplinary standard. (Discussion to *Rules of Professional Conduct, Rule 2-400.*)

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a. Confidential Information of Client (Rule 3-100).

1 Witkin Cal. Proc. Attys § 431

[§ 431] Confidential Information of Client (Rule 3-100).

Rules of Professional Conduct, Rule 3-100 provides that generally, an attorney must not reveal information protected from disclosure by *B. & P.C. 6068(e)(1)* (supra, §90) without the informed consent of the client. (*Rules of Professional Conduct, Rule 3-100(A).*)

However, an attorney may, but is not required to, reveal confidential information relating to a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm to an individual. (*Rules of Professional Conduct, Rule 3-100(B)*; see *B. & P.C. 6068(e)(2)* [duties of attorney; supra, §90].) Electing not to reveal the information does not violate *Rules of Professional Conduct, Rule 3-100*. (*Rules of Professional Conduct, Rule 3-100(E).*)

Before revealing the confidential information, the attorney must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or to do both. In addition, the attorney must inform the client of the attorney's ability or decision to reveal information as provided under *Rules of Professional Conduct, Rule 3-100(B)*. (*Rules of Professional Conduct, Rule 3-100(C).*)

In revealing confidential information, the attorney's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the attorney at the time of the disclosure. (*Rules of Professional Conduct, Rule 3-100(D).*)

The Discussion to Rule 3-100 suggests that the following factors should be considered in determining whether to disclose the confidential information:

(1) The time available to make a decision about disclosure.

(2) Whether the client or another has made similar threats before and whether they have acted or attempted to act on them.

(3) Whether the attorney believes efforts to dissuade the client have or have not been successful.

(4) The extent of adverse effect to the client's constitutional rights, and all other adverse effects resulting from disclosure.

(5) The nature and extent of information that must be disclosed.

Although the imminence of harm to a prospective victim may be considered, imminence is not a prerequisite to disclosure and the attorney may disclose the information without waiting until immediately before the harm occurs. (Discussion to *Rules of Professional Conduct, Rule 3-100.*)

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b. Failing To Act Competently (Rule 3-110).

1 Witkin Cal. Proc. Attys § 432

[§ 432] Failing To Act Competently (Rule 3-110).

(1) *In General.* An attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. (*Rules of Professional Conduct, Rule 3-110(A).*) As used here, "competence" means the (a) diligence, (b) learning and skill, and (c) the mental, emotional, and physical ability reasonably necessary for the performance of the service. (*Rules of Professional Conduct, Rule 3-110(B).*)

If an attorney does not have sufficient learning and skill when undertaking legal services, the attorney may nonetheless perform the services competently by (a) associating with or, where appropriate, professionally consulting another attorney reasonably believed to be competent, or (b) acquiring sufficient learning and skill before performance is required. (*Rules of Professional Conduct, Rule 3-110(C).*) (See *Lewis v. State Bar (1981) 28 C.3d 683, 170 C.R. 634, 621 P.2d 258* [former rule; solo practitioner lacking probate experience was disciplined for handling of probate matter]; *In the Matter of Taylor (1991) 1 Cal. State Bar Ct. Rptr. 563, 574* [former rule; prohibition on failure to perform legal services competently does not apply to suspended attorneys]; on negligent performance of duties, see *infra*, §§492, 493.)

(2) *Supervision of Subordinate.* The Discussion, citing a number of cases (see *infra*, §493), observes that the duties set forth in Rule 3-110 include the duty to supervise the work of subordinate attorney and nonattorney employees or agents. (Discussion to *Rules of Professional Conduct, Rule 3-110.*)

(3) *Emergency Advice or Assistance.* In an emergency, an attorney may give advice or assistance in a matter in which the attorney does not have the skill ordinarily required if referral or consultation with another attorney would be impractical. However, assistance should be limited to that reasonably necessary in the circumstances. (Discussion to *Rules of Professional Conduct, Rule 3-110.*) (See A.B.A. Model Rules of Professional Conduct, Rule 1.1 [competence].)

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c. Sexual Relations With Client (Rule 3-120).

1 Witkin Cal. Proc. Attys § 433

[§ 433] Sexual Relations With Client (Rule 3-120).

(1) *Prohibitions.* An attorney must not do any of the following:

(a) Require or demand sexual relations with a client incident to or as a condition of professional representation. (*Rules of Professional Conduct, Rule 3-120(B)(1).*)

(b) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client. (*Rules of Professional Conduct, Rule 3-120(B)(2).*)

(c) Continue representation of a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently in violation of *Rules of Professional Conduct, Rule 3-110* (supra, §432). (*Rules of Professional Conduct, Rule 3-120(B)(3).*)

If the client is an organization, any individual overseeing the representation is deemed to be the client. (Discussion to *Rules of Professional Conduct, Rule 3-120*; on imposition of discipline for sexual relations with client, see *B. & P.C. 6106.9*, infra, §494.)

(2) *Sexual Relations Defined.* "Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse. (*Rules of Professional Conduct, Rule 3-120(A).*)

(3) *Exclusions.* Rule 3-120(B) does not apply to sexual relations between attorneys and their spouses or to ongoing consensual sexual relationships that predate the initiation of the lawyer-client relationship. (*Rules of Professional Conduct, Rule 3-120(C).*) This exclusion, however, is not intended to preclude the applicability of other Rules of Professional Conduct, including Rule 3-110 (supra, §432). (Discussion to *Rules of Professional Conduct, Rule 3-120.*)

Where an attorney in a firm has sexual relations with a client but does not participate in the representation of that client, the other attorneys in the firm are not subject to discipline under this rule solely because of the sexual relations. (*Rules of Professional Conduct, Rule 3-120(D).*)

(4) *Intent of Rule.* "Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based on the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. ... The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. ... Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. ... In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation." (Discussion to *Rules of Professional Conduct, Rule 3-120.*) (See 40 *U.C.L.A. L. Rev.* 1275 [Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?]; 28 *U.S.F. L. Rev.* 715 [sexual harassment of attorneys by clients].)

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d. Prohibited Objectives of Employment (Rule 3-200).

1 Witkin Cal. Proc. Attys § 434

[§ 434] Prohibited Objectives of Employment (Rule 3-200).

An attorney must not seek, accept, or continue employment if the attorney knows or should know that the objective of the employment is either of the following:

(1) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring a person. (*Rules of Professional Conduct, Rule 3-200(A).*)

(2) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law. (*Rules of Professional Conduct, Rule 3-200(B).*)

Early cases illustrate these prohibitions. (See *Geibel v. State Bar* (1938) 11 C.2d 412, 79 P.2d 1073 [institution of malicious or vexatious suits in federal court; suspensions for 1 year and for 90 days]; *Light v. State Bar* (1939) 14 C.2d 328, 94 P.2d 35 [disbarment for filing several sham actions as nuisance suits].) (See also *Simonian v. Patterson* (1994) 27 C.A.4th 773, 786, 32 C.R.2d 722, *infra*, §557 [where one attorney, represented by another attorney, brought action solely to harass defendant, both attorneys were to blame; attorney is not to be treated more leniently because client is also attorney]; A.B.A., Model Rules of Professional Conduct, Rule 3.1 [meritorious claims and contentions]; 85 A.L.R.4th 544 [bringing frivolous claim as ground for discipline]; on duty to withdraw from employment under similar conditions, see *Rules of Professional Conduct, Rule 3-700(B)*, *supra*, §72 and *infra*, §451.)

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e. Advising Violation of Law (Rule 3-210).

1 Witkin Cal. Proc. Attys § 435

[§ 435] Advising Violation of Law (Rule 3-210).

An attorney must not advise the violation of a law, rule, or ruling of a tribunal unless the attorney believes in good faith that the law, rule, or ruling is invalid. Thus, an attorney may, in good faith, take appropriate steps to test the validity of any law, rule, or ruling. (*Rules of Professional Conduct, Rule 3-210.*)

Rule 3-210 is intended to apply to (1) a client's prospective conduct, (2) the interaction between the attorney and client, and (3) the specific legal service sought by the client from the attorney. (Discussion to *Rules of Professional Conduct, Rule 3-210.*) (For example of interaction between attorney and client subject to this rule, see *People v. Meredith* (1981) 29 C.3d 682, 688, 695, 175 C.R. 612, 631 P.2d 46 [on information from client, attorney removed evidence of crime and examined it before handing it over to police]; for example of application to specific legal service sought, see *People v. Pic'l* (1982) 31 C.3d 731, 735, 183 C.R. 685, 646 P.2d 847 [attorney negotiated return of stolen property in return for owner's promise not to prosecute attorney's client].)

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1. Nature and Scope of Rule.

1 Witkin Cal. Proc. Attys § 436

[§ 436] Nature and Scope of Rule.

(1) *Nature of Rule.* Generally, an attorney must not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client. (*Rules of Professional Conduct, Rule 3-300.*) However, the transaction or acquisition is permissible if each of the following requirements has been satisfied:

(a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed to the client in writing and in a manner that should reasonably have been understood by the client. (*Rules of Professional Conduct, Rule 3-300(A).*)

(b) 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. (*Rules of Professional Conduct, Rule 3-300(B).*)

(c) The client thereafter consents in writing to the terms of the transaction or acquisition. (*Rules of Professional Conduct, Rule 3-300(C).*)

In *BGJ Associates, LLC v. Wilson* (2003) 113 C.A.4th 1217, 7 C.R.3d 140, attorney J entered into an oral joint venture agreement with client B, and a third party, G, for purposes of purchasing land that was the subject of an easement lawsuit J filed on behalf of B. The purchase agreement expressly required B to dismiss the suit. J prepared a draft operating agreement, the terms of which B found unfair. The agreement stated that J did not represent either B or G in the venture and advised them to have independent counsel review the agreement. B retained counsel who agreed that the operating agreement was unfair, and although B tendered his capital contribution to J, he never signed the operating agreement. B later signed a purchase and sale agreement, but the original joint venture failed. J substituted out as counsel for B in the easement lawsuit and aligned with G with respect to the land transaction. However, because J appeared equivocal in the matter, B and other parties completed purchase of the land. J sued, alleging breach of the oral joint venture agreement. Defendants, including B, asserted as an affirmative defense that the agreement was void or voidable because J had entered into a business transaction with B without full disclosure and advice and an informed

waiver and consent. The trial court found that J's actions violated *Rules of Professional Conduct, Rule 3-300*, and its statutory counterpart, *Prob.C. 16004* (presumption of breach of trustee's fiduciary duty by entering into business transaction with beneficiary; *supra*, §91), and that the alleged contract was void as against public policy. *Held*, affirmed.

(a) By entering into the transaction with his client, J was required to satisfy all three requirements of Rule 3-300, only one of which was arguably satisfied here, as evidenced by the statement in the proposed operating agreement advising B and others of their right to independent counsel. Contrary to J's arguments, the rule remains in force after a client obtains the advice of independent counsel. The third requirement of the rule is that the client consents in writing to the terms of the transaction. This did not occur, and B's mere consultation with another attorney did not relieve J of the rule's obligations. (*113 C.A.4th 1226*.)

(b) Violation of Rule 3-300, while subjecting an attorney to discipline, does not in itself provide a basis for civil liability. However, *Prob.C. 16004* is a statutory complement to the rule, and applies to the fiduciary relationship between attorney and client. Thus, "a transaction between an attorney and client which occurs during the relationship and which is advantageous to the attorney is presumed to violate that fiduciary duty and to have been entered into without sufficient consideration and under undue influence." (*113 C.A.4th 1227*, quoting *Lewin v. Anselmo* (1997) 56 C.A.4th 694, 701, 65 C.R.2d 682.) Having failed to inform B of the perils of entering into a joint venture where other participants proposed a written agreement lacking material terms and protections, particularly when it required B to relinquish his lawsuit and thus benefiting J and others, J was unable to refute the presumption of *Prob.C. 16004*. (*113 C.A.4th 1227*.)

(2) *Scope of Rule*. Rule 3-300 applies where the attorney wishes to obtain an interest in a client's property in order to secure the amount of past due or future fees. The rule *does not* apply to the attorney-client retainer agreement, unless the agreement confers on the attorney an ownership, possessory, security, or other pecuniary interest adverse to the client. If so, the agreement is governed, in part, by Rule 4-200 (fees; *infra*, §454). (Discussion to *Rules of Professional Conduct, Rule 3-300*.) (See 42 *Santa Clara L. Rev.* 1227 [ethical considerations in stock-based compensation for legal services]; 47 *U.C.L.A. L. Rev.* 549 [permitting attorneys to invest in growth-oriented companies of their clients].)

Further, the rule is not intended to apply where the attorney and client each make an investment on terms offered to the general public. For example, the rule is inapplicable where an attorney invests in a limited partnership syndicated by a third party, and the attorney's client makes the same investment. Although both parties are investing in the same business, the attorney has not entered into the transaction *with* the client for purposes of this rule. (Discussion to Rule 3-300.)

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2. Illustrations.

1 Witkin Cal. Proc. Attys § 437

[§ 437] Illustrations.

The following cases further illustrate the application of *Rules of Professional Conduct, Rule 3-300*:

Santa Clara County Counsel Attorneys Assn. v. Woodside (1994) 7 C.4th 525, 545, 28 C.R.2d 617, 869 P.2d 1142, supra, §147 [suit by association representing attorneys in county counsel office to enforce members' bargaining rights under Meyers-Milias-Brown Act (Govt.C. 3500 et seq.) does not violate Rule 3-300].

Fletcher v. Davis (2004) 33 C.4th 61, 69, 14 C.R.3d 58, 90 P.3d 1216, infra, §514 [attorney's charging lien is adverse interest within meaning of Rule 3-300].

Mirabito v. Liccardo (1992) 4 C.A.4th 41, 44, 45, 5 C.R.2d 571 [decided under former rule; rule could be used to prove attorney's breach of fiduciary duty].

Passante v. McWilliam (1997) 53 C.A.4th 1240, 1243, 1248, 62 C.R.2d 298 [where corporate attorney for fledgling company agreed to accept stock in exchange for loan he had arranged, transaction violated Rule 3-300 because attorney did not advise company of its right to seek independent counsel].

Mayhew v. Benninghoff (1997) 53 C.A.4th 1365, 1369, 1370, 62 C.R.2d 27 [under *Rules of Professional Conduct, Rule 3-300*, attorney who enters into business transaction with client must advise client in writing to seek advice of independent lawyer and must give client advice against himself that he would give against third person; if attorney intends arbitration clause in engagement letter to extend both to legal services and to business dealings, he must comply with Rule 3-300].

Law Offices of Dixon R. Howell v. Valley (2005) 129 C.A.4th 1076, 1104, 29 C.R.3d 499, supra, §227 [client's unsecured promissory note for unpaid fees did not constitute adverse interest].

In the Matter of Priamos (1998) 3 Cal. State Bar Ct. Rptr. 824, 828 [attorney wilfully violated rule and committed acts of moral turpitude by continuing to invest client's investment funds over 7-year period in speculative ventures in

which attorney had financial interest without client's knowledge or consent, knowing of client's fragile mental health].

In the Matter of Silverton (2001) 4 Cal. State Bar Ct. Rptr. 252, 260 [authorization to compromise doctor's bills was business transaction covered by Rule 3-300 and not supplement to retainer agreement; it constituted immediate transfer from client of ownership and possessory interest in funds remaining *after* payment to client of distributive share of settlement and payment of attorneys' fees under original retainer agreement].

In the Matter of Gillis (2001) 4 Cal. State Bar Ct. Rptr. 387, 394 [transaction was not fair and reasonable to client or fully disclosed under Rule 3-300 where attorney sold his residential property to client in exchange for proceeds of settlement in client's wrongful death action but failed to advise client of numerous matters incidental to sale, e.g., encumbrances, need for title insurance].

SUPPLEMENT: [This section is current through the latest supplement]
Cases illustrating application of Rules of Professional Conduct, Rule 3-300:

In the Matter of Casey (2008) 5 Cal. State Bar Ct. Rptr. 117, 124 [attorney, although breaching other fiduciary duties, did not violate *Rules of Professional Conduct, Rule 3-300* by assisting in negotiations between clients A and S for client A acquire interest in condominium of client S; fact that A gave attorney's son 50% ownership interest to induce attorney to manage condo did not create on part of attorney "ownership, possessory, security or other interest" in property].



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1. In General.

1 Witkin Cal. Proc. Attys § 438

[§ 438] In General.

(1) *Nature of Rule.* *Rules of Professional Conduct, Rule 3-310* states the rule against representation of adverse interests and its exceptions. (On fiduciary obligations in connection with representation of adverse interests, see *supra*, §103 et seq.; on representing conflicting interests as an act subject to discipline, see *infra*, §§513, 514; on A.B.A. treatment of conflict of interest, see A.B.A. Model Rules of Professional Conduct, Rule 1.7 et seq.) Rule 3-310 governs the following situations:

(a) Where the attorney has a present or former relationship with a party or witness in the same matter. (*Rules of Professional Conduct, Rule 3-310(B)(1), (B)(2)*; *infra*, §439.)

(b) Where the attorney has a present or former relationship with a person or entity the attorney knows would be affected substantially by the outcome of the matter. (*Rules of Professional Conduct, Rule 3-310(B)(3)*; *infra*, §439.)

(c) Where the attorney has an interest in the subject matter of the representation. (*Rules of Professional Conduct, Rule 3-310(B)(4)*; *infra*, §439.)

(d) Where the attorney represents multiple clients. (*Rules of Professional Conduct, Rule 3-310(C), (D)*; *infra*, §440.)

(e) Where the attorney has obtained confidences of a present or former client. (*Rules of Professional Conduct, Rule 3-310(E)*; *infra*, §441.)

(f) Where the attorney accepts compensation from someone other than the client. (*Rules of Professional Conduct, Rule 3-310(F)*; *infra*, §442.)

(2) *Definitions.* For purposes of Rule 3-310 the following definitions apply:

(a) "Disclosure" means informing the client or former client of the relevant circumstances and the actual and

reasonably foreseeable adverse consequences. (*Rules of Professional Conduct, Rule 3-310(A)(1).*)

(b) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure. (*Rules of Professional Conduct, Rule 3-310(A)(2).*)

(c) "Written" means any writing as defined in *Ev.C. 250*. (*Rules of Professional Conduct, Rule 3-310(A)(3).*)

(3) *Disclosure*. Other rules and laws may preclude making adequate disclosure under this rule. (See, e.g., *B. & P.C. 6068(e)* [attorney has duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"; *supra*, §90].) If so, then informed written consent is likewise precluded. (Discussion to *Rules of Professional Conduct, Rule 3-310.*)

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2. Relationship With Party or Witness or Interest in Subject Matter.

1 Witkin Cal. Proc. Attys § 439

[§ 439] Relationship With Party or Witness or Interest in Subject Matter.

(1) *Attorney's Relationships.* An attorney must not accept or continue representation of a client without providing written disclosure (supra, §438) to the client in the following circumstances:

(a) Where the attorney has a present legal, business, financial, professional, or personal relationship with a party or witness in the same matter. (*Rules of Professional Conduct, Rule 3-310(B)(1).*)

(b) Where the attorney knows or reasonably should know that (1) he or she previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and (2) the previous relationship would substantially affect the attorney's representation. (*Rules of Professional Conduct, Rule 3-310(B)(2).*)

(c) Where 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 the resolution of the matter. (*Rules of Professional Conduct, Rule 3-310(B)(3).*)

(2) *Attorney's Interest in Subject Matter.* An attorney must not accept or continue representation of a client without providing written disclosure to the client where the attorney has or had a legal, business, financial, or professional interest in the subject matter of the representation. (*Rules of Professional Conduct, Rule 3-310(B)(4).*) (See *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 C.4th 525, 546, 28 C.R.2d 617, 869 P.2d 1142, supra, §147 [suit by association representing attorneys in county counsel office to enforce members' bargaining rights under Meyers-Milias-Brown Act (Govt.C. 3500 et seq.) does not violate Rule 3-310(B)(4)].)

(3) *Scope of Rule.* Rule 3-310(B) is intended to apply only to an attorney's own relationships or interests, unless the attorney knows that a partner or associate in the firm has or had a relationship with another party or witness, or has or had an interest in the subject matter of the representation. (Discussion to *Rules of Professional Conduct, Rule 3-310.*) The rule is not intended to apply to the relationship of an attorney to another party's attorney. Those relationships are governed by *Rules of Professional Conduct, Rule 3-320* (infra, §443). (Discussion to *Rules of Professional Conduct,*

Rule 3-310.) Further, the rule does not require either the disclosure of the new engagement to a former client or the former client's consent to the new engagement unless the attorney has obtained confidential information by reason of the representation (see *infra*, §441). (Discussion to *Rules of Professional Conduct*, *Rule 3-310.*)

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3. Representation of Multiple Clients.

1 Witkin Cal. Proc. Attys § 440

[§ 440] Representation of Multiple Clients.

(1) *Potential or Actual Conflict.* An attorney may not, without the informed written consent (*supra*, §438) of each client, do any of the following:

(a) Accept representation of more than one client in a matter in which the interests of the clients *potentially* conflict. (*Rules of Professional Conduct, Rule 3-310(C)(1).*)

(b) Accept or continue representation of more than one client in a matter in which the interests of the clients *actually* conflict. (*Rules of Professional Conduct, Rule 3-310(C)(2).*)

(c) Represent a client in a matter and simultaneously represent in a separate matter a person or entity whose interest in the first matter is adverse to the client in the first matter. (*Rules of Professional Conduct, Rule 3-310(C)(3).*) (See *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 C.A.4th 1422, 1431, 86 C.R.2d 20, *supra*, §117 [*Rules of Professional Conduct, Rule 3-310(C)(3)* was violated where attorney, retained by insurer to defend one suit and while that suit was pending, filed direct action against same insurer in unrelated matter without securing insurer's consent]; *Estate of Wright* (2001) 90 C.A.4th 228, 235, 108 C.R.2d 572 [general power of attorney from heir to attorney representing heir hunter created conflict under *Rules of Professional Conduct, Rule 3-310* because interests of heir hunter and heir were adverse concerning reasonableness of heir-hunting fee]; *Carroll v. Superior Court* (2002) 101 C.A.4th 1423, 1428, 124 C.R.2d 891 [in dependency proceeding involving minor siblings, trial court erred in denying motion to withdraw as counsel due to actual conflict where hearing under Welf.C. 366.26 (10 Summary (10th), *Parent and Child*, §680 et seq.) would require counsel to advocate both for and against adoption as permanent plan].) (For additional discussion of conflict issues in dependency proceedings, see 10 Summary (10th), *Parent and Child*, §§574, 575.)

In response to *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, *supra*, the Discussion to Rule 3-310 was amended in 2003 to clarify that Rule 3-310(C)(3) is not intended to apply to the relationship between an insurer and an attorney when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the

action.

(2) *Nature and Scope of Rule.* The provisions of Rule 3-310(C)(1), (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction, or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an antenuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In these situations, for the sake of convenience or economy, the parties may prefer to employ a single counsel, but a member must disclose the potential adverse aspects of the multiple representation and must obtain the informed written consent of the clients as specified by the rule. Moreover, if the potential adversity should become actual, the attorney must obtain the further informed written consent of the clients. (Discussion to *Rules of Professional Conduct, Rule 3-310.*) (See *American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 C.A.4th 1017, 1032, 117 C.R.2d 685, supra, §109 [violation as breach of fiduciary duty; Rule 3-310(C) does not require that offending attorney have lawyer-client relationship with both adverse parties]; *Sullivan v. Dorsa* (2005) 128 C.A.4th 947, 964, 27 C.R.3d 547 [real property owners in partition action failed to show that violation of Rule 3-310(C) by attorney hired to represent partition referee was serious enough to preclude award of attorneys' fees; following *Pringle v. La Chapelle* (1999) 73 C.A.4th 1000, 87 C.R.2d 90, infra, §449].)

(3) *Aggregate Settlement of Claims.* An attorney who represents two or more clients may not enter into an aggregate settlement of claims without the informed written consent of each client. (*Rules of Professional Conduct, Rule 3-310(D)(1).*) However, the rule does not apply to class action settlements subject to court approval. (Discussion to *Rules of Professional Conduct, Rule 3-310.*)

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(1) *Potential or Actual Conflict.*

(b) *Actual conflict:* In *Gong v. RFG Oil* (2008) 166 C.A.4th 209, 82 C.R.3d 416, brothers J and D owned corporation R with J as the minority shareholder, and both were directors. The brothers had a buy-sell agreement where one party would purchase the shares of the departing party at "book value." After a falling out, R terminated J and forced him to resign as a corporate officer. J sued D and R for involuntary dissolution of R as well as other causes of action including specific performance of the buy-sell agreement. The trial court found that the buy-sell agreement required D to purchase J's shares at fair market value. At this time, D and R were represented by the same law firm, and J challenged that continued representation on the ground that R now had a significant role in the dispute between the two brothers with respect to the buy-sell agreement, and J wished to ensure that counsel advising R was neutral and not acting primarily in D's interest. As a result, L substituted in as counsel for R only, but then also as D's counsel, and filed a cross-complaint against J for fraud and breaches of fiduciary duty. J then sought disqualification of L, which the trial court denied finding that no conflict of interest existed. *Held*, actual conflict existed and order denying disqualification motion was reversed.

(a) When the same attorney simultaneously represents potentially conflicting parties, the primary interest at stake is the attorney's duty of loyalty, and disqualification is generally automatic when that duty is compromised. As corporate counsel to R, L's professional obligations are to the corporate entity and not to the officers, directors, or shareholders in their representative or individual capacities. However, R is a closely held corporation that can only speak through D. In addition, R is not a passive litigant in the action but seeks damages and other remedies against J, and R's cross-complaint raises a concern that D is using R as a pawn in his dispute with J, possibly to R's detriment. Thus, L is unable to provide an undivided duty of loyalty to both D and R, and because an actual conflict exists between D and R, D's purported waiver of the conflict by itself is ineffective. (166 C.A.4th 216.)

(b) Separate counsel for R could exercise the professional judgment that would ensure the best interests of R "without the constraint of simultaneously promoting and protecting" D's interests, thus "preserving the duty of loyalty and the public trust in the administration of justice and the integrity of the bar, the primary rationale behind the dual

representation prohibition." (166 C.A.4th 216.)

(c) There is nothing objectionable in L continuing to represent D. Because R is a closely held corporation, L has worked for R through D, and L's personal loyalties will be with D. Moreover, confidential information L might have received from R during the joint representation would be the same information L received from D. Thus, in "this situation, where the functioning of a corporation is so intertwined with the individual defendant that any distinction between them is fictional," it makes no sense to require L's complete removal from the case based on L's prior representation of R. (166 C.A.4th 217.)(2) *Nature and Scope of Rule*. In *Sharp v. Next Entertainment* (2008) 163 C.A.4th 410, 78 C.R.3d 37, labor union G met with employees of television production companies that G suspected were violating wage and labor laws. Some of the employees agreed to be named plaintiffs in two labor law class actions against defendant television production companies and networks. These employees met with and retained R law firm as class counsel. The law firm had represented G for many years, and G had selected R for the employees and agreed to pay litigation expenses. Each of the 21 named plaintiffs signed conflict waivers acknowledging that G would subsidize the litigation costs and that R represented G in other matters. G informed plaintiffs that plaintiffs, not G, would control the litigation. Defendants sought disqualification of R, arguing in part that there were conflicts of interest in the concurrent representation under *Rules of Professional Conduct, Rule 3-310*, i.e., that the litigation's remedial goals conflicted with G's ultimate goal of unionizing the plaintiffs. The trial court denied the motion to disqualify. *Held*, affirmed.

(a) Disqualification is not always required where counsel's representation of one client creates actual or potential conflicts of interests with another client. Under *Rules of Professional Conduct, Rule 3-310*, concurrent representation that gives rise to actual or potential conflicts of interests, or where costs are borne by a third party, is permissible with the informed written consent of each client. Informed consent requires that the attorney fully disclose the relevant circumstances and the actual and reasonably foreseeable adverse consequences of the representation. (163 C.A.4th 429.)

(b) All plaintiffs who were the named representatives of the putative class here were fully aware of all potential conflicts. Plaintiffs signed conflict waiver forms in which they acknowledged that although G was funding the litigation and that R represented G, plaintiffs were controlling the litigation. Also, G signed a conflict waiver acknowledging that G would not interfere with R's judgment. "Thus, all clients who were directly affected by any purported conflict, [G], and all plaintiffs, were fully apprised of any potential conflicts of interests, understood the role of [R], the aim of the litigation, and who was to control the litigation. The clients ... understood the relevant circumstance and the actual and foreseeable consequences of the ... simultaneous representation." (163 C.A.4th 431.)



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4. Confidences of Present or Former Clients.

1 Witkin Cal. Proc. Attys § 441

[§ 441] Confidences of Present or Former Clients.

An attorney may not, without the informed written consent (supra, §438) 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 attorney has obtained confidential information material to the employment. (*Rules of Professional Conduct, Rule 3-310(E)*.) This portion of Rule 3-310 is intended to protect the confidences of another present or former client, and is intended to apply as a complementary provision to Rule 3-310(B) (supra, §439). (Discussion to *Rules of Professional Conduct, Rule 3-310*.) (See *American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 C.A.4th 1017, 1038, 117 C.R.2d 685, supra, §109 [violation of Rule 3-310(E) as breach of fiduciary duty].)

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5. Compensation From Person Other Than Client.

1 Witkin Cal. Proc. Attys § 442

[§ 442] Compensation From Person Other Than Client.

An attorney may only accept compensation for representing a client from a person other than the client when the following conditions are met:

(1) There is no interference with the attorney's independence of professional judgment or with the client-lawyer relationship. (*Rules of Professional Conduct, Rule 3-310(F)(1).*)

(2) Information relating to representation of the client is protected as required by *B. & P.C. 6068(e)* (*supra*, §90). (*Rules of Professional Conduct, Rule 3-310(F)(2).*)

(3) The attorney obtains the client's informed written consent (*supra*, §438). However, no disclosure or consent is required if (a) the nondisclosure is otherwise authorized by law, or (b) the attorney is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public. (*Rules of Professional Conduct, Rule 3-310(F)(3).*)

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h. Relationship With Other Party's Lawyer (Rule 3-320).

1 *Witkin Cal. Proc. Attys* § 443

[§ 443] Relationship With Other Party's Lawyer (Rule 3-320).

(1) *Relations Subject to Rule.* Unless the attorney informs the client in writing of the relationship, an attorney may not represent a client in a matter in which another party's lawyer (a) is a spouse, parent, child, or sibling of the attorney; (b) lives with the attorney; (c) is a client of the attorney; or (d) has an intimate personal relationship with the attorney. (*Rules of Professional Conduct, Rule 3-320.*)

(2) *Scope of Rule.* Rule 3-320 is not intended to apply to circumstances in which an attorney fails to advise the client of a relationship with another attorney who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter. (Discussion to *Rules of Professional Conduct, Rule 3-320.*)

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i. Limiting Malpractice Liability to Client (Rule 3-400).

1 Witkin Cal. Proc. Attys § 444

[§ 444] Limiting Malpractice Liability to Client (Rule 3-400).

(1) *Prohibitions.* An attorney may not contract with a client prospectively limiting the attorney's liability to the client for the attorney's professional malpractice. (*Rules of Professional Conduct, Rule 3-400(A).*) Nor may an attorney settle a claim or potential claim for the attorney's liability for professional malpractice unless the client is informed in writing that the client may consult an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to do so. (*Rules of Professional Conduct, Rule 3-400(B).*)

(2) *Intent of Rule.* 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 employment or representation. (Discussion to *Rules of Professional Conduct, Rule 3-400.*)

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j. Communications With Client (Rules 3-500, 3-510).

1 Witkin Cal. Proc. Attys § 445

[§ 445] Communications With Client (Rules 3-500, 3-510).

(1) *Information About Developments.* An attorney must keep a client reasonably informed about significant developments relating to the employment or representation and must promptly comply with reasonable requests for information and copies of significant documents needed to keep the client so informed. (*Rules of Professional Conduct, Rule 3-500.*) (See A.B.A. Model Rules of Professional Conduct, Rule 1.4 [communication].)

The rule is not intended to change an attorney's duties to his or her clients, but to make clear that an attorney will not be disciplined for failing to communicate insignificant or irrelevant information. (Discussion to *Rules of Professional Conduct, Rule 3-500*; see *B. & P.C. 6068(m)*, supra, §102 [duty to keep client informed].)

(2) *Communication of Settlement Offer.* An attorney must promptly communicate to the client the following:

(a) All terms and conditions of any offer made to the client in a criminal matter. (*Rules of Professional Conduct, Rule 3-510(A)(1).*)

(b) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters. (*Rules of Professional Conduct, Rule 3-510(A)(2).*)

As used in the rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class. (*Rules of Professional Conduct, Rule 3-510(B).*)

In civil matters, oral offers of settlement made to the client should be communicated if they are "significant" for the purposes of Rule 3-500. (Discussion to *Rules of Professional Conduct, Rule 3-510.*)

In criminal matters, Rule 3-510 requires that counsel convey all offers, whether written or oral, because give-and-take negotiations are less common than in civil matters. Further, the accused should be required to participate in the negotiations. (Discussion to *Rules of Professional Conduct, Rule 3-510.*) (See *In the Matter of Yagman* (1997) 3 Cal. State Bar Ct. Rptr. 788, 795 [attorney's failure to notify client of written counteroffer constituted violation of *Rules of Professional Conduct, Rule 3-510*]; 92 A.L.R.3d 288 [attorney's conduct in connection with settlement as ground for

disciplinary action].)

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k. Organization as Client (Rule 3-600).

1. General Principle.

1 Witkin Cal. Proc. Attys § 446

[§ 446] General Principle.

(1) *Rule and Concept.* In representing an organization, an attorney must conform the representation to the concept that the organization itself is the client, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement. (*Rules of Professional Conduct, Rule 3-600(A).*) (See *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 C.A.3d 692, 703, 282 C.R. 627 [first duty of attorney for corporation is to corporation; discussing Rule 3-600]; *Responsible Citizens v. Superior Court* (1993) 16 C.A.4th 1717, 1730, 1731, 20 C.R.2d 756, supra, §116 [Rule 3-600 applies to partnerships; attorney may, but does not necessarily, represent individual partners in addition to partnership]; A.B.A. Model Rules of Professional Conduct, Rule 1.13 [organization as client]; 26 *Pacific L. J.* 961 [representing partnerships and client misidentification]; 1 *A.L.R.4th* 1105 [propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or shareholder].)

(2) *Scope of Rule.* The discussion to Rule 3-600 attempts to clarify the scope of the rule by noting that the rule is *not* intended to do any of the following:

(a) Enmesh attorneys in the intricacies of the entity and aggregate theories of partnership.

(b) Prohibit attorneys from representing both an organization and other parties connected with it, for example, in establishing employee benefit packages for closely held corporations or professional partnerships.

(c) Create or validate artificial distinctions between entities and their officers, employees, or members, or deny the existence or importance of these formal distinctions. In dealing with a close corporation or small association, attorneys commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, attorneys are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. In resolving these multiple relationships attorneys must rely on case law.

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k. Organization as Client (Rule 3-600).

2. Response to Acts of Agents of Organization.

1 Witkin Cal. Proc. Attys § 447

[§ 447] Response to Acts of Agents of Organization.

If an attorney acting on behalf of an organization knows that an actual or apparent agent of the organization acts, or intends or refuses to act, in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner that is likely to result in substantial injury to the organization, the attorney must not violate the duty of protecting all confidential information as provided in *B. & P.C. 6068(e)* (supra, §90). However, subject to *B. & P.C. 6068(e)*, the attorney may take actions the attorney believes are in the best lawful interest of the organization. (*Rules of Professional Conduct, Rule 3-600(B)*.) These actions may include the following:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization. (*Rules of Professional Conduct, Rule 3-600(B)(1)*.)

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization. (*Rules of Professional Conduct, Rule 3-600(B)(2)*.)

If, despite the attorney's actions, the highest authority that can act on behalf of the organization insists on the questionable action or inaction, the attorney's response is limited to the attorney's right or duty to resign in accordance with *Rules of Professional Conduct, Rule 3-700* (infra, §450). (*Rules of Professional Conduct, Rule 3-600(C)*.)

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k. Organization as Client (Rule 3-600).

3. Dealing With Constituents of Organization.

1 Witkin Cal. Proc. Attys § 448

[§ 448] Dealing With Constituents of Organization.

In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, an attorney must explain the identity of the client for whom he acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituents with whom the attorney is dealing. The attorney must not mislead a constituent into believing that the constituent may communicate confidential information to the attorney in a way that will not be used in the organization's interest if that interest is or becomes adverse to the constituent. (*Rules of Professional Conduct, Rule 3-600(D).*)

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k. Organization as Client (Rule 3-600).

4. Representation of Constituents.

1 Witkin Cal. Proc. Attys § 449

[§ 449] Representation of Constituents.

An attorney representing an organization may also represent the organization's directors, officers, employees, members, shareholders, or other constituents, subject to the disclosure and consent provisions of *Rules of Professional Conduct, Rule 3-310* (supra, §438 et seq.). (*Rules of Professional Conduct, Rule 3-600(E)*.) If the organization's consent to dual representation is required by Rule 3-310, consent must be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented. (*Rules of Professional Conduct, Rule 3-600(E)*.) (See *Pringle v. La Chapelle* (1999) 73 C.A.4th 1000, 1003, 87 C.R.2d 90 [violation of *Rules of Professional Conduct, Rule 3-600(E)* did not automatically preclude attorney from obtaining fees; there must be serious violation of responsibilities before violation of ethical rule requires fee forfeiture].)

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4. Professional Relationship With Clients.

1. Termination of Employment (Rule 3-700).

1. In General.

1 Witkin Cal. Proc. Attys § 450

[§ 450] In General.

(1) *Permission*. If permission for termination of employment is required by the rules of a tribunal, an attorney cannot withdraw from employment in a proceeding before that tribunal without its permission. (*Rules of Professional Conduct, Rule 3-700(A)(1).*)

(2) *Steps To Avoid Prejudice to Client*. An attorney may not withdraw from employment before taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. These steps include (a) giving due notice to the client, (b) allowing time for the employment of other counsel, (c) complying with Rule 3-700(D) (infra, this section), and (d) complying with all other applicable laws and rules. (*Rules of Professional Conduct, Rule 3-700(A)(2).*) The steps may vary according to the circumstances. Absent special circumstances, however, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and Rule 3-700(D) has been satisfied. (Discussion to *Rules of Professional Conduct, Rule 3-700.*) (See *Ramirez v. Sturdevant* (1994) 21 C.A.4th 904, 915, 26 C.R.2d 554, supra, §98 [under *Rules of Professional Conduct, Rule 3-700*, attorney, either with client's consent or court's approval, may withdraw from case when withdrawal can be accomplished without undue prejudice to client's interests]; *In the Matter of Wolff* (2006) 5 Cal. State Bar Ct. Rptr. 1, 11 [indigent defense program attorney who represented over three hundred clients in juvenile dependency proceedings improperly withdrew by ceasing representation without notice to clients and without court's permission; writing letter to court stating that she resigned and returning client files to program were not effective].)

(3) *Papers, Property, and Fees*. On termination of employment, an attorney must do the following:

(a) Subject to any protective order or nondisclosure agreement, promptly release to the client, on the client's request, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not. (*Rules of Professional Conduct, Rule 3-700(D)(1).*)

(b) Promptly refund fees paid in advance that have not been earned. However, this provision is not applicable to a

true retainer fee that is paid solely for the purpose of ensuring the availability of the attorney for the matter. (*Rules of Professional Conduct, Rule 3-700(D)(2).*)

Rule 3-700(D)(1) makes clear the attorney's duties when new counsel seeks to obtain client files from an attorney discharged by the client. With respect to refunding unearned fees, if a client disputes the amount to be returned, the attorney must comply with *Rules of Professional Conduct, Rule 4-100(A)(2)* (preserving funds and property; *infra*, §453). (Discussion to *Rules of Professional Conduct, Rule 3-700.*)

Rule 3-700(D) is not intended to prohibit an attorney from making, at the attorney's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the attorney's expense in any subsequent legal proceeding. (Discussion to *Rules of Professional Conduct, Rule 3-700.*) (See *In the Matter of Lindmark* (2004) 4 Cal. State Bar Ct. Rptr. 668, 676 [attorney violated *Rules of Professional Conduct, Rule 3-700(D)(2)* by failing to return additional money received from client and retained as fee contrary to detailed fee agreement that required modification by writing, where no modification was made; public reprimand].)

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1. Termination of Employment (Rule 3-700).

2. Mandatory Withdrawal.

1 Witkin Cal. Proc. Attys § 451

[§ 451] Mandatory Withdrawal.

An attorney representing a client before a tribunal must withdraw from employment with the permission of the tribunal, if required by its rules, and an attorney representing a client in other matters must withdraw from employment, if in either case any of the following circumstances arise:

(1) The attorney knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring a person. (*Rules of Professional Conduct, Rule 3-700(B)(1).*)

(2) The attorney knows or should know that continued employment will result in violation of the Rules of Professional Conduct or of the State Bar Act. (*Rules of Professional Conduct, Rule 3-700(B)(2).*)

(3) The attorney's mental or physical condition renders it unreasonably difficult to carry out the employment effectively. (*Rules of Professional Conduct, Rule 3-700(B)(3).*)

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3. Permissive Withdrawal.

1 Witkin Cal. Proc. Attys § 452

[§ 452] Permissive Withdrawal.

If the rule governing mandatory withdrawal (supra, §451) is not applicable, an attorney may request permission to withdraw in matters pending before a tribunal, and may withdraw in other matters, when the following circumstances exist:

(1) The client insists on presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law. (*Rules of Professional Conduct, Rule 3-700(C)(1)(a).*)

(2) The client seeks to pursue an illegal course of conduct. (*Rules of Professional Conduct, Rule 3-700(C)(1)(b).*)

(3) The client insists that the attorney pursue a course of conduct that is illegal or that is prohibited under the Rules of Professional Conduct or the State Bar Act. (*Rules of Professional Conduct, Rule 3-700(C)(1)(c).*)

(4) The client, by other conduct, renders it unreasonably difficult for the attorney to carry out the employment effectively. (*Rules of Professional Conduct, Rule 3-700(C)(1)(d).*)

(5) The client insists, in a matter not pending before a tribunal, that the attorney engage in conduct that is contrary to the attorney's judgment and advice but not prohibited under the Rules of Professional Conduct or the State Bar Act. (*Rules of Professional Conduct, Rule 3-700(C)(1)(e).*)

(6) The client breaches an agreement or obligation to the attorney as to expenses or fees. (*Rules of Professional Conduct, Rule 3-700(C)(1)(f).*)

(7) The continued employment is likely to result in a violation of the Rules of Professional Conduct or of the State Bar Act. (*Rules of Professional Conduct, Rule 3-700(C)(2).*)

(8) The inability to work with cocounsel indicates that the best interests of the client likely will be served by

withdrawal. (*Rules of Professional Conduct, Rule 3-700(C)(3).*)

(9) The attorney's mental or physical condition renders it difficult for the attorney to carry out the employment effectively. (*Rules of Professional Conduct, Rule 3-700(C)(4).*)

(10) The client knowingly and freely assents to termination of the employment. (*Rules of Professional Conduct, Rule 3-700(C)(5).*)

(11) The attorney believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal. (*Rules of Professional Conduct, Rule 3-700(C)(6).*)

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5. Financial Relationship With Client.

a. Preserving Funds and Property (Rule 4-100).

1 Witkin Cal. Proc. Attys § 453

[§ 453] Preserving Funds and Property (Rule 4-100).

(1) *Trust Account or Client's Fund Account.* All funds received or held for the benefit of clients by an attorney or law firm, including advances for costs and expenses, must be deposited in identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import. The account must be maintained in California or, with the client's written consent, in another jurisdiction having a substantial relationship with the client or the client's business. (*Rules of Professional Conduct, Rule 4-100(A).*) (See *In the Matter of Respondent F.* (1992) 2 Cal. State Bar Ct. Rptr. 17, 26 [inadvertent violation of trust account requirement did not amount to misappropriation]; A.B.A. Model Rules of Professional Conduct, Rule 1.15 [safekeeping property]; on statutory requirement that financial institutions report to State Bar when properly payable instrument is presented against trust account containing insufficient funds, see *B. & P.C. 6091.1.*)

(2) *Commingling.* No funds belonging to the attorney or the law firm may be deposited into the trust account or otherwise commingled with trust account funds except as follows:

(a) Funds reasonably sufficient to pay bank charges. (*Rules of Professional Conduct, Rule 4-100(A)(1).*)

(b) In the case of funds belonging in part to a client and in part presently or potentially to the attorney or the law firm, the portion belonging to the attorney or law firm must be withdrawn at the earliest reasonable time after the interest in that portion becomes fixed. However, when a client disputes the right of the attorney or law firm to receive a portion of trust funds, the disputed portion may not be withdrawn until the dispute is resolved. (*Rules of Professional Conduct, Rule 4-100(A)(2).*) (See *T & R Foods v. Rose* (1996) 47 C.A.4th Supp. 1, 6, 8, 56 C.R.2d 41 [advance payment retainer remains property of client until actually earned by attorney, and under *Rules of Professional Conduct, Rule 4-100*, funds must remain segregated until earned; failure to segregate funds constitutes breach of fiduciary duty and professional negligence]; on commingling funds or failure to account as acts subject to discipline, see *infra*, §509 et seq.)

(3) *Responsibilities of Attorney.* As part of preserving a client's funds and property, an attorney must do the following:

(a) Promptly notify a client of the receipt of the client's funds, securities, or other properties. (*Rules of Professional Conduct, Rule 4-100(B)(1).*)

(b) Identify and label securities and properties of a client promptly on receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable. (*Rules of Professional Conduct, Rule 4-100(B)(2).*)

(c) Maintain complete records of all funds, securities, and other properties of a client coming into the attorney's or law firm's possession and render appropriate accounts to the client; preserve these records for a period of at least 5 years after final appropriate distribution of the funds or properties, and comply with any order for an audit of the records issued pursuant to the Rules of Procedure of the State Bar. (*Rules of Professional Conduct, Rule 4-100(B)(3).*)

(d) Promptly pay or deliver, as requested by the client, funds, securities, or other properties in the attorney's possession that the client is entitled to receive. (*Rules of Professional Conduct, Rule 4-100(B)(4).*) (See *In the Matter of Feldsott* (1997) 3 Cal. State Bar Ct. Rptr. 754, 758 [attorney's failure to indorse client's settlement check in order to protect valid lien on funds did not violate *Rules of Professional Conduct, Rule 4-100(B)(4)*].)

(4) *Standards.* Pursuant to Rule 4-100(C), the Board of Governors has adopted Trust Account Record Keeping Standards, which provide as follows:

(a) An attorney must, from the date of receiving client funds and for 5 years from the date of appropriate disbursement, maintain the following:

(1) a written ledger for each client on whose behalf funds are held that sets forth (a) the name of the client, (b) the date, amount, and source of all funds received on behalf of the client, (c) the date, amount, payee, and purpose of each disbursement made on behalf of the client, and (d) the current balance for the client.

(2) A written journal for each bank account that sets forth (a) the name of the account, (b) the date, amount, and client affected by each debit and credit, and (c) the current balance.

(3) All bank statements and canceled checks for each bank account and each monthly reconciliation (balancing).

(b) An attorney must, from the date of receiving securities and other properties for the benefit of a client and for 5 years from the date of appropriate disbursement of the securities or property, maintain a written journal that specifies (1) each item of security and property held, (2) the person on whose behalf the security or property is held, (3) the date of receipt of the security or property, (4) the date of distribution of the security or property, and (5) the person to whom the security or property was distributed.

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b. Fees for Legal Services (Rule 4-200).

1 Witkin Cal. Proc. Attys § 454

[§ 454] Fees for Legal Services (Rule 4-200).

An attorney must not enter into an agreement for, charge, or collect an illegal or unconscionable fee. (*Rules of Professional Conduct, Rule 4-200(A)*; see A.B.A. Model Rules of Professional Conduct, Rule 1.5 [fees]; on obtaining unearned or excessive fees as act involving moral turpitude, see *infra*, §488 et seq.)

Unconscionability of a fee is determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. (See *Shaffer v. Superior Court* (1995) 33 C.A.4th 993, 1003, 39 C.R.2d 506 [in legal malpractice action, defendant attorney's profit margin is not appropriate factor in determining conscionability of fee under *Rules of Professional Conduct, Rule 4-200*]; *In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 988 [fee was unconscionable because attorney failed to disclose to client that 35% contingency fee was in addition to fee earned by client's former counsel, thus withholding true facts that constituted "appropriation of ... client's funds under ... guise of retaining them as fees"]; 25 California Lawyer 45 (September 2005) [ethical billing practices].) Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) The amount of the fee in proportion to the value of the services performed. (*Rules of Professional Conduct, Rule 4-200(B)(1)*.)

(2) The relative sophistication of the attorney and the client. (*Rules of Professional Conduct, Rule 4-200(B)(2)*.)

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. (*Rules of Professional Conduct, Rule 4-200(B)(3)*.)

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. (*Rules of Professional Conduct, Rule 4-200(B)(4)*.)

(5) The amount involved and the results obtained. (*Rules of Professional Conduct, Rule 4-200(B)(5)*.)

(6) The time limitations imposed by the client or by the circumstances. (*Rules of Professional Conduct, Rule*

4-200(B)(6).)

(7) The nature and length of the professional relationship with the client. (*Rules of Professional Conduct, Rule 4-200(B)(7).*)

(8) The experience, reputation, and ability of the attorney or attorneys performing the services. (*Rules of Professional Conduct, Rule 4-200(B)(8).*)

(9) Whether the fee is fixed or contingent. (*Rules of Professional Conduct, Rule 4-200(B)(9).*)

(10) The time and labor required. (*Rules of Professional Conduct, Rule 4-200(B)(10).*)

(11) The informed consent of the client to the fee. (*Rules of Professional Conduct, Rule 4-200(B)(11).*)

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c. Expenses Incurred (Rule 4-210).

1 *Witkin Cal. Proc. Attys* § 455

[§ 455] Expenses Incurred (Rule 4-210).

An attorney must not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the attorney or the attorney's law firm will pay the personal or business expenses of a prospective or existing client. (*Rules of Professional Conduct, Rule 4-210(A).*) However, this rule does not prohibit an attorney from doing the following:

(1) With the consent of the client, paying or agreeing to pay expenses to third persons from funds collected or to be collected for the client as a result of the representation. (*Rules of Professional Conduct, Rule 4-210(A)(1).*)

(2) After employment, lending money to the client on the client's written promise to repay the loan. (*Rules of Professional Conduct, Rule 4-210(A)(2).*)

(3) Advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. These costs must be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation, or in providing any legal services to the client. (*Rules of Professional Conduct, Rule 4-210(A)(3).*)

Nothing in Rule 4-210 limits *Rules of Professional Conduct, Rule 3-300* (avoiding interest adverse to client; *supra*, §§436, 437), *Rule 3-310* (avoiding representation of adverse interests; *supra*, §438 et seq.), or *Rule 4-300* (purchasing property at foreclosure or sale subject to judicial review; *infra*, §456). (*Rules of Professional Conduct, Rule 4-210(B).*)

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5. Financial Relationship With Client.

d. Purchasing Property (Rule 4-300).

1 Witkin Cal. Proc. Attys § 456

[§ 456] Purchasing Property (Rule 4-300).

An attorney must not directly or indirectly purchase property at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the attorney or a lawyer affiliated with that attorney or with that attorney's law firm is counsel for a party or is acting as executor, receiver, trustee, administrator, guardian, or conservator. (*Rules of Professional Conduct, Rule 4-300(A)*.) (See *Eschwig v. State Bar* (1969) 1 C.3d 8, 15, 81 C.R. 352, 459 P.2d 904 [attorney was disbarred after purchasing principal asset of estate while he was representing executor in probate proceeding]; 35 A.L.R.3d 674 [purchasing client's property].)

An attorney may not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the attorney or of another lawyer in the attorney's law firm, or is an employee of the attorney or the attorney's law firm. (*Rules of Professional Conduct, Rule 4-300(B)*.)

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e. Gifts From Client (Rule 4-400).

1 Witkin Cal. Proc. Attys § 457

[§ 457] Gifts From Client (Rule 4-400).

An attorney may not induce a client to make a substantial gift, including a testamentary gift, to the attorney or to the attorney's parent, child, sibling, or spouse, except when the client is related to the attorney. (*Rules of Professional Conduct, Rule 4-400.*) However, an attorney may accept a gift from a client, subject to general standards of fairness and absence of undue influence. (Discussion to *Rules of Professional Conduct, Rule 4-400.*) The Discussion further notes that an attorney who participates in the preparation of an instrument memorializing an otherwise permissible gift ought not to be subject to professional discipline. However, when the attorney exerts impermissible influence, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 C.2d 423, 429, 24 C.R. 839, 374 P.2d 807, supra, §96 [drawing of will; highest good faith owed to client requires attorney to rebut inference of undue influence arising when attorney receives gift under circumstances reasonably suggesting undue influence]; 80 A.L.R.5th 597 [disciplinary cases involving attorney drafter as donee].) (On attorney drafting will in favor of self as violation of fiduciary duty, see supra, §96.)

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6. Advocacy and Representation.

a. Threatening Charges (Rule 5-100).

1 Witkin Cal. Proc. Attys § 458

[§ 458] Threatening Charges (Rule 5-100).

(1) *Rule and Exception.* An attorney must not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. (*Rules of Professional Conduct, Rule 5-100(A).*) However, Rule 5-100 is not intended to apply to an attorney threatening to initiate contempt proceedings against a party for a failure to comply with a court order. (Discussion to *Rules of Professional Conduct, Rule 5-100.*) (See *Kinnamon v. Staitman & Snyder (1977) 66 C.A.3d 893, 136 C.R. 321, 5 Summary (10th), Torts, §458* [damages for violating rule are recoverable]; *42 A.L.R.4th 1000* [initiating, or threatening to initiate, criminal prosecution as ground for discipline].)

(2) *Definitions.* The following definitions apply to Rule 5-100(A):

(a) "Administrative charges" means filing or lodging of a complaint with a federal, state, or local governmental entity that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature, but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action. (*Rules of Professional Conduct, Rule 5-100(B).*)

(b) "Civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity. (*Rules of Professional Conduct, Rule 5-100(C).*) The rule is equally applicable prior to the formal filing of an action. (Discussion to *Rules of Professional Conduct, Rule 5-100.*)

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b. Government Attorney Instituting Charges (Rule 5-110).

1 Witkin Cal. Proc. Attys § 459

[§ 459] Government Attorney Instituting Charges (Rule 5-110).

An attorney in government service may not institute criminal charges when the attorney knows or should know that the charges are not supported by probable cause. Moreover, if after charges have been instituted the attorney learns that they are not supported by probable cause, the attorney must promptly advise the court. (*Rules of Professional Conduct, Rule 5-110*; see A.B.A. Model Rules of Professional Conduct, Rule 3.8 [special responsibilities of prosecutor]; *13 Hastings Const. L. Q.* 537 [prosecutorial ethics].)

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c. Publicizing Litigation (Rule 5-120).

1 Witkin Cal. Proc. Attys § 460

[§ 460] Publicizing Litigation (Rule 5-120).

(1) *General Prohibition.* An attorney who is participating in the investigation or litigation of a matter must not make an extrajudicial statement that a reasonable person would expect to be disseminated by public communication if the attorney knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. (*Rules of Professional Conduct, Rule 5-120(A).*) Rule 5-120(A) is intended to apply to statements made by or on behalf of the attorney. (Discussion to *Rules of Professional Conduct, Rule 5-120.*) (See *People v. Marshall* (1996) 13 C.4th 799, 863, 864, footnote 15, 55 C.R.2d 347, 919 P.2d 1280, citing the text [after guilt phase but before penalty phase in retrial of capital case, prosecutor in conversation with reporter listed evidence presented in second trial but not in first; prosecutor's actual comments were not reasonably likely to affect imposition of sentence and thus did not violate former rule, and prosecutor was not required to anticipate reporter's inaccurate reporting of conversation]; A.B.A. Model Rules of Professional Conduct, Rule 3.6 [trial publicity]; 69 So. Cal. L. Rev. 1627 [ethical considerations in making public statements]; 43 U.C.L.A. L. Rev. 1321 [criticizing *Rules of Professional Conduct, Rule 5-120*, and A.B.A. Model Rule 3.6 as flawed approach to problem of trial publicity]; 30 U.S.F. L. Rev. 95 [arguing that more stringent gag orders are needed to ensure fair trials in information age]; on publicizing litigation as act subject to discipline, see *infra*, §521.)

(2) *Permitted Statements.* Notwithstanding Rule 5-120(A), an attorney may make a statement that a reasonable attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the attorney or the attorney's client. However, the statement must be limited to that information necessary to mitigate the recent adverse publicity. (*Rules of Professional Conduct, Rule 5-120(C).*) Further, an attorney may state the following:

(a) The claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved. (*Rules of Professional Conduct, Rule 5-120(B)(1).*)

(b) The information contained in a public record. (*Rules of Professional Conduct, Rule 5-120(B)(2).*)

(c) That an investigation of the matter is in progress. (*Rules of Professional Conduct, Rule 5-120(B)(3).*)

(d) The scheduling or result of any step in litigation. (*Rules of Professional Conduct, Rule 5-120(B)(4).*)

(e) A request for assistance in obtaining evidence and information. (*Rules of Professional Conduct, Rule 5-120(B)(5).*)

(f) A warning of danger concerning the behavior of a person involved, when there is reason to believe of the likelihood of substantial harm to an individual or the public interest. (*Rules of Professional Conduct, Rule 5-120(B)(6).*) However, this exception is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of *B. & P.C. 6068(e)* (supra, §90) regarding an attorney's duty to maintain client confidence and secrets. (Discussion to *Rules of Professional Conduct, Rule 5-120.*)

(g) In a criminal case, an attorney may also state the following:

(1) The identity, residence, occupation, and family status of the accused. (*Rules of Professional Conduct, Rule 5-120(B)(7)(a).*)

(2) If the accused has not been apprehended, information necessary to aid in the apprehension of the accused. (*Rules of Professional Conduct, Rule 5-120(B)(7)(b).*)

(3) The fact, time, and place of arrest. (*Rules of Professional Conduct, Rule 5-120(B)(7)(c).*)

(4) The identity of investigating and arresting officers or agencies and the length of the investigation. (*Rules of Professional Conduct, Rule 5-120(B)(7)(d).*)

(3) *Applicability of Rule.* Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel. (Discussion to *Rules of Professional Conduct, Rule 5-120.*)

(4) *Factors Determining Violation of Rule.* The Discussion to Rule 5-120 recognizes that whether an extrajudicial statement violates the rule depends on many factors including the following:

(a) Whether the statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue.

(b) Whether the statement presents information the attorney knows is false, deceptive, or the use of which would violate *B. & P.C. 6068(d)* (employing only means consistent with truth; see *infra*, §§480, 541).

(c) Whether the statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (e.g., in juvenile, domestic, mental disability, and certain criminal proceedings).

(d) The timing of the statement.

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d. Trial Conduct (Rules 5-200, 5-220).

1 Witkin Cal. Proc. Attys § 461

[§ 461] Trial Conduct (Rules 5-200, 5-220).

(1) *Conduct Consistent With Truth.* In presenting a matter to a tribunal, an attorney must employ, for the purpose of maintaining the causes confided to the attorney, only those means consistent with truth. (*Rules of Professional Conduct, Rule 5-200(A)*; see *Datig v. Dove Books* (1999) 73 C.A.4th 964, 979, 87 C.R.2d 719 [defense counsel breached duty as officer of court in seeking to dismiss ex parte and failing to comply with ex parte notice requirements and by misrepresenting to court that plaintiff had failed to file amended complaint within specified time]; A.B.A. Model Rules of Professional Conduct, Rule 3.3 [candor toward tribunal].) Thus, an attorney must not do any of the following:

(a) Seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law. (*Rules of Professional Conduct, Rule 5-200(B)*; see *Batt v. San Francisco* (2007) 155 C.A.4th 65, 82, footnote 9, 65 C.R.3d 716, citing the text [discussing California and A.B.A. Rules and criticizing plaintiff's counsel for failure to cite relevant cases].)

(b) Intentionally misquote to a tribunal the language of a book, statute, or decision. (*Rules of Professional Conduct, Rule 5-200(C)*.)

(c) Knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (*Rules of Professional Conduct, Rule 5-200(D)*.)

(d) Assert personal knowledge of the facts at issue, except when testifying as a witness (see *infra*, §462). (*Rules of Professional Conduct, Rule 5-200(E)*.)

(2) *Evidence.* An attorney must not suppress evidence that the attorney or attorney's client has a legal obligation to reveal or to produce. (*Rules of Professional Conduct, Rule 5-220*.)

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e. Attorney as Witness (Rule 5-210).

1 Witkin Cal. Proc. Attys § 462

[§ 462] Attorney as Witness (Rule 5-210).

(1) *When Testimony Is Permitted.* An attorney may act as both advocate and witness before a jury only when the following conditions are met:

(a) The testimony relates to an uncontested matter. (*Rules of Professional Conduct, Rule 5-210(A).*)

(b) The testimony relates to the nature and value of legal services rendered in the case. (*Rules of Professional Conduct, Rule 5-210(B).*)

(c) The attorney has the client's informed, written consent. (*Rules of Professional Conduct, Rule 5-210(C).*) If the attorney represents the People or a governmental entity, the consent must be obtained from the head of the office by which the attorney is employed and must be consistent with principles of recusal. (*Rules of Professional Conduct, Rule 5-210(C).*)

(2) *Scope of Rule.* Rule 5-210 is intended to apply when the attorney knows or should know that he or she will be called as a witness in litigation before a jury. The rule is not applicable in nonadversarial proceedings, as when the attorney testifies on behalf of the client in a hearing before a legislative body. Nor does the rule apply when a lawyer in an advocate's firm is a witness. (Discussion to *Rules of Professional Conduct, Rule 5-210.*) (See *Comden v. Superior Court* (1978) 20 C.3d 906, 915, 145 C.R. 9, 576 P.2d 971 [former rule; disqualification of plaintiff's law firm on ground that firm's attorney might be called as witness on behalf of own client]; *Graphic Process Co. v. Superior Court* (1979) 95 C.A.3d 43, 51, footnote 4, 156 C.R. 841 [discussing modification to former rule to overcome *Comden*]; *Lyle v. Superior Court* (1981) 122 C.A.3d 470, 475, 482, 175 C.R. 918 [same]; *Smith, Smith & Kring v. Superior Court* (1997) 60 C.A.4th 573, 579, 70 C.R.2d 507 [evidence for recusal of attorney witness must be more than conclusory allegations; it must convincingly demonstrate detriment to party requesting recusal or injury to integrity of judicial process]; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §8.10.)

In *People v. Donaldson* (2001) 93 C.A.4th 916, 113 C.R.2d 548, during a trial for attempted murder and child endangerment, the prosecutor called herself as a witness in order to impeach the exculpatory testimony of the only

prosecution witness to the alleged crimes, and during closing argument expressed her personal belief, as both advocate and witness, in defendant's guilt. Defense counsel failed to object and defendant was found guilty. *Held*, reversed. Defense counsel's representation was constitutionally deficient and prejudicial. The prohibition against an attorney acting as both advocate and witness is especially necessary and fundamental within the criminal justice system where jurors may be unduly influenced by the prestige and prominence of the prosecutor's office and thus "base their credibility determinations on improper factors." (93 C.A.4th 929.) "In neither testimony nor argument should a prosecutor express a personal belief in a witness's credibility or in an accused's guilt. ... Especially if witness credibility is crucial, a prosecutor's expression of a personal belief in a witness's credibility or in an accused's guilt can jeopardize the fundamental fairness of the trial." (93 C.A.4th 931.)

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f. Contact With Officials (Rule 5-300).

1 *Witkin Cal. Proc. Attys* § 463

[§ 463] Contact With Officials (Rule 5-300).

(1) *Gifts and Contributions.* An attorney may not directly or indirectly give or lend anything of value to a judge, official, or tribunal employee unless the personal or family relationship between the attorney and the individual is such that gifts are customarily given and exchanged. However, an attorney may contribute to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to these contributions. (*Rules of Professional Conduct, Rule 5-300(A).*)

(2) *Communications With Judge.* An attorney may directly or indirectly communicate with or argue to a judge or judicial officer on the merits of a contested matter pending before that judge or judicial officer only in the following circumstances:

- (a) In open court. (*Rules of Professional Conduct, Rule 5-300(B)(1).*)
- (b) With the consent of all other counsel in the matter. (*Rules of Professional Conduct, Rule 5-300(B)(2).*)
- (c) In the presence of all other counsel in the matter. (*Rules of Professional Conduct, Rule 5-300(B)(3).*)
- (d) In writing with a copy furnished to the other counsel. (*Rules of Professional Conduct, Rule 5-300(B)(4).*)
- (e) In ex parte matters. (*Rules of Professional Conduct, Rule 5-300(B)(5).*)

As used in Rule 5-300, "judge" and "judicial officer" include law clerks, research attorneys, or other court personnel who participate in the decisionmaking process. (*Rules of Professional Conduct, Rule 5-300(C).*)

In *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 64 C.R.2d 705, counsel for a party to an administrative proceeding informed the administrative law judge (ALJ) ex parte that the opposing party had been crying during a witness' testimony and that counsel was concerned for his and cocounsel's safety. *Held*, the prohibition on ex parte communication applies to an ALJ, and the communication was improper.

(a) The predecessor to Rule 5-300(B) was adopted in 1928, long before the burgeoning of the present system of administrative law. At that time, "judicial officer" had a settled meaning; it referred to persons who exercised judicial power and was often used to distinguish between administrative and judicial officials. (55 C.A.4th 1316.) Thus, an ALJ is not a "judicial official" within the meaning of Rule 5-300(B). (55 C.A.4th 1316, 1317.) However, the law of legal ethics includes not only written law, but also common or "unwritten" law. "There is no principled basis to distinguish between an ALJ and a judge in the judicial branch for purposes of the ethical strictures against ex parte contacts. Hence, we find the same standard applicable." (55 C.A.4th 1317.)

(b) The general standard for improper ex parte communication is stated in various ways, but it is in essence a rule of fairness to ensure that all interested parties are heard on an issue. "It extends to communication of information in which counsel knows or should know the opponents would be interested. ... Construed in aid of its purpose, we conclude the standard generally bars any ex parte communication by counsel to the decisionmaker of information relevant to issues in the adjudication." (55 C.A.4th 1317.)

(c) Concern about personal safety may sometimes warrant ex parte communication with the tribunal. "If immediate open disclosure would compromise the safety of the participants, e.g., if counsel believed that an opposing party was unlawfully carrying a concealed weapon, counsel could communicate that information to the tribunal. However, there was no such an emergency in this case. Moreover, no reason appears why the communication should not be fully disclosed to the opponent after the immediacy of the perceived danger abates." (55 C.A.4th 1317, 1318.) (See *Heavey v. State Bar* (1976) 17 C.3d 553, 559, 131 C.R. 406, 551 P.2d 1238 ["Petitioner's refusal, after two unmistakable warnings, to send copies of his correspondence to opposing counsel demonstrates a brazen disregard of his professional duties"]; A.B.A. Model Rules of Professional Conduct, Rule 3.5 [impartiality and decorum of the tribunal]; 22 A.L.R.4th 917 [disciplinary action for attorney communication with judge on merits of case].)

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g. Contact With Witnesses (Rule 5-310).

1 Witkin Cal. Proc. Attys § 464

[§ 464] Contact With Witnesses (Rule 5-310).

(1) *Concealing Witness*. An attorney must neither advise a person to secrete himself or herself, nor directly or indirectly cause a person to leave a tribunal's jurisdiction in order to make that person unavailable as a witness. (*Rules of Professional Conduct, Rule 5-310(A).*)

(2) *Purchasing Testimony*. An attorney may not, directly or indirectly, offer to pay, or agree to pay compensation to a witness contingent on the content of the witness' testimony or the outcome of the case. (*Rules of Professional Conduct, Rule 5-310(B).*) However, except where prohibited by law, an attorney may advance, guarantee, or agree to pay the following items:

(a) Expenses reasonably incurred by a witness in attending or testifying. (*Rules of Professional Conduct, Rule 5-310(B)(1).*)

(b) Reasonable compensation to a witness for loss of time in attending or testifying. (*Rules of Professional Conduct, Rule 5-310(B)(2).*)

(c) A reasonable fee for the professional services of an expert witness. (*Rules of Professional Conduct, Rule 5-310(B)(3).*)

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h. Contact With Jurors (Rule 5-320).

1 Witkin Cal. Proc. Attys § 465

[§ 465] Contact With Jurors (Rule 5-320).

(1) *Panel*. An attorney connected with a case may not communicate directly or indirectly with anyone the attorney knows to be a member of the panel from which the jury will be selected. (*Rules of Professional Conduct, Rule 5-320(A).*)

(2) *During Trial*.

(a) *Attorney Connected With Case*. During trial, an attorney connected with the case may not communicate directly or indirectly with jurors. (*Rules of Professional Conduct, Rule 5-320(B).*)

(b) *Attorney Not Connected With Case*. During trial, an attorney who is not connected with the case may not communicate directly or indirectly concerning the case with anyone the attorney knows is a juror in the case. (*Rules of Professional Conduct, Rule 5-320(C).*)

(3) *Harassing or Embarrassing Jurors After Discharge of Jury*. After discharge of the jury, an attorney may not question or make comments to a juror when the questions or comments are intended to harass or embarrass the juror or to influence the juror's actions in future jury service. (*Rules of Professional Conduct, Rule 5-320(D).*)

(4) *Out-of-Court Investigations*. An attorney may not directly or indirectly conduct an out-of-court investigation of a person who is either a member of the panel or a juror in a manner likely to influence the state of mind of these persons in connection with present or future jury service. (*Rules of Professional Conduct, Rule 5-320(E).*)

(5) *Revealing Improper Juror Conduct*. An attorney must promptly reveal to the court knowledge of improper conduct (a) by a person who is either a member of a panel or a juror, or (b) by another toward a person, or toward the person's family, when the person is either a member of a panel or a juror. (*Rules of Professional Conduct, Rule 5-320(G).*)

(6) *"Juror" Defined*. For purposes of Rule 5-320, "juror" means any impaneled, discharged, or excused juror. (*Rules of Professional Conduct, Rule 5-320(I).*)

(7) *Scope of Rule.* All restrictions imposed by Rule 5-320 also apply to communications with, or investigations of, members of the family of a person who is either a member of the panel or a juror. (*Rules of Professional Conduct, Rule 5-320(F).*) The rule does not prohibit an attorney from communicating with persons who are members of a panel or jurors as a part of the official proceedings. (*Rules of Professional Conduct, Rule 5-320(H).*) (See A.B.A. Model Rules of Professional Conduct, Rule 3.5 [impartiality and decorum of tribunal]; 19 *A.L.R.4th* 1209 [propriety of attorney's communication with jurors after trial].)

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(3) *Harassing or Embarrassing Jurors After Discharge of Jury.* See *In the Matter of Loftus* (2007) 5 Cal. State Bar Ct. Rptr. 80, 87 [when juror S refused to aid attorney by signing affidavit suggesting trial judge committed prejudicial error by telling jurors judge would not advise jurors' employers of day off jury duty, attorney violated rule by threatening to and subsequently contacting S's employer suggesting S committed fraud by taking unauthorized day off work for jury duty].



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IX. CONVICTION OF CRIME

A. Conviction of Crime Involving Moral Turpitude.

1. In General.

1 Witkin Cal. Proc. Attys § 466

[§ 466] In General.

(1) *Statutes.* Conviction of a crime is sometimes a basis for disciplinary action against an attorney. When the crime may involve moral turpitude, *B. & P.C. 6101* and *6102* provide for suspension followed by a hearing to determine the issue; and, despite a determination that the crime does involve moral turpitude, the final order may be either disbarment or suspension. (See *infra*, §468 et seq.) (On immediate suspension following conviction of felony, see *infra*, §479.)

(2) *Rules.* The Supreme Court has prescribed rules of procedure and practice for proceedings under *B. & P.C. 6101* and *6102*. (See Rules Relating to Attorney Admission and Disciplinary Proceedings and Review of State Bar Proceedings; C.R.C., Rule 9.10 et seq., *infra*, §468 et seq.)

The State Bar Court exercises all statutory powers under *B. & P.C. 6101* and *6102* with respect to the discipline of attorneys convicted of crimes. (C.R.C., Rule 9.10(a); see *B. & P.C. 6087* [authorization of State Bar to take actions otherwise reserved to Supreme Court].) Thus, unless the Supreme Court exercises its inherent jurisdiction over attorney discipline, the State Bar Court may impose or recommend discipline in conviction matters as in other disciplinary proceedings, may place attorneys on interim suspension, and may vacate, delay, and temporarily stay the effect of those orders. (C.R.C., Rule 9.10(a).) (On proceedings by State Bar Court generally, see *infra*, §561 et seq.; on conviction proceedings, see *infra*, §630.)

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2. Nature of Conviction.

1 Witkin Cal. Proc. Attys § 467

[§ 467] Nature of Conviction.

(1) *Probation and Suspended Sentence.* A judgment of guilty is a conviction even though probation is granted and execution of the sentence is suspended, and irrespective of a subsequent withdrawal of the plea and the dismissal of the charges under P.C. 1203.4. (*B. & P.C. 6102*; see *In re Phillips* (1941) 17 C.2d 55, 58, 109 P.2d 344; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §92.) But where the imposition of sentence is suspended there is no judgment of conviction, and there is no authority to disbar. (*In re Hickman* (1941) 18 C.2d 71, 113 P.2d 1; see 3 Cal. Crim. Law (3d), *Punishment*, §538 et seq.)

(2) *Pardon.* In an early case it was held that an unconditional pardon was a defense against automatic disbarment under the former statute. (*In re Emmons* (1915) 29 C.A. 121, 126, 154 P. 619; see 59 A.L.R.3d 466 [pardon as defense to disbarment].)

(3) *Federal or Out-of-State Conviction.* Conviction in a federal court or the court of another state has the same effect as a California conviction. (See *B. & P.C. 6101(c)*; *In re Craig* (1938) 12 C.2d 93, 96, 82 P.2d 442; *In re Richardson* (1940) 15 C.2d 536, 540, 102 P.2d 1076; 7 Am.Jur.2d (2007 ed.), *Attorneys at Law* §94; 63 A.L.R.3d 476 [federal income tax conviction as involving moral turpitude]; 63 A.L.R.3d 512 [federal income tax conviction as constituting nonprofessional misconduct warranting disciplinary action]; 98 A.L.R.3d 357 [attorney's federal or out-of-state conviction as grounds for discipline].)

(4) *Plea of Nolo Contendere.* A conviction after a plea of nolo contendere has the same effect as a conviction. (*B. & P.C. 6101(e)*; *In re Gross* (1983) 33 C.3d 561, 567, 189 C.R. 848, 659 P.2d 1137; *In the Matter of Jackson* (2003) 4 Cal. State Bar Ct. Rptr. 610, 613 [attorney's nolo contendere plea to felony charge of assault with deadly weapon was conviction of felony for purposes of State Bar Act regardless of sentencing court's reduction of crime to misdemeanor].)

(5) *Conviction for Acts Committed Prior to Admission.* Conviction of a crime after admission to practice authorizes discipline even though the acts on which the conviction was based were committed before admission. (*In re Bogart* (1973) 9 C.3d 743, 749, 108 C.R. 815, 511 P.2d 1167.)

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3. Procedure.

a. Temporary Suspension on Conviction.

1. In General.

1 Witkin Cal. Proc. Attys § 468

[§ 468] In General.

(1) *Notice to State Bar.* On obtaining information that the defendant in a pending felony or misdemeanor prosecution is an attorney, the prosecuting agency must immediately notify the State Bar. The notice must identify the attorney and describe the crimes charged and the alleged facts. Notice that the defendant is an attorney must also be given to the clerk of the court where the action is pending, and the clerk must prominently record that fact in the file. (*B. & P.C. 6101(b).*)

(2) *Copy of Record.* Within 48 hours after the attorney's conviction, the clerk of the criminal court transmits a certified copy of the record to the State Bar. (*B. & P.C. 6101(c).*) (For proceedings on conviction of felony, see *infra*, §479.)

(3) *State Bar Action.* The State Bar, within 5 days of receipt, must transmit to the Supreme Court the record of any conviction that "involves or may involve moral turpitude." The State Bar may procure and transmit the record of conviction "when the clerk has not done so or when the conviction was had in a court other than a court of this state." (*B. & P.C. 6101(c).*) Further, on receipt of the certified copy of the record, the State Bar disciplinary agency must promptly forward a certified copy of the judgment of conviction to the disciplinary agency in each jurisdiction in which the attorney is admitted. (*B. & P.C. 6092.5(c).*)

(4) *Proceedings To Disbar or Suspend.* Proceedings to disbar or suspend follow the procedure provided in *B. & P.C. 6101* and *6102*. (*B. & P.C. 6101(d)*; C.R.C., Rule 9.10(a).)

(5) *Supreme Court Action.* The Supreme Court suspends the attorney until affirmance of the judgment of conviction on appeal, lapse of time for appeal, or until the judgment "has otherwise become final," "and until the further order of the court." On its own motion or on good cause shown "the court may decline to impose, or may set aside, the suspension when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of, and confidence in, the profession." (*B. & P.C. 6102(a).*)

(6) *Effect of Suspension on Criminal Defendant's Right to Counsel. In re Johnson* (1992) 1 C.4th 689, 4 C.R.2d 170, 822 P.2d 1317, involved representation of a criminal defendant by an attorney who, prior to trial and without defendant's knowledge, was suspended from practice and then submitted his resignation to the State Bar with disciplinary charges pending. The court concluded that the attorney's representation of the defendant after the attorney's submission of his resignation denied defendant his right under the California Constitution to representation by a member of the *State Bar*. (1 C.4th 700, 701; see 5 Cal. Crim. Law (3d), *Criminal Trial*, §205.) However, an attorney's suspension under B. & P.C. 6102 does not reflect a legislative or judicial determination that the attorney lacks competence or is unfit to practice law. Hence, such a suspension does not, of itself, create a presumption of incompetence or deprive a defendant of his right to a "fully licensed attorney." (1 C.4th 696, 700.)

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3. Procedure.

a. Temporary Suspension on Conviction.

2. Procedural Aspects.

1 Witkin Cal. Proc. Attys § 469

[§ 469] Procedural Aspects.

In re Strick (1983) 34 C.3d 891, 196 C.R. 509, 671 P.2d 1251, examines the procedural aspects of temporary suspension. Petitioner had pleaded guilty to passing a forged prescription for a controlled substance, and had also been convicted of voluntary manslaughter and assault with a deadly weapon. While his appeal was pending from the two latter convictions, the court referred the forgery conviction to the State Bar for an inquiry into moral turpitude. Petitioner, relying on the panel's assurance that it would make recommendations as to interim suspension only, presented no evidence or argument in mitigation. The State Bar found that petitioner had been convicted of criminal offenses involving moral turpitude and recommended disbarment. *Held*, the procedure was improper.

(a) *Court's practice.* Interim suspension is the method by which the court may temporarily suspend an attorney pending the final resolution of criminal charges, and *B. & P.C. 6102(a)* is framed in mandatory terms. However, it is the court's practice to refer to the State Bar cases in which the determination of moral turpitude requires an examination of the facts and circumstances of the case. This practice was implicitly recognized in former C.R.C., Rule 951(a), which precluded a petition to set aside temporary suspension if a referral to the State Bar preceded the suspension order. "Thus we find that our referral order properly conferred upon the State Bar the power to report whether petitioner's offenses involved moral turpitude or other misconduct warranting discipline, in order to assist this court in deciding whether interim suspension is warranted. This court retains the sole power to order petitioner suspended from the practice of law." (34 C.3d 898.)

(b) *Due process.* The State Bar hearing examiner took evidence on the facts and circumstances of the convictions, stating that the record would ultimately be placed before the court, thus avoiding a retrial after the convictions became final. This procedure, however, was a denial of due process. The attorney is entitled to notice and an opportunity to be heard prior to the making of a final disciplinary order; and although he may be called to testify, he may decline to answer questions where the testimony would tend to incriminate. Petitioner chose to remain silent with regard to the charges which had not been finally determined; he cannot be criticized for asserting this right, nor may he be penalized by having the issue of discipline submitted on a record that was developed without his participation. (34 C.3d 899.)

(c) *Advice as to probable cause.* Interim suspension is mandated in cases where it appears from the record of conviction that the crime involved moral turpitude. "We refer to the State Bar those cases where moral turpitude is not inherent in the offense itself. We do not require, however, that the State Bar make a full and final determination of the nature and circumstances of the crimes. Instead, we seek advice as to whether there is probable cause to believe that the particular offense involved moral turpitude requiring interim suspension of the attorney." (34 C.3d 899.)

(d) *Record is conclusive evidence only for interim suspension.* A probable cause recommendation may be made on an examination of the record of the proceedings resulting in conviction, including a transcript of the testimony. This record may be deemed conclusive evidence of guilt only for purposes of interim suspension. "While the attorney should be afforded an opportunity to present evidence and argument that his or her conduct did not amount to moral turpitude, he or she should not be forced to do so. Once the conviction has become final a full hearing is authorized and required by statute. At this point the attorney must be permitted to present evidence, testimony and argument on both the issue of moral turpitude and the question of appropriate discipline." (34 C.3d 900.)

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3. Procedure.

b. Hearing After Conviction Is Final.

1. Notice and Opportunity To Be Heard.

1 Witkin Cal. Proc. Attys § 470

[§ 470] Notice and Opportunity To Be Heard.

(1) *Procedure.* When a judgment of conviction has become final or probation with a suspended sentence is granted, the court must provide a hearing after adequate notice. If after this hearing the court finds that the crime or the circumstances of its commission involved moral turpitude, the court must either (a) enter an order disbaring or suspending the attorney, or (b) dismiss the proceedings. In determining the extent of the discipline the court may consider any prior discipline imposed on the attorney. (*B. & P.C. 6102(e).*)

(2) *What Constitutes Final Judgment.* "[A] judgment of conviction is deemed final when the availability of appeal has been exhausted and the time for filing a petition for certiorari in the United States Supreme Court on direct review of the judgment of conviction has elapsed and no petition has been filed, or if filed the petition has been denied or the judgment of conviction has been affirmed." (C.R.C., Rule 9.10(a).) (See *In re Calaway (1977) 20 C.3d 165, 167, 141 C.R. 805, 570 P.2d 1223* [federal conviction was deemed final despite pendency of habeas corpus proceeding].) (For proceedings on conviction of felony, see *infra*, §479.)

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2. Review of State Bar Court Decision.

1 Witkin Cal. Proc. Attys § 471

[§ 471] Review of State Bar Court Decision.

Review of the State Bar Court's recommendation of disbarment or suspension is initiated by filing a verified petition with the Supreme Court within 60 days after a certified copy of the decision is filed with the Supreme Court. (C.R.C., Rule 9.13(a); on contents of petition, see C.R.C., Rule 9.13(e); on procedures for review of State Bar Court decisions, see *infra*, §603 et seq.)

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4. What Crimes Involve Moral Turpitude.

a. Meaning and Tests.

1 Witkin Cal. Proc. Attys § 472

[§ 472] Meaning and Tests.

"Moral turpitude has been defined by many authorities as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 C.2d 93, 97, 82 P.2d 442; see 7 Am.Jur.2d (2007 ed.), Attorneys at Law §86.) The meaning and tests are the same whether the dishonest or immoral act is a felony, a misdemeanor, or no crime at all. (See 24 Cal. L. Rev. 9; on acts involving moral turpitude as basis for discipline, see *infra*, §480 et seq.)

In re Rothrock (1940) 16 C.2d 449, 106 P.2d 907, makes this distinction:

(a) "In cases such as those involving convictions of murder, forgery, extortion, bribery, perjury, robbery, embezzlement and other forms of theft, no difficulty would attend the determination of the question of moral turpitude from a consideration of the record of conviction alone." (16 C.2d 454.)

(b) In doubtful cases the question is whether the offense bears on the petitioner's moral fitness to practice law; and, in the absence of a statute making evil intent an element of the crime, the courts do not ordinarily classify assault with a deadly weapon with the other serious crimes enumerated above. "A high degree of moral standards is required of an attorney, but the courts have not been inclined to impute moral turpitude in the commission of the lesser infractions of the penal laws which carry no reflection upon the attorney's moral fitness to practice law. The commission of such lesser offenses by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to involve moral turpitude." (16 C.2d 458, 459.) (See *In re Hatch* (1937) 10 C.2d 147, 150, 73 P.2d 885 [similar analysis].)

In re Fahey (1973) 8 C.3d 842, 106 C.R. 313, 505 P.2d 1369, reaffirmed the distinction drawn in *Rothrock* and *Hatch*. Petitioner had been convicted of wilfully failing to file federal income tax returns for two specific years. The administrative committee found no moral turpitude in his conduct, but the disciplinary board, largely relying on a pattern of failure to file and nonpayment of taxes over a period of many years, concluded that the facts surrounding the

conviction established moral turpitude and recommended 3 months' suspension. *Held*, proceeding dismissed.

(a) Under federal law the conviction did not require an intent to defraud, and thus did not establish moral turpitude on its face. Petitioner was therefore subject to discipline only if special circumstances established moral turpitude. (8 C.3d 850.)

(b) Petitioner's persistent failure to file or to pay his taxes was consistent with his expressed intent to ultimately file and pay, and was explained by his lack of adequate records and by expert testimony of his psychological inability to take care of his personal financial affairs. (8 C.3d 850.) There was no evidence of deception or dishonesty, and the fact that he testified before the administrative committee gave special weight to its acceptance of his credibility. (8 C.3d 851.) Also, petitioner fully discharged his professional duties to his clients, and there had been no prior disciplinary proceedings against him. (8 C.3d 848, 852.)

(c) "Offenses that do not involve moral turpitude or affect professional performance should not be a basis for professional discipline simply because they fall short of the highest standards of professional ethics or may in some way impair the public image of the profession. Otherwise the imposition of discipline may tend to be influenced by the degree to which the offense has become known to the public. ... Our standard of moral turpitude depends not on popular impressions but on the violator's own motivation as it relates to his moral fitness to practice law." (8 C.3d 853.) (Cf. *In re Rohan* (1978) 21 C.3d 195, 202, 145 C.R. 855, 578 P.2d 102, *infra*, §478 [reexamining *Fahey* approach].)

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b. Illustrations.

1. Crimes Against Person or Property.

1 Witkin Cal. Proc. Attys § 473

[§ 473] Crimes Against Person or Property.

The classification of cases in this and the following sections indicates the scope of the concept of "crime involving moral turpitude."

(1) *Crimes Against the Person.* (See *In re Kirschke* (1976) 16 C.3d 902, 129 C.R. 780, 549 P.2d 548 [first degree murder]; *In re Duggan* (1976) 17 C.3d 416, 422, 130 C.R. 715, 551 P.2d 19 [contributing to delinquency of minor]; *In re Lesansky* (2001) 25 C.4th 11, 18, 104 C.R.2d 409, 17 P.3d 764, *infra*, §479 [attempted lewd act on child]; 21 A.L.R.3d 887, 890 [homicide]; 21 A.L.R.3d 887, 892 [assault].)

(2) *Crimes Against Property.* (See *In re Plotner* (1971) 5 C.3d 714, 97 C.R. 193, 488 P.2d 385 [receiving stolen property and procuring an abortion]; *In re Bogart* (1973) 9 C.3d 743, 748, 108 C.R. 815, 511 P.2d 1167 [grand theft and forgery; "heinous crimes"]; *In re Wright* (1973) 10 C.3d 374, 376, 110 C.R. 348, 515 P.2d 292 [grand theft of trust funds]; *In re Lyons* (1975) 15 C.3d 322, 124 C.R. 171, 540 P.2d 11 [embezzlement of trust funds]; *In re Waisbren* (1975) 15 C.3d 553, 557, 125 C.R. 479, 542 P.2d 639 [receiving stolen property]; *In re Honoroff* (1975) 15 C.3d 755, 760, 126 C.R. 229, 543 P.2d 597 [grand theft]; *In re Hurwitz* (1976) 17 C.3d 562, 131 C.R. 402, 551 P.2d 1234 [petitioner charged with burglary, found guilty of lesser offense of unauthorized entry; review of record indicated that he committed "acts in the nature of burglary" and disbarment was ordered]; *Ambrose v. State Bar* (1982) 31 C.3d 184, 181 C.R. 903, 643 P.2d 486 [grand theft of trust funds].)

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b. Illustrations.

2. Crimes Involving Fraud.

1 Witkin Cal. Proc. Attys § 474

[§ 474] Crimes Involving Fraud.

The term "moral turpitude" includes "fraud," and "a crime in which an intent to defraud is an essential element is a crime involving moral turpitude." (*In re Hallinan* (1954) 43 C.2d 243, 247, 248, 272 P.2d 768.) *Hallinan* involved a conviction in federal court on a charge of "willfully and knowingly filing false and fraudulent income tax returns." The court declared that there was no distinction between defrauding an individual and the government: "[A]n attorney, whose standard of conduct should be one of complete honesty, ... who is convicted of either offense is not worthy of the trust and confidence of his clients, the courts, or the public." However, the federal offense does not necessarily involve fraud; some measure of bad faith or evil intent is essential. But it can be inferred from careless disregard of lawfulness of acts. Hence, in accordance with the court's practice (now codified by B. & P.C. 6102(f)), the matter was referred to the State Bar for a hearing, report, and recommendation. Thereafter, on a record showing "a callous and brazen indifference to the obligations of an attorney, with the object of personal gain," a 3-year suspension was ordered. (*In re Hallinan* (1957) 48 C.2d 52, 56, 307 P.2d 1.) (See *In re Distefano* (1975) 13 C.3d 476, 479, 119 C.R. 105, 531 P.2d 417 [filing false and fraudulent income tax returns]; *In re Silverton* (1975) 14 C.3d 517, 121 C.R. 596, 535 P.2d 724 [solicitation of grand theft; conspiracy to obtain money by false pretenses and to present fraudulent insurance claim for personal injury damages]; *In re Schwartz* (1982) 31 C.3d 395, 182 C.R. 640, 644 P.2d 833 [use of fictitious name to perpetrate mail fraud]; 63 A.L.R.3d 476 [federal income tax conviction as involving moral turpitude]; 63 A.L.R.3d 512 [federal income tax conviction as constituting nonprofessional misconduct warranting disciplinary action].) (For discussion of same ground for revocation of other professional licenses, see *Lorenz v. Board of Med. Examiners* (1956) 46 C.2d 684, 298 P.2d 537.)

The crime of selling securities without a permit, although only a "malum prohibitum," may involve moral turpitude if the violation is not merely technical but with intent to evade the regulation for the purpose of gain or profit. (*In re Hatch* (1937) 10 C.2d 147, 150, 73 P.2d 885; *In re Clark* (1959) 52 C.2d 322, 324, 340 P.2d 613; *In re Langford* (1966) 64 C.2d 489, 496, 50 C.R. 661, 413 P.2d 437 [fraudulent concealment of facts of transaction, for gain of client]; see 18 A.L.R.3d 1408 [violation of securities regulations as ground of disciplinary action against attorney].)

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b. Illustrations.

3. Perjury and Related Offenses.

1 *Witkin Cal. Proc. Attys* § 475

[§ 475] Perjury and Related Offenses.

Perjury and related offenses involve moral turpitude. (See *In re Allen* (1959) 52 C.2d 762, 344 P.2d 609 [perjury]; *In re Craig* (1938) 12 C.2d 93, 82 P.2d 442 [conspiracy to obstruct justice]; *In re Jones* (1971) 5 C.3d 390, 400, 96 C.R. 448, 487 P.2d 1016, citing the text [subornation of perjury and offering false evidence]; *In re Hanley* (1975) 13 C.3d 448, 451, 119 C.R. 5, 530 P.2d 1381 [bribing witness not to testify]; *In re Kristovich* (1976) 18 C.3d 468, 134 C.R. 409, 556 P.2d 771 [perjury conviction of public administrator for swearing to false names of buyers at probate sales; 3-month actual suspension despite absence of pecuniary harm]; *Montag v. State Bar* (1982) 32 C.3d 721, 725, 186 C.R. 894, 652 P.2d 1370 [perjury in testimony before grand jury].)

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b. Illustrations.

4. Miscellaneous Crimes.

1 *Witkin Cal. Proc. Attys* § 476

[§ 476] Miscellaneous Crimes.

The following offenses have also been held to involve moral turpitude:

(1) *Narcotics Offenses*. (See *In re Kreamer* (1975) 14 C.3d 524, 121 C.R. 600, 535 P.2d 728 [possession of marijuana for distribution, motivated at least in part by prospect of financial gain]; *In re Possino* (1984) 37 C.3d 163, 168, footnote 3, 207 C.R. 543, 689 P.2d 115 [offering marijuana for sale may justify finding of moral turpitude, where petitioner acts as principal in transaction, is motivated by financial gain, and is aware of illegality of his actions]; *In re Scott* (1991) 52 C.3d 968, 978, 277 C.R. 201, 802 P.2d 985 [conviction of felony possession of cocaine while municipal court judge clearly involved moral turpitude]; 99 A.L.R.3d 288 [narcotics conviction]; cf. *In re Higbie* (1972) 6 C.3d 562, 571, 99 C.R. 865, 493 P.2d 97, *infra*, §477 [violation of federal statute imposing transfer tax on marijuana is not crime necessarily involving moral turpitude, because statute does not require intent to defraud].)

(2) *Gambling Offenses*. (See *In re Calaway* (1977) 20 C.3d 165, 141 C.R. 805, 570 P.2d 1223 [illegal gambling business involving cheating of customers and unauthorized use of conservatee's funds].)

(3) *Income Tax Offenses*. (See *In re Chira* (1986) 42 C.3d 904, 909, 231 C.R. 560, 727 P.2d 753 [conviction of conspiracy to impede lawful function of IRS, based on intentional backdating of automobile sales contract, shows deceit, hence involves moral turpitude]; 63 A.L.R.3d 476 [federal income tax conviction]; 81 A.L.R.3d 1140 [misconduct in preparation of tax returns for others]; cf. *In re Fahey* (1973) 8 C.3d 842, 106 C.R. 313, 505 P.2d 1369, *supra*, §472 [crime of failure to file income tax returns does not necessarily involve moral turpitude].) (On money laundering generally, see 2 *Cal. Crim. Law* (3d), *Crimes Against Governmental Authority*, §155.)

(4) *Sex Offenses*. (See *In re Safran* (1976) 18 C.3d 134, 135, 133 C.R. 9, 554 P.2d 329 [child molestation; indecent exposure]; 43 A.L.R.4th 1062 [attorney's sexual improprieties]; cf. *Cartwright v. Board of Chiropractic Examiners* (1976) 16 C.3d 762, 768, 129 C.R. 462, 548 P.2d 1134 [conviction of violation of P.C. 315, wilfully residing in house of ill fame, was not sufficient in itself to warrant revocation of professional license; discussing cases dealing with medicine and law].)

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c. Conduct of Defendant Is Determinative.

1 Witkin Cal. Proc. Attys § 477

[§ 477] Conduct of Defendant Is Determinative.

Even though a crime may not necessarily involve moral turpitude, the conduct of the person committing it may. (*In re Higbie* (1972) 6 C.3d 562, 572, 99 C.R. 865, 493 P.2d 97, citing the text.) In *Higbie*, petitioner, an attorney of good reputation, had constantly assisted B, a freelance pilot, with loans, jobs, referrals for jobs, and legal representation. B, in financial difficulties, asked petitioner for another loan, which petitioner could not afford. Instead, petitioner brought B together with some young friends who conceived a plan to smuggle marijuana from Mexico. The plan was implemented, but B, who had previously profited by informing on another, informed the Customs Service, and petitioner was arrested. The federal charge was conspiracy to smuggle marijuana, but on a plea bargain he pleaded guilty to violation of the transfer tax section, and was given 3 years' probation with 90 days' service in jail. The local committee and board concluded that the crime of failure to pay the tax did not involve moral turpitude, but that the conduct of petitioner did. *Held*, recommendation of suspension approved. The record showed that petitioner's objective was to aid a friend, and that he did not share in the conspiracy's fraudulent purpose. But he purposefully disregarded legal standards of conduct, invited his friend to engage in an unlawful conspiracy, failed to sever himself from the conspiracy, and used his legal knowledge to assist in a violation of the law. (6 C.3d 573.) (See *In the Matter of Frascinella* (1991) 1 Cal. State Bar Ct. Rptr. 543, 550 [brandishing replica firearm involved moral turpitude; attorney was not acting out of uncontrollable anger or disabling disorder when he threatened landlord with gun].)

In re McAllister (1939) 14 C.2d 602, 95 P.2d 932, was decided on a record that clearly showed the nature of the offense: conspiracy to violate the Cemetery Act by fraudulent representations in connection with the sale of burial plots. The judge in the criminal trial, with the express purpose of avoiding forfeiture of petitioner's license to practice, elected to impose a fine only (treating the case as a misdemeanor), and declared that the offense did not involve moral turpitude. Nevertheless the Supreme Court ordered petitioner disbarred, holding that (a) the conspiracy to commit a dishonest act involved moral turpitude; (b) a misdemeanor as well as a felony may involve moral turpitude so as to require disbarment; (c) the question is one of law; and (d) the authority to decide it is in the Supreme Court on certification of the record of conviction, and not in the judge who tries the criminal case.

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d. Unrelated Criminal Conduct.

1 Witkin Cal. Proc. Attys § 478

[§ 478] Unrelated Criminal Conduct.

In re Rohan (1978) 21 C.3d 195, 145 C.R. 855, 578 P.2d 102, decided by a badly divided court, examines the question of discipline when the crime does not involve moral turpitude or an attorney's performance of professional services. Petitioner was convicted of wilful failure to file a federal income tax return. A local administrative committee and the Disciplinary Board concluded that no moral turpitude was involved, but the board recommended discipline. The court ordered suspension for 2 years, with probation on condition of actual suspension for 60 days. The *first opinion* (two justices) reasons as follows:

(a) *Violation of attorney's oath.* B. & P.C. 6103 states that a violation of the oath is a cause for disbarment or suspension. (See *infra*, §495.) But B. & P.C. 6101 (*supra*, §466) and B & P.C. 6106 (*infra*, §480), dealing with criminal acts, refer solely to those involving moral turpitude. "If we are to embrace the proposition that criminal conduct not involving moral turpitude nevertheless warrants disciplinary action because it constitutes a breach of an attorney's oath, we would necessarily impose higher disciplinary standards than those imposed by statute." (21 C.3d 201.) Prior cases in which discipline was imposed for violation of the oath involved misconduct related to the attorney's professional responsibilities. (21 C.3d 202.) But after *In re Fahey* (1973) 8 C.3d 842, 106 C.R. 313, 505 P.2d 1369, *supra*, §472, references to the State Bar have called for a report on whether the facts and circumstances involved moral turpitude "or other misconduct warranting discipline." (21 C.3d 201, 203.)

(b) *Demeaning the integrity of the profession.* An attorney's refusal to obey the law, and the bar's failure to discipline him for that refusal, "will not only demean the integrity of the profession but will encourage disrespect for and further violations of the law. This is particularly true in the case of revenue law violations by an attorney." (21 C.3d 203.) Hence, in accord with the heavy weight of authority and the recommendations of the A.B.A., "even in the absence of a finding of moral turpitude or a breach of an attorney's responsibilities in the performance of professional services, the willful failure to timely file income tax returns may warrant, in particular circumstances, disciplinary action." (21 C.3d 204.) However, some criminal acts (even wilful failure to file tax returns) may not warrant discipline for an oath violation; but discipline is warranted "when the violation demeans the integrity of the legal profession and constitutes a breach of the attorney's responsibility to society." (21 C.3d 204.) Here, there were no mitigating circumstances. "His reasons for failing to file over a prolonged period of years raise problems differing little in kind or degree from those

confronting many a harried taxpayer." (21 C.3d 204.)

The *second opinion* (two justices) supports the order but condemns the theory of the decision as imposing "far too vague and amorphous a standard," and argues that the requirement of a "specific nexus" between the attorney's conduct and the practice of law should not be evaded by assertions that the conduct demeans the integrity of the profession or encourages others to violate the law. (21 C.3d 205.) This opinion suggests that the approach to "moral turpitude" in *Morrison v. State Bd. of Education* (1969) 1 C.3d 214, 82 C.R. 175, 461 P.2d 375, 3 Summary (10th), *Agency and Employment*, §301, should be followed in construing B. & P.C. 6101 and 6106; i.e., the phrase should be construed to mean "conduct by an attorney which indicates unfitness to practice." (21 C.3d 206.)

The *third opinion* (two justices), also concurring in the order, disagrees with the reassessment of *Fahey* and with the "formulation of general bases for discipline in this area, couched in vague language and fashioned from nebulous 'suggestions' in the statutory and case law." (21 C.3d 207.)

In re Morales (1983) 35 C.3d 1, 196 C.R. 353, 671 P.2d 857, which involved another divided court, reviewed the *Rohan* opinions and approved the review department's finding that petitioner should be disciplined not for acts of moral turpitude but for "other misconduct warranting discipline." The court added that "under all three opinions in *Rohan*, the wilful failure to file income tax returns was held sufficient to justify imposition of two years' suspension, stayed, with sixty days' actual suspension, whether that conclusion was based on a finding of moral turpitude or otherwise." (35 C.3d 5.)

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B. Conviction of Felony.

1 Witkin Cal. Proc. Attys § 479

[§ 479] Conviction of Felony.

(1) *In General.* *B. & P.C. 6102* requires the immediate suspension of an attorney convicted of a felony. (*B. & P.C. 6102(a)*.) If the conviction meets specified criteria, the attorney must be summarily disbarred when the judgment is final. (*B. & P.C. 6102(c)*.) (See *13 Hastings Const. L. Q.* 415, 433 [arguments for and against automatic disbarment on felony conviction].)

(2) *Definition of Felony.* The statute applies if the crime is a felony under California or federal law, or the law of another state or U.S. territory. (See *B. & P.C. 6102(a)*, (c).) A crime is a felony under California law if it is specifically declared a felony or is a felony by virtue of *P.C. 17(a)*, unless charged as a misdemeanor pursuant to *P.C. 17(b)(4)* or *17(b)(5)*. The crime is a felony regardless of whether in a particular case it may be considered a misdemeanor as a result of postconviction proceedings, including proceedings under *P.C. 17(b)(1)* or *17(b)(3)* resulting in probation or punishment other than imprisonment in state prison. (*B. & P.C. 6102(b)*; see *1 Cal. Crim. Law (3d)*, *Introduction to Crimes*, §72 et seq.)

When the conviction is in another state or U.S. territory, the crime is a felony if the elements of the offense would constitute a felony under California law and if judgment or conviction was entered as a felony, regardless of whether sentence was suspended or probation granted or whether it may be considered a misdemeanor as a result of postconviction proceedings. (*B. & P.C. 6102(d)*.)

(3) *Temporary Suspension on Conviction.* On receiving a certified copy of a record of conviction that appears to involve a felony under California or federal law, or under the laws of another state or U.S. territory, the Supreme Court must suspend the attorney in the same manner as it does in the case of an attorney convicted of a crime that may involve moral turpitude. (*B. & P.C. 6102(a)*; see *supra*, §468.)

(4) *Summary Disbarment.* After judgment of conviction has become final or probation with a suspended sentence is granted, and regardless of a subsequent withdrawal of the plea and dismissal of the charges under *P.C. 1203.4*, the Supreme Court must summarily disbar the attorney if the conviction is a felony under California or federal law, or the law of another state or U.S. territory, and "an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude." (*B. & P.C. 6102(c)*.)

In re Lesansky (2001) 25 C.4th 11, 104 C.R.2d 409, 17 P.3d 764, held that no nexus is required between a crime and the practice of law for summary disbarment purposes. Petitioner pleaded nolo contendere to an attempted lewd act on a child, and the record of conviction was sent to the State Bar Court. The Review Department determined that crimes involving lewd acts on children necessarily involve moral turpitude, and that petitioner was therefore subject to summary disbarment. Petitioner contended that the summary disbarment statute applies only if the underlying offense demonstrates unfitness to practice law, that the offense was a private act unrelated to the practice of law, and that he was thus not subject to summary disbarment. *Held*, summary disbarment ordered.

(a) Professional competence is only one element in determining whether a person is fit to practice law. To be admitted to practice, an individual must also have good moral character, which includes honesty, fairness, candor, trustworthiness, respect for and obedience to laws, and respect for the rights of others and the judicial process. Persons of good character do not commit acts or crimes involving moral turpitude, a concept "that embraces a wide range of deceitful and depraved behavior." (25 C.4th 15.)

(b) Although moral turpitude must be defined in attorney discipline proceedings in a way that is relevant to an attorney's fitness to practice, unfitness to practice may be shown by criminal conduct not committed in the practice of law or against a client. And although moral turpitude cannot be defined with precision, criminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows a deficiency in a character trait necessary for the practice of law (e.g., trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves a serious breach of a duty owed to another or to society, or a flagrant disrespect for the law or for societal norms so that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession. (25 C.4th 16.)

(c) An offense necessarily involves moral turpitude if the conviction would in every case evidence bad moral character, and includes crimes that are extremely repugnant to accepted moral standards, such as serious sexual offenses. Here, petitioner attempted a serious sexual offense that carried a punishment of up to 3 years in state prison. It is irrelevant that the conviction was for an attempt rather than a completed offense. The conduct was extremely repugnant to accepted moral standards, necessarily involves moral turpitude for purposes of attorney discipline, and shows that petitioner is unsuitable to be entrusted with the privileges and duties of the legal profession. (25 C.4th 18.)

The following cases are also instructive:

In re Utz (1989) 48 C.3d 468, 481, 256 C.R. 561, 769 P.2d 417 [federal mail fraud conviction].

In the Matter of Paquirigan (1998) 3 Cal. State Bar Ct. Rptr. 936, 940 [forgery conviction].

In the Matter of Weber (1998) 3 Cal. State Bar Ct. Rptr. 942, 945 [federal mail fraud conviction].

In re Paquirigan (2001) 25 C.4th 1, 4, 104 C.R.2d 402, 17 P.3d 758 [forgery conviction; B. & P.C. 6102(c) neither infringes on court's inherent authority over attorney discipline nor lacks fundamental fairness; it informs attorney that one result of conviction of qualifying crime will be disbarment].

In the Matter of Oheb (2006) 4 Cal. State Bar Ct. Rptr. 920, 925 [B. & P.C. 6102(c) requires conviction of crime that inherently involves moral turpitude; thus, two felony convictions under P.C. 549 (accepting referrals with reckless disregard of false or fraudulent insurance claims) did not support summary disbarment because crime does not inherently involve moral turpitude; however, totality of circumstances surrounding conviction warranted disbarment].

(5) *Other Felonies*. If the offense does not call for summary disbarment, it may still be subject to discipline as a crime involving moral turpitude. (See B. & P.C. 6102(e); supra, §466 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER I - Attorneys

Witkin Summary of California Law X. ACTS SUBJECT TO DISCIPLINE

A. Acts Involving Moral Turpitude.

1. In General.

a. Statutory Framework.

1 Witkin Cal. Proc. Attys § 480

[§ 480] Statutory Framework.

(1) *Moral Turpitude, Dishonesty, or Corruption.* The commission of an act by an attorney involving moral turpitude, dishonesty, or corruption, whether committed in the course of the attorney's practice or otherwise, and whether the act is a felony or misdemeanor or not criminal, constitutes a cause for disbarment or suspension. If the act constitutes a felony or misdemeanor, conviction (*supra*, §466 *et seq.*) "is not a condition precedent to disbarment or suspension from practice." (*B. & P.C. 6106.*) (See *Noland v. State Bar* (1965) 63 C.2d 298, 46 C.R. 305, 405 P.2d 129 [assistant district attorney compiled list of jurors who had voted not guilty and suggested they be deleted from justice court list; this was attempt to thwart constitutional and statutory guarantee of impartial jury and constituted act of moral turpitude under *B. & P.C. 6106*]; *In the Matter of Maloney & Virsik* (2005) 4 Cal. State Bar Ct. Rptr. 774, 786 [knowingly submitting numerous pleadings that were "permeated with half-truths, omissions, and outright misstatements of fact and law" constituted acts of moral turpitude in violation of *B. & P.C. 6106*].)

(2) *Violation of Oath or Duties.* *B. & P.C. 6106* is partially duplicated by *B. & P.C. 6103* (*infra*, §495), which provides, as a ground for disbarment or suspension, a violation of the oath taken by the attorney, or of the attorney's duties. This brings the following statutes into operation:

(a) *B. & P.C. 6067*, prescribing the oath "faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability."

(b) *B. & P.C. 6068*, prescribing the duties, including the employment of means "only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (*B. & P.C. 6068(d)*; see *In the Matter of Chesnut* (2000) 4 Cal. State Bar Ct. Rptr. 166, 173 [attorney's false representation to two judges that he had personally served opposing party with summons and complaint violated *B. & P.C. 6068(d)* and constituted moral turpitude under *B. & P.C. 6106*]; *In re S.C. (2006) 138 C.A.4th 396, 419, 41 C.R.3d 453* [improper and excessively long and ranting opening brief contained (1) unjust attacks on opposing party and trial judge, and (2) misrepresentation of record that was in part attempt to mislead court; copy of opinion sent to State Bar].) *Rules of Professional Conduct, Rule 5-200* is similar. (See *supra*, §461 and *infra*, §497.)

A deliberate violation by an attorney of the oath or of the duties set forth in *B. & P.C. 6068* usually involves moral turpitude. And, in practice, the same serious acts of misconduct are often charged as and found to be violations of *B. & P.C. 6106* and *6103*. (See, e.g., *Marsh v. State Bar* (1930) 210 C. 303, 307, 291 P. 583 [misrepresentation to clients and breach of fiduciary duties]; *Bryant v. State Bar* (1942) 21 C.2d 285, 296, 131 P.2d 523 [knowingly preparing documents for usurious transactions]; *Pickering v. State Bar* (1944) 24 C.2d 141, 144, 148 P.2d 1 [filing complaint knowing that facts were false]; *Phillips v. State Bar* (1975) 14 C.3d 492, 500, 121 C.R. 605, 535 P.2d 733 [attempt to deceive State Bar by falsifying letter allegedly sent to client]; *Weir v. State Bar* (1979) 23 C.3d 564, 570, 576, 152 C.R. 921, 591 P.2d 19 [knowing presentation of false information to Immigration Service on behalf of clients].)

(3) *Other Prohibitions*. Other statutes prohibiting various acts, although not expressly mentioning "moral turpitude," provide for a range of discipline including suspension and disbarment. The following are illustrative:

(a) *Agreement to hide misconduct*. It is cause for suspension, disbarment, or other discipline for an attorney, whether acting as a party or an attorney, to agree or seek an agreement that (1) professional misconduct, or the terms of a settlement of a claim for professional misconduct, will not be reported to the disciplinary agency; (2) the plaintiff will withdraw or will not cooperate in the investigation or prosecution of a disciplinary complaint; or (3) the record of a civil action for professional misconduct will be sealed from review by the disciplinary agency. (*B. & P.C. 6090.5(a)*.) The statute applies to all settlements, whether made before or after commencement of a civil action. (*B. & P.C. 6090.5(b)*.)

(b) *Unauthorized appearance*. "Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." (*B. & P.C. 6104*.) "Appearance" as used in *B. & P.C. 6104* has the same meaning as in *C.C.P. 1014* (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §208). An appearance also occurs when the defendant's attorney participates in a trial or in a hearing on a motion to show cause. (*In the Matter of Lais* (1998) 3 Cal. State Bar Ct. Rptr. 907, 915 [review of motion to compel, telephone conversations with client and opposing counsel, research, preparation of response to motion to compel, preparation of letter to client about status conference, and preparation of substitution of attorney form and its filing did not constitute appearance]; *In the Matter of Regan* (2005) 4 Cal. State Bar Ct. Rptr. 844, 853 [filing notice of appeal and opening brief contrary to clients' express wishes].)

(c) *Lending name to nonattorney*. It is a cause for disbarment or suspension for an attorney to lend his or her name to be used as attorney by a person not an attorney. (*B. & P.C. 6105*.)

(d) *Insurance claims*. An attorney may be disbarred or suspended for engaging in conduct prohibited under *Ins.C. 1871.4* (knowingly false or fraudulent material statements relating to workers' compensation claims), or *P.C. 550* (false or fraudulent claims or statements). (*B. & P.C. 6106.5*.)

(e) *Violation of Athlete Agents Act*. An attorney may be disciplined for violating any provision of the Athlete Agents Act (*B. & P.C. 18895 et seq.*) or the law of another state regulating athlete agents. (*B. & P.C. 6106.7*.)

West's Key Number Digest, Attorney and Client 38 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Other Prohibitions*. (f) *(New) Violation of Mortgage Law*. *B. & P.C. 6106.3* was added in 2009 to make it a cause for discipline if an attorney violates *C.C. 2944.6*, added in 2009 (disclosures by persons performing mortgage loan modification services), or *C.C. 2944.7*, added in 2009 (prohibiting advance fees, wage assignments, or powers of attorney regarding mortgage loan modification services). (*B. & P.C. 6106.3(a)*.) *B. & P.C. 6106.3* is repealed as of January 1, 2013, unless a later enacted statute deletes or extends that date. (*B. & P.C. 6106.3(b)*.)

B. & P.C. 6106.3 was added in 2009, effective January 1, 2013, to make it a cause for discipline if an attorney violates *C.C.P. 2944.6*.



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 - 1. In General.
 - b. Meaning of Moral Turpitude.

1 Witkin Cal. Proc. Attys § 481

[§ 481] Meaning of Moral Turpitude.

The definitions of "act involving moral turpitude" are frequent and repetitious. The simplest is that an act "contrary to honesty and good morals is conduct involving moral turpitude." (*Stanford v. State Bar* (1940) 15 C.2d 721, 728, 104 P.2d 635; see *Jacobs v. State Bar* (1933) 219 C. 59, 64, 25 P.2d 401 ["everything done contrary to justice, honesty or good morals"]; *Fall v. State Bar* (1944) 25 C.2d 149, 160, 153 P.2d 1; *Marlowe v. State Bar* (1965) 63 C.2d 304, 308, 46 C.R. 326, 405 P.2d 150, *infra*, §485; 24 Cal. L. Rev. 14; on crimes involving moral turpitude, see *supra*, §472 et seq.)

This definition, of course, merely uses common words in place of other common words, but the net result is to give the State Bar and the Supreme Court broad discretion in applying the statutes. Nor would more precision in the definition be of any practical value, for the conclusion that an attorney has been guilty of an act involving moral turpitude does not necessarily result in disbarment. Punishment for such an act is sometimes only suspension, for a few months or a year, which is the same kind of punishment imposed for violations of law or rules of conduct that do not involve moral turpitude. (See *infra*, §483 et seq.) The following cases are illustrative:

In the Matter of Kroff (1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [making prohibited telephone solicitations to victims of automobile accidents, misrepresenting that "friend" had referred him, charging unconscionable fees, and mishandling funds constituted multiple acts of moral turpitude].

In the Matter of Dixon (1999) 4 Cal. State Bar Ct. Rptr. 23, 28 [having client sign blank pleading forms and then completing and filing those forms as having been executed under penalty of perjury without first confirming accuracy of information with client constituted act of moral turpitude].

In the Matter of Torres (2000) 4 Cal. State Bar Ct. Rptr. 138, 146 [harassment and intentional infliction of emotional distress on former client constituted two acts of moral turpitude].

In the Matter of Petilla (2001) 4 Cal. State Bar Ct. Rptr. 231, 237 [obtaining cash advances on two credit cards in 2 months totaling over \$ 19,000 for purposes of gambling with no intention to repay constituted moral turpitude].

In the Matter of Dale (2005) 4 Cal. State Bar Ct. Rptr. 798, 807 [in negligence action against building owner following arson, conduct of plaintiff's attorney constituted overreaching and gross negligence amounting to moral turpitude; attorney had persistent contact with arsonist and obtained incriminating statement from him while he was incarcerated, represented, and awaiting appeal].

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SUPPLEMENT: [This section is current through the latest supplement]

Illustrations:

In the Matter of Loftus (2007) 5 Cal. State Bar Ct. Rptr. 80, 86 [attorney committed moral turpitude by instigating conversation with adverse party under false pretenses, secretly recording conversation, and then lying and concealing recording during litigation].

In the Matter of Casey (2008) 5 Cal. State Bar Ct. Rptr. 117, 124 [attorney committed moral turpitude by breaching his fiduciary duty in failing to fully communicate to his client terms of sale of client's condominium that was purchased by another client and attorney's son, failing to properly document transaction, and by overreaching and creating conflict of interest].



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A. Acts Involving Moral Turpitude.

1. In General.

c. Criminal Acquittal Does Not Bar Discipline.

1 Witkin Cal. Proc. Attys § 482

[§ 482] Criminal Acquittal Does Not Bar Discipline.

The acquittal of an attorney in a criminal trial does not bar subsequent disciplinary action against that attorney even if the issues in both proceedings are identical. This is so because the parties, the quantum of proof required, and the purposes of the two proceedings are different. The purpose of the criminal trial is to punish the accused if found guilty; the purpose of the disciplinary proceeding is to protect the public, the courts, and the legal profession. (*Best v. State Bar* (1962) 57 C.2d 633, 638, 21 C.R. 589, 371 P.2d 325; *Zitny v. State Bar* (1966) 64 C.2d 787, 790, 51 C.R. 825, 415 P.2d 521; *Wong v. State Bar* (1975) 15 C.3d 528, 531, 532, 125 C.R. 482, 542 P.2d 642 [serious consideration will ordinarily be given to fact of acquittal, but where it is solely on technical ground like entrapment it has no significance]; see 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §96; 76 *A.L.R.3d* 1028 [effect of acquittal or dismissal in criminal prosecution as barring disciplinary action against attorney]; 7 *Cal. Proc.* (5th), *Judgment*, §387.) (On nature and purpose of disciplinary proceedings, see *infra*, §558 et seq.)

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2. Wrongs Against Client.
a. Misappropriating Funds or Property.

1 Witkin Cal. Proc. Attys § 483

[§ 483] Misappropriating Funds or Property.

A frequent ground for disciplinary proceedings is misappropriating or withholding a client's money or property. In the absence of strong mitigating circumstances (see *infra*, §543 et seq.), disbarment is likely. (See 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §63.) Where the offense is merely failure to account, however, suspension is the appropriate punishment. (On distinction between the greater and the lesser offense, see *infra*, §510; on disciplinary rule for preserving identity of funds and property of client, see *Rules of Professional Conduct, Rule 4-100*, *supra*, §453.) The following cases are illustrative:

Aydelotte v. State Bar (1930) 209 C. 737, 290 P. 41 [embezzlement and fraudulent representations to client].

Roark v. State Bar (1936) 5 C.2d 665, 55 P.2d 839 [forgery and conversion of assets of estate].

Maggart v. State Bar (1936) 7 C.2d 495, 61 P.2d 451 [misappropriation and issuance of bad checks in repayment].

Glover v. State Bar (1939) 13 C.2d 229, 88 P.2d 922 [misappropriation].

Stanford v. State Bar (1940) 15 C.2d 721, 104 P.2d 635 [misappropriation].

Moura v. State Bar (1941) 18 C.2d 31, 112 P.2d 629 [increasing amount of client's check and appropriating proceeds].

Pearlin v. State Bar (1941) 18 C.2d 682, 117 P.2d 341 [misappropriation].

Davis v. State Bar (1942) 20 C.2d 332, 125 P.2d 467 [embezzlement].

Gaffney v. State Bar (1942) 20 C.2d 735, 128 P.2d 516 [conversion].

Sturr v. State Bar (1959) 52 C.2d 125, 338 P.2d 897 [misappropriation].

- Resner v. State Bar* (1960) 53 C.2d 605, 2 C.R. 461, 349 P.2d 67 [misappropriation].
- Johnstone v. State Bar* (1966) 64 C.2d 153, 154, 49 C.R. 97, 410 P.2d 617 [commingling and conversion of funds].
- Most v. State Bar* (1967) 67 C.2d 589, 63 C.R. 265, 432 P.2d 953 [misappropriation].
- Cutler v. State Bar* (1969) 71 C.2d 241, 253, 78 C.R. 172, 455 P.2d 108 [misappropriation].
- Mack v. State Bar* (1970) 2 C.3d 440, 85 C.R. 625, 467 P.2d 225 [misappropriation].
- Walter v. State Bar* (1970) 2 C.3d 880, 891, 87 C.R. 833, 471 P.2d 481 [misappropriation].
- Tardiff v. State Bar* (1971) 3 C.3d 903, 92 C.R. 301, 479 P.2d 661 [forgeries and misappropriation].
- Himmel v. State Bar* (1971) 4 C.3d 786, 94 C.R. 825, 484 P.2d 993 [forgery and misappropriation].
- Ridley v. State Bar* (1972) 6 C.3d 551, 99 C.R. 873, 493 P.2d 105 [took fees and failed to perform services, withheld payment of client's funds].
- Sevin v. State Bar* (1973) 8 C.3d 641, 646, 105 C.R. 513, 504 P.2d 449 [requested check payable to attorney only; failed to inform client of settlement; misappropriation].
- Mrakich v. State Bar* (1973) 8 C.3d 896, 899, 106 C.R. 497, 506 P.2d 633 [failure to notify client of receipt of funds; failure to deposit funds in trust account; misappropriation].
- Persion v. State Bar* (1973) 9 C.3d 456, 461, 107 C.R. 708, 509 P.2d 524 [misappropriation by deceit and forgery].
- In re Wright* (1973) 10 C.3d 374, 380, 110 C.R. 348, 515 P.2d 292 [misappropriation of client's funds retained after misrepresentation that funds would be invested for client].
- Bradpiece v. State Bar* (1974) 10 C.3d 742, 745, 111 C.R. 905, 518 P.2d 337 [misappropriation of minor's settlement].
- Brody v. State Bar* (1974) 11 C.3d 347, 348, 350, 113 C.R. 371, 521 P.2d 107 [persistent refusal to account for funds established wilful commingling and misappropriation].
- Yokozeki v. State Bar* (1974) 11 C.3d 436, 444, 445, 113 C.R. 602, 521 P.2d 858 [misappropriation of property transferred by client being sued for malpractice to corporation controlled by petitioner].
- Magee v. State Bar* (1975) 13 C.3d 700, 119 C.R. 485, 532 P.2d 133 [attorney retained sums intended as fees of two other attorneys, whom he paid out of funds intended for client alone].
- Lavin v. State Bar* (1975) 14 C.3d 581, 121 C.R. 729, 535 P.2d 1185 [misappropriations in four separate matters].
- Fitzpatrick v. State Bar* (1977) 20 C.3d 73, 141 C.R. 169, 569 P.2d 763 [misappropriation of trust account funds].
- In re Calaway* (1977) 20 C.3d 165, 141 C.R. 805, 570 P.2d 1223 [misappropriation of conservatorship funds to finance illegal enterprise].
- Allen v. State Bar* (1977) 20 C.3d 172, 141 C.R. 808, 570 P.2d 1226 [misappropriation].
- Athearn v. State Bar* (1977) 20 C.3d 232, 142 C.R. 171, 571 P.2d 628 [misappropriation].
- Worth v. State Bar* (1978) 22 C.3d 707, 711, 150 C.R. 273, 586 P.2d 588 [misappropriation with no mitigating

circumstances].

Weir v. State Bar (1979) 23 C.3d 564, 576, 152 C.R. 921, 591 P.2d 19 [settlement without client's consent and conversion of funds].

Ambrose v. State Bar (1982) 31 C.3d 184, 181 C.R. 903, 643 P.2d 486 [misappropriation of trust funds and other serious misconduct].

In re Vaughn (1985) 38 C.3d 614, 213 C.R. 583, 698 P.2d 651 [misappropriation of over \$ 100,000].

Baca v. State Bar (1990) 52 C.3d 294, 304, 276 C.R. 169, 801 P.2d 412 [failure to use entrusted funds for intended purpose constitutes misappropriation].

Read v. State Bar (1991) 53 C.3d 394, 425, 279 C.R. 818, 807 P.2d 1047 [unless there is strong mitigating evidence, harshest discipline is ordinarily imposed in case of misappropriation of money].

McKnight v. State Bar (1991) 53 C.3d 1025, 1036, 1039, 281 C.R. 766, 810 P.2d 998 [misappropriation of over \$ 17,000, due partly to psychiatric problems; disbarment not required, but 1 year's actual suspension was appropriate].

In the Matter of Kueker (1991) 1 Cal. State Bar Ct. Rptr. 583, 596 [misappropriation of over \$ 66,000 in client trust funds; attorney disbarred].

In the Matter of Shinn (1992) 2 Cal. State Bar Ct. Rptr. 96, 107 [misappropriation of at least \$ 90,000; attorney disbarred].

In the Matter of Blum (1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [misappropriation of \$ 55,000; disbarment].

In the Matter of Spaith (1996) 3 Cal. State Bar Ct. Rptr. 511 [one misappropriation of approximately \$ 40,000; no mitigating circumstances; disbarment].

In the Matter of Davis (2003) 4 Cal. State Bar Ct. Rptr. 576, 587 [knowing and intentional misappropriating of approximately \$ 30,000; suspension and restitution].

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 - 1. Misrepresentations Concerning Case.

1 Witkin Cal. Proc. Attys § 484

[§ 484] Misrepresentations Concerning Case.

Deliberately false representations to a client about the condition of the case or the performance of the attorney's duties are acts involving moral turpitude, although, standing alone, they seldom result in a more severe punishment than suspension. In *Foot v. State Bar* (1951) 37 C.2d 127, 230 P.2d 617, petitioner advised his clients that a will contest had been continued for hearing when, without authority, petitioner had actually dismissed it. The clients did not learn the truth until the time to contest had expired. The court pointed to petitioner's repeated misrepresentations, observed that by his "duplicity" he "destroyed the claims of his clients, which he was engaged to protect and enforce," and found no mitigating circumstances. Nevertheless, the board's lenient recommendation of suspension for 9 months was approved. (37 C.2d 129.) (See *Wood v. State Bar* (1938) 11 C.2d 139, 78 P.2d 429 [3 months' suspension]; cf. *Stephens v. State Bar* (1942) 19 C.2d 580, 583, 122 P.2d 549 [disbarment].)

Similar conduct was condemned in many later cases. (See *Alkow v. State Bar* (1971) 3 C.3d 924, 935, 92 C.R. 278, 479 P.2d 638 ["[P]etitioner demanded legal fees in advance, in return for agreeing to perform certain services; petitioner failed to perform those services, but continually represented to his clients that he was diligently working on their respective cases; and petitioner habitually retained the legal fees paid him without doing work to earn such fees"]; *Tardiff v. State Bar* (1971) 3 C.3d 903, 92 C.R. 301, 479 P.2d 661; *Himmel v. State Bar* (1971) 4 C.3d 786, 94 C.R. 825, 484 P.2d 993; *Ridley v. State Bar* (1972) 6 C.3d 551, 99 C.R. 873, 493 P.2d 105; *Fitzpatrick v. State Bar* (1977) 20 C.3d 73, 141 C.R. 169, 569 P.2d 763.)

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2. Concealing Personal Interest.

1 Witkin Cal. Proc. Attys § 485

[§ 485] Concealing Personal Interest.

In *Marlowe v. State Bar* (1965) 63 C.2d 304, 46 C.R. 326, 405 P.2d 150, petitioner, who had been retained to recover \$ 2,000 in past due alimony payments, levied execution on real property of the client's ex-husband worth about \$ 3,500. No one appeared to bid except petitioner's wife, who bought the property for \$ 50. Petitioner then treated it as property of himself and his wife until a civil action was filed to establish a constructive trust, which was settled. *Held*, he was guilty of conduct involving moral turpitude. He should at least have advised his client to seek independent legal counsel, and he should have held the property as a constructive trustee for her. (63 C.2d 309.) (See *Sodikoff v. State Bar* (1975) 14 C.3d 422, 121 C.R. 467, 535 P.2d 331 [while representing decedent's estate, petitioner undertook to obtain "offers from some of our clients" to purchase real estate left to foreign resident, and then submitted bid of petitioner's personally owned corporation for \$ 20,000 on property appraised at \$ 46,500].) (On disciplinary rule concerning purchasing property at foreclosure or sale subject to judicial review, see *Rules of Professional Conduct, Rule 4-300*, *supra*, §456.)

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 - 3. Borrowing Money From Client.

1 Witkin Cal. Proc. Attys § 486

[§ 486] Borrowing Money From Client.

In *Laney v. State Bar* (1936) 7 C.2d 419, 422, 60 P.2d 845, petitioner, the attorney for an elderly guardian of an incompetent, borrowed money from the estate without the approval of the probate court, knowingly gave inadequate security, and ultimately failed to repay the debt. *Held*, suspension would not be efficacious to protect against this conduct, and the recommendation of disbarment was approved.

In *Aydelotte v. State Bar* (1930) 209 C. 737, 740, 290 P. 41, petitioner took money from his client for investment, and represented that he had invested it, when in fact he had lost the money in business schemes of his own. *Held*, disbarment was ordered.

On the other hand, in *Wallis v. State Bar* (1942) 21 C.2d 322, 131 P.2d 531, petitioner borrowed money from his client on insufficient security, to finance his business deals. The board found that petitioner's representations of value were not warranted by his information, and the court assumed that the evidence would have supported a judgment in a civil action based on fraud. But the court nevertheless held that intent to mislead was not proved, and dismissed the charges, saying: "The situation then is one where a lawyer apparently attempted to augment his professional income by engaging in business transactions which were highly speculative, and beyond his ability to fairly appraise or successfully carry out. He interested the complaining witness in these ventures by promising her more profit than a prudent investor would expect. The inevitable result is unfortunate for both of them but ... his conduct does not justify disciplinary action." (21 C.2d 329.)

A number of other decisions are illustrative. (See *Krieger v. State Bar* (1954) 43 C.2d 604, 610, 275 P.2d 459 [2 years' suspension for soliciting \$ 10,000 investment from client in company in which attorney was interested without disclosing facts of its financial insecurity]; *Clancy v. State Bar* (1969) 71 C.2d 140, 77 C.R. 657, 454 P.2d 329 [money obtained on understanding that it was to be invested for client was actually sought and used to pay attorney's own debts; 3 years' suspension]; *In re Wright* (1973) 10 C.3d 374, 380, 110 C.R. 348, 515 P.2d 292 [misappropriation of funds retained under false promise to invest them for client; disbarment]; *Benson v. State Bar* (1975) 13 C.3d 581, 119 C.R. 297, 531 P.2d 1081 [concealing his financial distress, petitioner borrowed \$ 31,000 from client and made only token

repayments; disbarment]; *In the Matter of Boyne* (1993) 2 Cal. State Bar Ct. Rptr. 389, 400 [improper large loan from client, among other offenses; 2 years' actual suspension]; 9 *A.L.R.5th* 193 [disciplinary action against attorney taking loan from client].)

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1 Witkin Cal. Proc. Attys § 487

[§ 487] Miscellaneous Frauds.

In *McKinney v. State Bar* (1964) 62 C.2d 194, 196, 41 C.R. 665, 397 P.2d 425, an attorney simulated his client's signature on a settlement draft, and fabricated a purported "loan agreement" giving him the right to use the settlement proceeds. *Held*, disbarment was proper in light of previous acts of misconduct. (See *Lantz v. State Bar* (1931) 212 C. 213, 298 P. 497 [dishonest dealings with client for attorney's advantage, but in view of mitigating circumstances only 1 year's suspension]; *Monroe v. State Bar* (1961) 55 C.2d 145, 10 C.R. 257, 358 P.2d 529 [failure to make good on dishonored checks given to client as share of judgment proceeds, together with other misconduct; 9 months' suspension]; *Lee v. State Bar* (1970) 2 C.3d 927, 941, 88 C.R. 361, 472 P.2d 449 ["Knowingly making false statements, knowing that they were false when made, representation of adverse interests without a timely and complete disclosure and consent based upon full knowledge and understanding, participating in a fraudulent and dishonest scheme to cut off and make valueless the liens of junior encumbrances, filing a claim in a judicial proceeding based on a sham note and deed of trust, and making false allegations in sworn testimony therein"; 3 years' suspension, stayed, 1 year's actual suspension]; *Allen v. State Bar* (1977) 20 C.3d 172, 141 C.R. 808, 570 P.2d 1226 [attorney defrauded client and client's creditors by obtaining client's real property on false promise to reconvey; transfer of bank funds induced by fraudulent concealment of owner's death; disbarment].) (On restrictions regarding donative transfers to attorney who drafted or transcribed donative instrument, see *Prob.C. 21350*, *supra*, §96; on rule regulating gifts from clients, see *Rules of Professional Conduct, Rule 4-400*, *supra*, §457.)

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c. Obtaining Unearned or Excessive Fees.

1. Unearned Fees.

1 Witkin Cal. Proc. Attys § 488

[§ 488] Unearned Fees.

Taking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses, and undoubtedly involves moral turpitude. Where the court has the power to refuse enforcement of a contract calling for excessive fees (*supra*, §178), the disciplinary proceedings cover a much wider range of situations involving actual fraud, constructive fraud (violation of fiduciary duty), or other unconscionable conduct. The usual punishment is suspension. (For cases in which misconduct was found to be not deliberate fraud but rather gross negligence, see *infra*, §§492, 493.)

In the usual case the attorney collects or retains a fee without performing substantial services. The following cases are illustrative:

Bailey v. State Bar (1930) 209 C. 476, 478, 288 P. 433 [fee for appeal accepted after time for appeal had lapsed, also other misconduct; disbarment].

Bruns v. State Bar (1941) 18 C.2d 667, 669, 117 P.2d 327 [fee accepted but no action filed; other misconduct and past record justified disbarment].

Penaat v. State Bar (1944) 25 C.2d 26, 32, 152 P.2d 442 [petitioner falsely represented that claims of members of insolvent association had been approved due to his efforts; 6 months' suspension].

Sullivan v. State Bar (1958) 50 C.2d 491, 500, 326 P.2d 138 [3 years' suspension for habitually accepting employment and compensation from clients and wilfully failing to perform services; aggravating circumstances were misrepresentations to clients, noncooperation with local committees, and previous suspension for similar misconduct; excuse of ill health was insufficient].

Schullman v. State Bar (1973) 10 C.3d 526, 535, 111 C.R. 161, 516 P.2d 865 ["Petitioner accepts a fee, promises to perform legal services, and then fails to follow through for his clients. In each instance ... the record indicates he

retained his fee despite avoiding his clients and ultimately abandoning their interests. The record shows professional misconduct on petitioner's part and amply supports the findings of the disciplinary board"; 2 years' suspension].

Nizinski v. State Bar (1975) 14 C.3d 587, 121 C.R. 824, 536 P.2d 72 [acceptance of fees in three cases for services promised and never performed; 2 years' suspension and restitution].

Read v. State Bar (1991) 53 C.3d 394, 410, 279 C.R. 818, 807 P.2d 1047 [finding of failure to refund unearned fees was improper where funds were not fees but advances for payment of expenses].

In the Matter of Bach (1990) 1 Cal. State Bar Ct. Rptr. 631, 650 [client abandonment, failure to return unearned portion of advance fee; 2 years' suspension, stayed; 9 months' actual suspension, restitution, and probation].

In the Matter of Harris (1992) 2 Cal. State Bar Ct. Rptr. 219, 229 [failure to return unearned fees with aggravating factors; stayed and actual suspension].

In the Matter of Nees (1996) 3 Cal. State Bar Ct. Rptr. 459, 465 [attorney's reckless and "protracted failure to perform legal services for an incarcerated client" and failure to refund promptly unearned, advanced fees; suspension and restitution].

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2. Fees in Excess of Statutory Limits.

1 Witkin Cal. Proc. Attys § 489

[§ 489] Fees in Excess of Statutory Limits.

An attorney may properly perform substantial services but improperly take a fee beyond the amount authorized by statute. (See *B. & P.C. 6103.6* [grounds for discipline for violating *Prob.C. 15687*, restricting right of attorney serving as trustee to recover compensation for providing legal services to trust]; *In re Graves* (1929) 208 C. 57, 280 P. 115 [suspension for 6 months where attorney collected both executor's fee and attorney's fee in probate]; *Coviello v. State Bar* (1953) 41 C.2d 273, 276, 259 P.2d 7 [suspension for 30 days for charging fees in workers' compensation case in excess of those allowed by Commission]; C.E.B., 1 Civil Proc. Before Trial 4th, §3.37; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §277.)

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3. Exorbitant Fees.

1 Witkin Cal. Proc. Attys § 490

[§ 490] Exorbitant Fees.

In a number of cases the fee was held to be exorbitant under the circumstances, and therefore indicative of actual or constructive fraud or oppression. *Goldstone v. State Bar* (1931) 214 C. 490, 6 P.2d 513, is an excellent illustration. An injured employee filed an application with the Industrial Accident Commission, and an award was made but notice of it never reached him. Later he called on petitioner, who, for a 40% contingent fee, found the award in the Commission file and obtained payment of \$ 822.96 by calling at the insurance company's office. *Held*, the exaction of a fee of \$ 310 from a client of limited means, and for "a most trivial service," was "a flagrant overreaching" of the client. (214 C. 498.) The court was careful to note its approval of contingent fees in general and to deny any general power of supervision of fees by the State Bar, but declared that "if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called," it warrants disciplinary action (here 3 months' suspension). (214 C. 498.)

In *Recht v. State Bar* (1933) 218 C. 352, 23 P.2d 273, petitioner, while representing an investment trust, discovered that money was owed to two investors. Using this confidential information, petitioner represented to them that he had investigated their claims, "tied up the money," and was the only person who could get it for them. They signed heavy contingent fee agreements, petitioner obtained the money and retained his share. *Held*, the right to practice law "is not a license to mulct the unfortunate," but suspension rather than disbarment was ordered because of his youth. (218 C. 355.)

In *Dalzell v. State Bar* (1936) 6 C.2d 433, 57 P.2d 1300, petitioner's contingent fee contract on behalf of estate heirs provided for a fee of 25% of "the amount recovered." Petitioner obtained a judgment for \$ 18,827.25, which was never paid in full. Nevertheless he deducted 25% of that total sum from the first money received and retained other payments to meet additional unwarranted charges. *Held*, petitioner's unreasonable interpretation of the agreement and his failure to account for money improperly taken was conduct involving moral turpitude and justified his disbarment.

Several other decisions are illustrative. (See *Rohe v. State Bar* (1941) 17 C.2d 445, 110 P.2d 389 [obtained more than twice agreed fee by failing to advise client truthfully of nature of recovery; 3 months' suspension]; *Petersen v. State Bar* (1943) 21 C.2d 866, 136 P.2d 561 [unreasonable fees and deception of clients; in view of two prior suspensions,

disbarred]; *Bushman v. State Bar* (1974) 11 C.3d 558, 563, 564, 113 C.R. 904, 522 P.2d 312 [\$ 5,000 note, \$ 300 payable immediately, balance payable \$ 50 per month, obtained from family on welfare for simple custody matter; clients were later billed \$ 2,800 for services found worth \$ 300 by trial court].)

The foregoing cases should be read in the light of a limiting rule declared in *Herrscher v. State Bar* (1935) 4 C.2d 399, 402, 49 P.2d 832: "[T]he mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action." In addition to the excessive fee there must be "some element of fraud or overreaching" of the client, so that the act constitutes a practical appropriation of the client's funds in the guise of retaining them as fees. (4 C.2d 403.) Accordingly, the conclusion that the fee involved in one of the charges against petitioner was "probably excessive" and "exorbitant," and probably could not have been sustained in a civil action (4 C.2d 417, 421), did not justify discipline where none of the other elements was present. (See 25 A.L.R.6th 1 [excessive fee as ground for discipline; criminal, tort, and real property matters]; 26 A.L.R.6th 1 [excessive fee as ground for discipline; estate, trust, domestic relations, and family law matters]; 27 A.L.R.6th 1 [excessive fee as ground for discipline; business and tax, employee benefits and termination, civil rights, and other limited civil matters]; on *Rules of Professional Conduct, Rule 4-200* (fees), see *supra*, §454.)

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d. Improper Methods of Collecting Fees.

1 Witkin Cal. Proc. Attys § 491

[§ 491] Improper Methods of Collecting Fees.

(1) *In General.* An attorney may sue a client to collect a fee (supra, §208 et seq.) and, if the attorney has a contractual lien, may withhold a part of the recovery in satisfaction of the lien (supra, §168). But oppressive methods of collection, such as the use of threats, or illegal withholding of funds or property without a lien, constitute serious misconduct, even though the fee itself is proper and the client has no excuse for refusal to pay. (See *McGrath v. State Bar* (1943) 21 C.2d 737, 741, 135 P.2d 1 [3 months' suspension]; *Lindenbaum v. State Bar* (1945) 26 C.2d 565, 573, 160 P.2d 9 [6 months' suspension]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §60; 91 *A.L.R.3d* 583 [fee collection practices as ground for disciplinary action].) (On arbitration or mediation of fee disputes, see supra, §220 et seq.)

(2) *Threats.* In *Bluestein v. State Bar* (1974) 13 C.3d 162, 118 C.R. 175, 529 P.2d 599, petitioner offered to drop criminal assault charges against his client's husband on the latter's payment of legal fees in the client's divorce action. *Held*, the act was an oppressive method of attempting to collect the fees and involved moral turpitude even if it did not amount to attempted extortion under *P.C. 518 et seq.* (13 C.3d 170.)

(3) *Absence of Contractual Lien.* In *Silver v. State Bar* (1974) 13 C.3d 134, 117 C.R. 821, 528 P.2d 1157, petitioner received over \$ 3,000 from a sale on execution of his client's judgment, and withheld \$ 1,000 for his services and \$ 1,000 for the services of his partner. *Held*, suspension imposed. (13 C.3d 147.) "Since petitioner did not possess a contractual lien for attorney's fees, he had no right or authority unilaterally to determine that he was entitled to \$ 1,000 for his services and to withhold the money, even if his services in truth were worth that figure." Likewise, he had neither the right nor the authority to withhold \$ 1,000 for services "assertedly rendered" by his partner. (13 C.3d 142, citing the text.)

(4) *Confession of Judgment.* In *Hulland v. State Bar* (1972) 8 C.3d 440, 105 C.R. 152, 503 P.2d 608, petitioner's office manager had a client execute a confession of judgment for "money justly due for legal services" in the amount of the agreed fee for representation in a contested divorce action, and his secretary had the client leave an undorsed tax refund check at the attorney's office for "safekeeping." After the client's husband indicated that he would not contest the action, the client sought to have the fee reduced; and, on petitioner's refusal, she regained possession of the check by pretending to indorse it. Petitioner took the case off the default calendar without notice to the client, obtained judgment

on the confession of judgment, and sought to execute. *Held*, public reproof affirmed.

(a) Petitioner's assumption of a position inimical to the interests of his client to ensure collection of his fee violated his duty of fidelity and, combined with his wilful failure to perform the services for which he was retained, warranted public reproof. (8 C.3d 448.)

(b) Petitioner's attempt to demonstrate that he was entitled to the amount of the judgment was unsupported, and his use of a confession of judgment to collect unearned fees also warranted public reproof. (8 C.3d 449.)

(c) The use of a confession of judgment is an extreme procedure and is sharply limited by statute in the majority of states. (8 C.3d 449.) Its use by an attorney to collect fees "presents opportunities for overreaching that avoid judicial scrutiny; the practice creates a situation in which the client's ignorance of legal matters makes it unlikely that he will understand the character and effect of the instrument. Moreover, use of a confession of judgment is unnecessary, since a promissory note is equally effective to embody the obligation for legal fees into a readily enforceable form." (8 C.3d 450.) (On constitutionality of statutory procedure for confession of judgment without action, see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §128.)

(5) *Distinguishing Wrongdoer From Victim*. In fee collection cases it is sometimes difficult to distinguish the wrongdoer from the victim. In *Fall v. State Bar* (1944) 25 C.2d 149, 153 P.2d 1, petitioner's client, an executor, assigned a note and deed of trust to petitioner as security for fees and advances. After petitioner's discharge and while the client was represented by another attorney, petitioner secretly obtained a writ of execution on the note and deed of trust, and purchased the interest of the estate at the ensuing sale. The sale was subsequently set aside, and the controversy settled, but the court held that if the purchase had stood, petitioner would have received more than he was entitled to get, and that the sale without notice to his former client was a violation of the plainest principles of fair dealing. (25 C.2d 159, 160.) This latter conclusion, and the judgment of 1 year's suspension, was denounced in a dissenting opinion as "unrealistic, unjust and in utter disregard of the facts and legal principles." (25 C.2d 165.) And the majority opinion makes this concession: "Unquestionably she was a difficult and unappreciative client who had no scruples against obtaining legal services without paying an adequate amount for them." (25 C.2d 159.)

A somewhat similar situation was presented in *Arden v. State Bar* (1959) 52 C.2d 310, 341 P.2d 6, where the client, a mother who had given up her child for adoption, demanded \$ 3,000 from the adopting parents or the return of the child. The attorney, who represented both parties, was held guilty of unethical conduct in threatening prosecution to induce her to desist. (52 C.2d 320.)

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 - 1. Earlier Cases.

1 Witkin Cal. Proc. Attys § 492

[§ 492] Earlier Cases.

Clearly an attorney may be held liable for damages to a client for negligence (supra, §285 et seq.), and an attorney's negligence may be a defense in an action for fees (supra, §202). However, negligence as a ground for discipline is a different and more difficult problem. Prior to the adoption of *Rules of Professional Conduct, Rule 3-110* (supra, §432), negligence was not mentioned in statutes or rules, and could be the basis of discipline only if it were considered an act of moral turpitude or a failure to discharge duties (supra, §444).

Thus, it was generally assumed that negligence alone was not a sufficient basis for disciplinary action. (See *Friday v. State Bar* (1943) 23 C.2d 501, 505, 144 P.2d 564; 7 Am.Jur.2d (2007 ed.), Attorneys at Law §66; 29 Cal. L. Rev. 427; 14 So. Cal. L. Rev. 349.) Some California cases seemed to suggest that it was, but the opinions disclose that some additional element was invariably present.

Marsh v. State Bar (1930) 210 C. 303, 291 P. 583, was the first case to explore the power of the State Bar to make negligence a ground for disciplinary proceedings. Petitioner accepted a fee from one client but failed to file the requested action, though he represented that it had been set for trial and continued. In another case he failed to appear for trial. His defenses were that he had instructed his clerk to file the complaint and was unaware of the clerk's failure to do so, and that his secretary had entered an erroneous trial date in his docket. *Held*, a year's suspension was proper: (a) He was guilty of "gross negligence" in the handling of his client's affairs. (b) His misrepresentations amount to "outright dishonesty," a breach of his fiduciary relation, and therefore involved moral turpitude. (c) He failed to "faithfully discharge" his duties as an attorney.

Marsh was followed in *Waterman v. State Bar* (1936) 8 C.2d 17, 63 P.2d 1133. Petitioner accepted a fee, failed to file a complaint, and represented that it had been filed. He also induced complainants not to appear as witnesses in an administrative committee hearing, with the result that they were held in contempt. Suspension for 6 months was approved. Petitioner's "gross carelessness" was a violation of his oath and involved moral turpitude in that it was a breach of the fiduciary relation. The facts disclose "an habitual failure to give reasonable attention to the handling of the affairs of his clients rather than an isolated instance of carelessness followed by a firm determination to make amends."

(8 C.2d 21.)

In *Trusty v. State Bar* (1940) 16 C.2d 550, 107 P.2d 10, a 30-day suspension was ordered where petitioner failed to have an interlocutory decree of divorce prepared and signed. The court reviewed *Marsh* and *Waterman* and declared that petitioner's conduct was not only negligence but involved "active misrepresentation," although the opinion is not clear about what the misrepresentation was. (16 C.2d 554.)

In *Bruns v. State Bar* (1941) 18 C.2d 667, 672, 117 P.2d 327, the prior cases were cited in support of the rule that "[r]epeated acts of negligence and omission may involve moral turpitude and prove as great a lack of fitness to practice law as affirmative violations of duty." But petitioner was also held guilty of failure to account. (See *Farrar v. State Bar* (1934) 1 C.2d 359, 363, 34 P.2d 1024 [negligence and misrepresentation]; *Stephens v. State Bar* (1942) 19 C.2d 580, 583, 122 P.2d 549 [same]; *Herron v. State Bar* (1944) 24 C.2d 53, 59, 147 P.2d 543 [negligence coupled with some deception]; *Gelberg v. State Bar* (1938) 11 C.2d 141, 78 P.2d 430 [negligent failure to supervise office practice that allowed employees who owned no property to sign bonds for attachment and other purposes; violation of law]; *Clark v. State Bar* (1952) 39 C.2d 161, 174, 246 P.2d 1 [negligence coupled with misleading account as guardian]; *Lowe v. State Bar* (1953) 40 C.2d 564, 254 P.2d 506 [negligence and deception of court].)

Call v. State Bar (1955) 45 C.2d 104, 287 P.2d 761, after reviewing the authorities and citing the text, held that negligence alone is not a ground for discipline. Petitioner represented a child left a small amount by his father's will, taking an advance of \$ 1,250 to investigate for purposes of a contest. He assumed that the contest could be filed any time before distribution, allowed the 6-month period to elapse, and later returned the money advanced. *Held*, proceeding dismissed. "All that is established here is that petitioner mistakenly believed in good faith that he had ample time to file a contest on behalf of his client and that because of this mistake he failed to act in time." (45 C.2d 111.) "An attorney may be disciplined for a violation of his oath to discharge his duties to the best of his knowledge and ability, but mere ignorance of the law in conducting the affairs of a client in good faith is not cause for discipline. ... The good faith of an attorney is a matter to be considered in determining whether discipline should be imposed for acts done through ignorance or mistake." (45 C.2d 110.)

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1 Witkin Cal. Proc. Attys § 493

[§ 493] Later Cases.

(1) *Gross Negligence*. In *Rock v. State Bar* (1962) 57 C.2d 639, 21 C.R. 572, 371 P.2d 308, petitioner's performance was delayed and inadequate, he did not answer calls, and he made misrepresentations. *Held*, the board's findings of "gross negligence" amounting to moral turpitude were supported by the evidence, and 2 years' suspension was affirmed, for the record showed "more than mere negligence." (57 C.2d 643.) (See *Moore v. State Bar* (1964) 62 C.2d 74, 81, 41 C.R. 161, 396 P.2d 577 [90 days' suspension for neglecting to make good assurances to client, to undertake defense of case, and to attempt to set aside default judgment; excuse of reliance on employee who was suspended lawyer was insufficient]; *Grove v. State Bar* (1967) 66 C.2d 680, 683, 58 C.R. 564, 427 P.2d 164 [long continued neglect of clients' affairs, resulting in losses to them, constituted moral turpitude and grounds for disbarment; but court observed that reinstatement might be possible].)

Rock and *Grove* were followed in *Simmons v. State Bar* (1970) 2 C.3d 719, 87 C.R. 368, 470 P.2d 352. "The evidence herein discloses a common pattern in the three matters investigated, that is, petitioner's acceptance of fees followed by his failure to communicate or deal directly with his clients regarding their cases, his refusal to respond to their inquiries (he was invariably 'out' when they telephoned or sought to see him, and requests to have him return their calls were ignored), and his failure to advise them at any time that they should obtain other counsel or to give them any kind of notice to prevent the consequences of defaults in two matters and failure to prosecute in the other. The official court files show that at all times petitioner had notice of the status of the cases; but he took no steps for the protection of his clients, and during his suspension he held himself out to opposing counsel and the courts as attorney of record. Thus, petitioner not only failed to give notice to his clients, but also effectively prevented them from receiving notice from others." (2 C.3d 729.)

The following cases gave additional support to the notion that gross negligence, either alone or with some other minor act of misconduct, can furnish the basis for discipline:

Taylor v. State Bar (1974) 11 C.3d 424, 431, 113 C.R. 478, 521 P.2d 470 [3 months' suspension for failure to pursue case with diligence].

Spindell v. State Bar (1975) 13 C.3d 253, 118 C.R. 480, 530 P.2d 168 [1 month's suspension for "extreme neglect" in delaying marital dissolution proceeding for 5 years and wilfully refusing to communicate with client, who meanwhile remarried on false assurance of petitioner's secretary that remarriage was permissible].

Schullman v. State Bar (1976) 16 C.3d 631, 635, 128 C.R. 671, 547 P.2d 447 [failure to file suits; evidence of five prior disciplinary proceedings during 12-year period, three on grounds identical to those involved in present proceeding; disbarment].

Selznick v. State Bar (1976) 16 C.3d 704, 709, 129 C.R. 108, 547 P.2d 1388 [abandonment of criminal appeal after acceptance of retainer; 3 years' suspension supported by aggravating circumstances].

Gassman v. State Bar (1976) 18 C.3d 125, 130, 132 C.R. 675, 553 P.2d 1147 [failure to pursue probate and guardianship proceedings, and to establish and supervise trust account procedures for clients' funds mismanaged by office employee; 2 years' suspension stayed; 1 year's actual suspension and probation].

Sanchez v. State Bar (1976) 18 C.3d 280, 133 C.R. 768, 555 P.2d 889 [failure to supervise employees who prepared and filed complaint over attorney's purported signature without authority, failure to prepare timely motion to prevent dismissal for lack of trial, and false statement that trial date had been set; 3 months' suspension].

Jackson v. State Bar (1979) 23 C.3d 509, 513, 153 C.R. 24, 591 P.2d 47 [persistent failure to account to heirs on demand; 5 years' suspension stayed, 3 months' actual suspension].

Baranowski v. State Bar (1979) 24 C.3d 153, 162, 154 C.R. 752, 593 P.2d 613 [failure to inform client of change in professional opinion on merit of client's case; 1 year's suspension stayed, 6 months' actual suspension].

Davis v. State Bar (1983) 33 C.3d 231, 238, 188 C.R. 441, 655 P.2d 1276 [wilful usurpation of client's decision to bring suit and subsequent failure to represent her constituted "gross negligence"; 3 years' probation, with 1 year's actual suspension, supported by additional finding of wilful deception of court and two prior disciplinary proceedings involving wilful failure to perform services].

McMorris v. State Bar (1983) 35 C.3d 77, 83, 196 C.R. 841, 672 P.2d 431 [persistent and habitual failure to perform services, shown by evidence in present case and in three prior disciplinary proceedings, constituted moral turpitude justifying disbarment].

Palomo v. State Bar (1984) 36 C.3d 785, 796, 205 C.R. 834, 685 P.2d 1185 [pervasive carelessness and pattern of gross negligence in overseeing client funds; 1 year's stayed suspension].

Alberton v. State Bar (1984) 37 C.3d 1, 15, 206 C.R. 373, 686 P.2d 1177 [failure to act competently and misappropriation of funds; 5-year stayed suspension].

Coppock v. State Bar (1988) 44 C.3d 665, 681, 244 C.R. 462, 749 P.2d 1317 ["gross carelessness and negligence" in care of client funds; 2-year stayed suspension and restitution].

Read v. State Bar (1991) 53 C.3d 394, 426, 279 C.R. 818, 807 P.2d 1047 [habitual disregard of clients and failure to communicate constitute acts of moral turpitude justifying disbarment].

(2) *Commentary.* Negligence as a basis for discipline has been the subject of extensive comment. (See 7 *Am.Jur.*2d (2007 ed.), *Attorneys at Law* §§58, 66 et seq.; 80 *A.L.R.*3d 1240 [failure to communicate with client]; 92 *A.L.R.*3d 655 [attorney's negligence as executor]; 21 *A.L.R.*4th 75 [delay in handling estate]; 63 *A.L.R.*4th 656 [negligence in matter involving formation or dissolution of business organization]; 65 *A.L.R.*4th 24 [negligence in matter involving real estate transaction]; 66 *A.L.R.*4th 314 [negligence in tax matters]; 66 *A.L.R.*4th 342 [negligent handling of probate matters]; 67 *A.L.R.*4th 415 [negligence in family law matters]; 68 *A.L.R.*4th 694 [negligence in handling personal injury or property

damage actions]; 69 *A.L.R.4th* 410 [negligence in criminal matters]; 70 *A.L.R.4th* 786 [negligence in bankruptcy matters].)

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 f. Sexual Relations With Client.

1 Witkin Cal. Proc. Attys § 494

[§ 494] Sexual Relations With Client.

(1) *Statute and Rule.* *B. & P.C. 6106.9* and *Rules of Professional Conduct, Rule 3-120* (supra, §433) prohibit an attorney from requiring or demanding or coercing clients into having sexual relations with the attorney. Intentional violation of the rule constitutes a cause for suspension or disbarment. (*B. & P.C. 6106.8(d).*)

(2) *Prohibited Conduct.* Under *B. & P.C. 6106.9*, an attorney may be disciplined for doing any of the following:

(a) Expressly or impliedly conditioning the performance of legal services for a current or prospective client on the client's willingness to engage in sexual relations with the attorney. (*B. & P.C. 6106.9(a)(1).*)

(b) Employing coercion, intimidation, or undue influence in entering into sexual relations with a client. (*B. & P.C. 6106.9(a)(2).*)

(c) Continuing representation of a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently in violation of *Rules of Professional Conduct, Rule 3-110*, or if the sexual relations would, or would be likely to, damage or prejudice the client's case. (*B. & P.C. 6106.9(a)(3).*)

For purposes of *B. & P.C. 6106.9*, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse. (*B. & P.C. 6106.9(d).*) (See *40 U.C.L.A. L. Rev. 1275* [Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?]; *28 U.S.F. L. Rev. 715* [sexual harassment of attorneys by clients].)

(3) *Exceptions.* *B. & P.C. 6106.9(a)* is not applicable to sexual relations between attorneys and their spouses or persons in an equivalent domestic relationship or to ongoing consensual sexual relationships that predate the attorney-client relationship. (*B. & P.C. 6106.9(b).*) Further, if an attorney in a firm has sexual relations with a client but does not participate in representing that client, the attorneys in the firm are not subject to *B. & P.C. 6106.9* solely because of the occurrence of those sexual relations. (*B. & P.C. 6106.9(c).*)

(4) *Verified Complaint.* Complaints made to the State Bar alleging a violation of *B. & P.C. 6106.9(a)* must be

"verified under oath by the person making the complaint." (*B. & P.C. 6106.9(e).*)

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1 Witkin Cal. Proc. Attys § 495

[§ 495] In General.

A violation of an attorney's oath or of his or her duties as an attorney constitutes cause for disbarment or suspension. (*B. & P.C. 6103*.) Where the dishonest act is a fraud on the court, the charge may be either violation of oath and duties (*B. & P.C. 6103*) or commission of an act involving moral turpitude (*B. & P.C. 6106*), or both.

Perjury and suborning perjury are obvious examples. (See *Green v. State Bar* (1931) 213 C. 403, 2 P.2d 340 [false testimony by attorney, and silence during false testimony by client]; *In re Jones* (1929) 208 C. 240, 280 P. 964 [advice to defendants in criminal case to raise fabricated defense by false testimony]; *In re Allen* (1959) 52 C.2d 762, 344 P.2d 609 [attorney's investigator sought purchased testimony in personal injury action; attorney disbarred]; *Mosesian v. State Bar* (1972) 8 C.3d 60, 66, 103 C.R. 915, 500 P.2d 1115 ["Once petitioner took the witness stand and was sworn, it was incumbent upon him as a witness, but in particular as a member of the State Bar, to testify in complete candor and never to seek to mislead. Even if he had not been sworn, he would still be held to the same high standards of honesty and candor in his statements to the court"]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §49; 40 *A.L.R.3d* 169 [fabrication or suppression of evidence as ground of disciplinary action against attorney].) (On court's duty to report to State Bar reversal based on misconduct or wilful misrepresentation, see *infra*, §575.)

Misrepresentation to the State Bar in its investigations and proceedings is as serious an offense as misrepresentation to the court. (See *Worth v. State Bar* (1978) 22 C.3d 707, 711, 150 C.R. 273, 586 P.2d 588 [evidence, fabricated to conceal misappropriation, presented to hearing panel]; *Olguin v. State Bar* (1980) 28 C.3d 195, 200, 167 C.R. 876, 616 P.2d 858 [untrue statements and fabricated documents].)

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 - 2. False Pleadings or Documents.

1 Witkin Cal. Proc. Attys § 496

[§ 496] False Pleadings or Documents.

(1) *False Pleadings.* Filing a false pleading is a ground for disciplinary action. (See *Bruns v. State Bar* (1931) 213 C. 151, 154, 1 P.2d 989 [deliberately false statement in petition for adoption of child, to secure advantage for client, held "highly reprehensible, and a flagrant violation of an attorney's duty"]; *Paine v. State Bar* (1939) 14 C.2d 150, 93 P.2d 103 [false allegations in petition to probate court for compromise of claim]; *Vickers v. State Bar* (1948) 32 C.2d 247, 252, 196 P.2d 10 [attorney's petition for special letters of administration, falsely representing that he was decedent's husband]; *McMahon v. State Bar* (1952) 39 C.2d 367, 370, 246 P.2d 931 [false allegations of intestacy to obtain appointment of client as special administrator, with knowledge of will naming executor]; *Reznik v. State Bar* (1969) 1 C.3d 198, 81 C.R. 769, 460 P.2d 969 [pleading that falsely concealed alteration of cancelled check]; on requirement of truthful pleading, see 4 Cal. Proc. (5th), *Pleading*, §397.)

Pickering v. State Bar (1944) 24 C.2d 141, 148 P.2d 1, involved false allegations in the complaint. A disturbing dissent asserts that the conduct of petitioner was not different from that of "a very large percentage of practitioners," that there is no reasonable distinction between a false allegation and a false denial, and that "it is a matter of common knowledge that attorneys in the preparation of answers permit their clients to deny allegations in the complaint which they know to be true, and which they do not intend to offer evidence to rebut." (24 C.2d 146.) (Cf. *Werner v. State Bar* (1954) 42 C.2d 187, 196, 265 P.2d 912, 4 Cal. Proc. (5th), *Pleading*, §397 [unwarranted denial of matters of public record was not act involving moral turpitude].)

In *Davis v. State Bar* (1983) 33 C.3d 231, 188 C.R. 441, 655 P.2d 1276, petitioner, representing himself in a malpractice action, filed a verified answer that included a general denial and an affirmative defense containing false statements of fact. The court, noting that it need not decide whether a general denial, standing alone, would warrant discipline, held that the affirmative misrepresentation constituted wilful deception of the court warranting discipline. (33 C.3d 239, 240, following *Pickering*.) (See *In the Matter of Regan* (2005) 4 Cal. State Bar Ct. Rptr. 844, 853 [falsely representing in motion to vacate that clients did not actually want appeal dismissed; following *Davis*].)

(2) *False Documents.* Other false documents used in legal proceedings may justify discipline. (See *Barton v. State*

Bar (1931) 213 C. 186, 2 P.2d 149 [advice to clients in bankruptcy petition to take pauper's oath and make false answers to interrogatories]; *Woodard v. State Bar* (1940) 16 C.2d 755, 108 P.2d 407 [purported judgment by default against defendant]; *Utz v. State Bar* (1942) 21 C.2d 100, 104, 130 P.2d 377 [alteration of devisee's receipt, on application for discharge as administrator]; *Eschwig v. State Bar* (1969) 1 C.3d 8, 81 C.R. 352, 459 P.2d 904 [concealed purchase at probate sale, documents filed to make it appear that property remained an asset of estate]; *In re Kristovich* (1976) 18 C.3d 468, 134 C.R. 409, 556 P.2d 771 [public administrator used false names on document for sale of autos from estate he was administering]; *Codiga v. State Bar* (1978) 20 C.3d 788, 793, 144 C.R. 404, 575 P.2d 1186 [alteration of will]; *Jackson v. State Bar* (1979) 23 C.3d 509, 513, 153 C.R. 24, 591 P.2d 47 [false accountings filed with probate court]; *Drociak v. State Bar* (1991) 52 C.3d 1085, 1091, 1092, 278 C.R. 86, 804 P.2d 711 [use of client's presigned verification in answering interrogatories, without consulting client to assure truth of responses, involves moral turpitude or dishonesty in violation of B. & P.C. 6106 and 6068(d), supra, §480]; 40 A.L.R.3d 169 [fabrication of documents as ground of disciplinary action against attorney].)

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1 Witkin Cal. Proc. Attys § 497

[§ 497] Misleading Court.

(1) *Case Law*. A number of decisions have upheld disciplinary action based on misrepresentation to or concealment of facts from the court. (See *In re Richardson* (1930) 209 C. 492, 288 P. 669 [misrepresentations to procure dismissal of criminal proceeding and appropriate bail money]; *Shaeffer v. State Bar* (1945) 26 C.2d 739, 749, 752, 160 P.2d 825 [misrepresentation of condition of case]; *Best v. State Bar* (1962) 57 C.2d 633, 637, 21 C.R. 589, 371 P.2d 325 [false statements to federal district judge concerning services to justify fee].) (For related problem of attorney's failure to adequately prepare for hearing on motion and to cite recent cases, see *People v. Crafts* (1970) 13 C.A.3d 457, 460, 91 C.R. 563; on attorney's misrepresentation to court of attorney's state of health or other personal matter in seeking trial delay, see 61 A.L.R.4th 1216.)

In *Grove v. State Bar* (1965) 63 C.2d 312, 46 C.R. 513, 405 P.2d 553, petitioner, representing the wife in a divorce action, served the husband with an order to show cause. The husband's attorney telephoned from Los Angeles requesting a continuance, which was refused; he telephoned on the day of the hearing saying that he could not get a plane in time, and again requested a continuance. Petitioner nevertheless appeared and, without informing the judge of the request, handled it as a default matter. *Held*, the evidence supported a finding of wilful concealment, intentionally misleading the judge. (63 C.2d 315.)

In *Di Sabatino v. State Bar* (1980) 27 C.3d 159, 162 C.R. 458, 606 P.2d 765, petitioner misled a bail commissioner by failing to disclose that he had made two other unsuccessful bail reduction motions on behalf of the same clients. A public reproof (by the opinion) was ordered. (27 C.3d 164.) Three justices dissented, characterizing the matter as "trivial" and unworthy of the attention of the *State Bar or the court*. (27 C.3d 164.)

(2) *Disciplinary Rule*. *Rules of Professional Conduct*, Rule 5-200 (supra, §461), based on *B. & P.C.* 6068 and 6106 (supra, §480), prescribes the attorney's conduct in presenting matters to the court. (See *Young v. Rosenthal* (1989) 212 C.A.3d 96, 126, 260 C.R. 369, citing the text; *In the Matter of Temkin* (1991) 1 Cal. State Bar Ct. Rptr. 321, 330 [violation of prior rule (misleading judge by false statement) constituted act of dishonesty in violation of *B. & P.C.* 6106]; *In the Matter of Rodriguez* (1993) 2 Cal. State Bar Ct. Rptr. 480, 488 [misleading superior court judge about

inability to attend earlier hearing]; *In the Matter of Dixon* (1999) 4 Cal. State Bar Ct. Rptr. 23, 30 [racial epithets and false charges of pedophilia regarding opposing counsel made in court papers; "[t]he court doubts that any of respondent's allegations actually misled a court, but certainly she sought to do so, using her false allegations to buttress her arguments in opposition to motions filed against her client"].)

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b. Disobedience of Order.

1 Witkin Cal. Proc. Attys § 498

[§ 498] Disobedience of Order.

An attorney's wilful disobedience or violation of an order of the court requiring the attorney to do or forbear an act connected with or in the course of the attorney's profession is a cause for disbarment or suspension. (*B. & P.C. 6103*.) As with disrespect (*infra*, §500 et seq.), contempt is the usual punishment (*C.C.P. 1209*), but suspension from practice may be ordered. (See *In re Sadicoff* (1929) 208 C. 555, 282 P. 952 [publishing scandalous matter in divorce case after court had ordered pleadings sealed and their contents not disclosed]; *In the Matter of Wolff* (2006) 5 Cal. State Bar Ct. Rptr. 1, 11 [indigent defense program attorney who improperly withdrew from representing over 300 clients wilfully disobeyed court order to continue to appear on behalf of clients by failing to appear in subsequent hearings].)

Refusal of an attorney to testify in a judicial investigation into unethical practices, under a claim of the Fifth Amendment privilege, cannot be the basis of disciplinary action. (*Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574, 2 Cal. Evidence (4th), Witnesses, §363, overruling *Cohen v. Hurley* (1961) 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156.)

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1 *Witkin Cal. Proc. Attys* § 499

[§ 499] Noncompliance With Support Judgment or Order.

State boards may not issue or renew business or professional licenses to obligors who are not in compliance with child or family support judgments or orders. Further, the state Department of Child Support Services must distribute a list of the obligors to each board responsible for the regulation of licenses. (*Family C. 17520.*) (See 11 *Summary* (10th), *Husband and Wife*, §338.)

C.R.C., Rule 9.22 implements *Family C. 17520* with respect to members of the State Bar. The rule authorizes the State Bar, on an annual basis, and for repeat delinquent obligors as necessary, to transmit to the Supreme Court, with a recommendation for suspension, the names of attorneys listed by the Department of Child Support Services as delinquent in their payments of court-ordered child or family support. A suspended attorney may be reinstated only after the Supreme Court receives notification from the State Bar that the attorney's name has been removed from the Department of Child Support Services list. (C.R.C., Rule 9.22(a), (b), (c).) (See State Bar Rules and Regulations, Art. I, §13 [suspension of members for failure to comply with judgment or order for child or family support].)

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 d. Offensive or Disrespectful Acts.
 1. Conduct Subject to Discipline.

1 Witkin Cal. Proc. Attys § 500

[§ 500] Conduct Subject to Discipline.

It is the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers." (*B. & P.C. 6068(b)*); see *B. & P.C. 6068(f)* [duty to abstain from advancing fact prejudicial to honor or reputation of party or witness "unless required by the justice of the cause with which" attorney is charged].)

Improper conduct toward the court is usually punished by the court as a contempt. (See *C.C.P. 1209*; *7 Cal. Proc. (5th), Trial*, §189 et seq.) However, as a violation of oath and duties, the improper conduct is also subject to disciplinary proceedings, the typical punishment being suspension. (See *Peters v. State Bar* (1933) 219 C. 218, 223, 26 *P.2d* 19 [false charges of corruption against judge, in affidavit seeking disqualification]; *7 Am.Jur.2d* (2007 ed.), *Attorneys at Law* §50; *12 A.L.R.3d* 1408 [attorney's criticism of judicial acts as ground of disciplinary action].)

Hogan v. State Bar (1951) 36 *C.2d* 807, 228 *P.2d* 554, involved offensive and disparaging remarks, and an open letter attacking the character and the competence of an inferior court judge. Petitioner contended that, because the judge was a candidate for reelection, the statements in the open letter were privileged as fair comment. (See 5 *Summary* (10th), *Torts*, §617 et seq.) The court held, however, that disrespectful conduct by the attorney was subject to discipline regardless of whether it constituted actionable libel. (36 *C.2d* 811.)

In *Ramirez v. State Bar* (1980) 28 *C.3d* 402, 169 *C.R.* 206, 619 *P.2d* 399, a divided court approved discipline (1 year probation, 1 month actual suspension) for "falsely maligning" justices of the Court of Appeal. Petitioner, the attorney for clients whose money judgment was reversed, unsuccessfully sought relief in the federal district court, and filed a brief in the Ninth Circuit Court of Appeals asserting that the three named justices had acted "unlawfully" and "illegally" in reversing the trial court's judgment. In a later petition for certiorari in the United States Supreme Court petitioner intimated that the justices had falsified the record on appeal in the state court proceeding, and that their "unblemished" judicial records were "undeserved." The State Bar, after extensive proceedings, recommended disciplinary action, and the Supreme Court determined that the foregoing and other demeaning accusations had been made without any factual substantiation and with reckless disregard for the truth. Accordingly, citing *Peters* and *Hogan*, the court concluded that petitioner's zealous representation of his clients could not excuse the breach of his duties as an

attorney, and that appropriate discipline should be imposed, "if for no other reason than the protection of the public and preservation of respect for the courts and the legal profession." (28 C.3d 414.)

Three justices dissented, maintaining that petitioner was exercising his constitutional right of free speech and engaging in permissible criticism of the system of administration of justice. (28 C.3d 414, 420, 424.) "[A]bsent any evidence, other than his words, that he sought to charge the judges with some kind of corruption, should not those words be read as no more than a forceful contention that the appellate judges had usurped the power of the jury and of the trial judge by setting aside the verdict and judgment?" (28 C.3d 414.) "When writing his briefs must every lawyer--even in a case where he is suing judges for their alleged malfeasance--neither insinuate nor recite that there are institutionalized distortions? Must he remain mute, regardless of his own and his clients' views, as to charges that the court system as a whole inherently profits the Establishment?" (28 C.3d 423.) An additional opinion of one of the three dissenters observes that the chilling effect of the decisions on actions of a lawyer is too high a price to pay for "the fragile sensibilities of a judge or justice," and that "it smacks of arrogance to so limit the bar while we ourselves carry on dialogues which match or exceed what was said here." (28 C.3d 427.)

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 - 2. Distinction: Privileged Criticism.

1 *Witkin Cal. Proc. Attys* § 501

[§ 501] Distinction: Privileged Criticism.

In re Sawyer (1959) 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473, takes an extraordinarily liberal view of the lawyer's freedom to comment on the courts and court proceedings. Petitioner, counsel for defendants in a Smith Act (anti-Communist) trial in Hawaii, was suspended from practice by the Hawaii court. The main ground was that, while the trial was pending, petitioner made a public address in which she repeatedly charged shocking unfairness in the conduct of the trial, and urged her listeners to tell people what a vicious thing the Smith Act was. The Supreme Court, reversing the order, emphasized the right of lawyers to criticize the state of the law or the rulings of judges, before either professional or lay audiences. "Such criticism simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges." (79 S.Ct. 1381, 3 L.Ed.2d 1481.) "If Judge [W] was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed." (79 S.Ct. 1383, 3 L.Ed.2d 1483.)

The majority justices attributed no importance to the fact that the attack was made during the trial, reasoning that, if the statements did not impugn the judge's integrity, the pendency of the proceeding was immaterial. (79 S.Ct. 1383, 3 L.Ed.2d 1483.) But to the dissenting justices this distinction was crucial: "When a lawyer attacks the fairness, the even-handedness, and the integrity of the proceedings in a trial in which he himself is actively engaged, in the inflammatory, public fashion that this record reveals, supplemented with specific attack on the presiding judge, how can the conclusion be escaped that it was not rules of law in the abstract which were assailed, but the manner in which the processes of justice in the particular case were being conducted? More particularly, such an attack inescapably impugns the integrity of the judge. It is he who truly embodies the law as the guardian of the rights of defendants to justice under law." (79 S.Ct. 1397, 3 L.Ed.2d 1498.) (See *In the Matter of Anderson* (1997) 3 Cal. State Bar Ct. Rptr. 775, 783 [First Amendment protected attorney's 116 statements impugning honesty and integrity of court; discipline is only possible where statements are false and attorney knows of falsity; State Bar bears burden of proof of falsity]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §51; 12 *A.L.R.3d* 1408 [attorney's criticism of judicial acts as ground of disciplinary action].)

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 3. Distinction: Courtroom Attire.

1 Witkin Cal. Proc. Attys § 502

[§ 502] Distinction: Courtroom Attire.

(1) *Jury Setting*. In *People v. Rainey* (1964) 224 C.A.2d 93, 36 C.R. 291, a criminal trial, C, the attorney for defendant, wore a large hat. The judge requested that all attorneys appear hatless because hats can distract jurors. C strenuously objected and continued to wear the hat throughout the trial. The judge repeatedly stated that he was merely requesting, not ordering her to remove her hat, and admonished the jury that this was a matter between himself and counsel and should not be given consideration by them. C, however, demanded a mistrial, and on appeal argued that the judge was guilty of prejudicial misconduct. *Held*, judgment of conviction affirmed.

(a) C's contention was rejected; the issue was not the right of a woman attorney to wear a hat in the courtroom, but rather "whether the judge or a lawyer in the case is to dictate in matters of courtroom decorum and behavior which bears upon the orderly conduct of the proceedings, and especially those which might distract the minds of the jurors from the solemn duty they have to perform." (224 C.A.2d 97.) "Parading a freakish hat before a jury could only be characterized as pure exhibitionism; and courtroom exhibitionism indulged in by either men or women lawyers is a type of aberration which merits only disapproval." (224 C.A.2d 97.)

(b) The case came within the rule making it the duty of every attorney to be respectful toward the court. "Speaking generally, we would not deny that at times some judges may go too far in the manner in which they exert control over the conduct of counsel, but, with rare exceptions, lawyers understand that such occurrences are among the minor difficulties of the practice of law and refrain from acts of disrespect or disobedience." (224 C.A.2d 97.) (See 73 A.L.R.3d 353 [court's power to impose standard of personal appearance or attire]; 84 A.L.R.3d 1143 [court's power to order attorney who is a clergyman to refrain from wearing clerical garb].)

(2) *Nonjury Setting*. Headgear was again at issue in *Jensen v. Superior Court* (1984) 154 C.A.3d 533, 201 C.R. 275, with a different result. Petitioner, an attorney, regularly wore a turban in court proceedings. When he appeared before Judge L at a hearing on a demurrer, the judge asked him whether he had a legitimate reason for doing so, such as a religious observance or cosmetic necessity, and petitioner refused to answer. The judge then advised him that he would not be permitted to appear without removing his headgear or making the necessary showing. *Held*, mandamus granted,

directing the superior court judge to permit petitioner to appear without having to reveal why he wears a turban, unless the judge can establish that the turban interferes with or disrupts justice.

(a) The test for attire is whether it interferes with courtroom decorum and thus impedes the functioning of the court. "As moneychangers may be driven from the temple, courts have the right to require appropriate dress, decorum and demeanor to assure proceedings that touch upon basic interests are conducted in a reasoned and rational fashion free from distraction and disruption prompted by bizarre behavior or dress." (154 C.A.3d 542.)

(b) In the exercise of that right, however, "we should be mindful of our pluralistic society, the preservation of individual choices and appreciation for divergent lifestyles." A judge hearing law and motion matters is not in the same position as a judge presiding over a jury trial; and distraction and disruption are to be measured objectively in the context of the circumstances presented. "More is required to establish interference with courtroom processes than a judge's personal idiosyncrasies." (154 C.A.3d 542.)

(c) "In short, we announce no dress code. We have confidence the good taste and sense of community mores of trial judges seasoned with their perceptions of changing times will strike the balance between attire appropriate to the circumstances and that which distracts and thus disrupts judicial proceedings." (154 C.A.3d 542.)

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1 Witkin Cal. Proc. Attys § 503

[§ 503] Leaving Courtroom.

In *People v. Busick* (1968) 259 C.A.2d 744, 66 C.R. 532, supra, §275, an attorney, after receiving two continuances and stipulating to trial without statutory notice, moved again for a continuance, and, when this was refused, departed. The court said: "Counsel for appellants ... simply walked out of the courtroom when a further postponement was denied and refused to participate in the trial. Even if there were some justification for this conduct, and we see none, it does little to support a charge of an abuse of discretion on the part of the trial court in refusing to set aside the judgment. On the contrary, it serves as a proper reason to deny the motion because counsel knew when he left that the court would hear the evidence and enter judgment in his absence." (259 C.A.2d 751.)

In *Bennett v. Unger* (1969) 272 C.A.2d 202, 77 C.R. 326, the attorney, asserting (on untenable grounds) that his client, cross-defendant, was no longer a party, made this pronouncement: "I have ... nothing further to say in this case, and I'm going to excuse myself." Then *he left*. (272 C.A.2d 207.) "A cross-defendant may not resign from a law suit. His counsel, however, cannot be restrained from walking out during the trial. When he does so the wheels of justice do not come to a creaking halt to await counsel's pleasure. His client simply suffers the misfortune of being unrepresented during the rest of the trial of the issues affecting that party." (272 C.A.2d 208.) The misconduct, although rare, was nothing less than an "attempt to trifle with the processes of the law. ... This might be more readily understandable had it been perpetrated by an inexperienced practitioner. The fact is that it was expressly ratified by a senior member of a long-established firm. ... A frightful and frightening backlog of appeals, few of which, one hopes, will match this one in frivolity has become further swollen by the time required to review the absurd contentions made here. This deserves more than censure. It necessitates sanctions." Judgment was affirmed, and the firm was fined \$ 500 for a frivolous appeal. (272 C.A.2d 211.)

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1 Witkin Cal. Proc. Attys § 504

[§ 504] Wrongs Against Opposing Counsel.

In *Hallinan v. State Bar* (1948) 33 C.2d 246, 249, 200 P.2d 787, 3 months' suspension was ordered where petitioner, acting under a client's power of attorney, simulated the client's signature on settlement papers with the object and effect of deceiving opposing counsel who had insisted on the personal signature of the client. (See *Coviello v. State Bar* (1955) 45 C.2d 57, 65, 286 P.2d 357 [without authority, attorney inserted client's name in grant deeds for purposes of deceiving opposition; it was immaterial that no harm resulted from deception; 6 months' suspension]; *Monroe v. State Bar* (1961) 55 C.2d 145, 152, 10 C.R. 257, 358 P.2d 529 [to obtain stay of execution of writ of possession attorney M intentionally misled opposing counsel to believe that M had received cash from his clients that was being held in escrow and would be used if M's clients failed to obtain financing; 9 months' suspension; other misconduct involved].)

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1 Witkin Cal. Proc. Attys § 505

[§ 505] In General.

Some illegal, immoral, or unethical acts of an attorney are not contrary to the interests of the client but are, nevertheless, grounds for discipline. The following are examples:

(1) *Defrauding Creditors of Client.* (See *Galbraith v. State Bar* (1933) 218 C. 329, 333, 23 P.2d 291 [attorney had client make note and chattel mortgage to him to prevent client's wife from levying on property; 3 months' suspension]; *Townsend v. State Bar* (1948) 32 C.2d 592, 197 P.2d 326 [attorney advised client to make fraudulent conveyance; in view of previous bad record, 3 years' suspension]; *Coppock v. State Bar* (1988) 44 C.3d 665, 683, 244 C.R. 462, 749 P.2d 1317, citing the text.)

(2) *False Claims Against Insurance Company.* It is "cause for disbarment or suspension" for an attorney to make false or fraudulent insurance claims as prohibited by *Ins.C. 1871.4* or *P.C. 550*. (*B. & P.C. 6106.5*.) (See *Sampson v. State Bar* (1974) 12 C.3d 70, 115 C.R. 43, 524 P.2d 139.)

(3) *Groundless Action. Rules of Professional Conduct, Rule 3-200* (supra, §434) prohibits the maintenance of groundless actions. (On improper support of client's cause, see *infra*, §541.)

(4) *Improper Methods of Collecting Debt Due Client.* A number of decisions have upheld disciplinary action based on improper conduct in debt collection such as threats or simulated legal process. (See *Libarian v. State Bar* (1952) 38 C.2d 328, 239 P.2d 865; 93 A.L.R.3d 880 [method employed in collecting debt due client as ground for disciplinary action against attorney].) The activity is now subject to statutory regulation. (See *B. & P.C. 6077.5*, *infra*, §506.)

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1 Witkin Cal. Proc. Attys § 506

[§ 506] Improper Debt Collection Methods.

Attorneys and their employees employed primarily to collect consumer debts owed to another are subject to specific requirements (*B. & P.C. 6077.5*), and a wilful breach of the requirements is cause for attorney discipline (*B. & P.C. 6077.5(i)*). Thus, attorneys and their employees must adhere to the following requirements:

(1) An attorney and the attorney's employees must comply with the obligations imposed on debt collectors pursuant to C.C. 1788.10 et seq. (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §5 et seq.). (*B. & P.C. 6077.5(a)*.)

(2) When communicating with a consumer debtor, an attorney's employee who is not a member of the State Bar must properly identify himself or herself, including job title and for whom employed. (*B. & P.C. 6077.5(b)*.) Communications by the attorney or employee must be restricted to times and places convenient to the debtor (generally between 8 a.m. and 9 p.m. at the debtor's location) (*B. & P.C. 6077.5(c)*), and must (with specified exceptions) cease on the debtor's written notification (*B. & P.C. 6077.5(d)*).

(3) An attorney is prohibited from taking or threatening to take nonjudicial action against the property (*B. & P.C. 6077.5(e)*) and from charging for communications by concealing the true purposes of those communications (*B. & P.C. 6077.5(f)*).

(4) An attorney seeking to collect an unsecured debt must send the debtor a written notice containing specified information and generally must cease collection efforts, except for filing a lawsuit, if the debtor disputes the debt or a portion of the debt. (*B. & P.C. 6077.5(g)*.)

(5) Payments received from the debtor must be applied in accordance with the debtor's directions. (*B. & P.C. 6077.5(h)*.) (On regulation of attorney debt collectors under the federal Fair Debt Collection Practices Act, see 35 *Hastings L. J.* 669.)

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c. Conduct Not in Capacity as Attorney.

1 Witkin Cal. Proc. Attys § 507

[§ 507] Conduct Not in Capacity as Attorney.

An attorney may be disciplined for an act involving moral turpitude even if the act is not committed in the attorney's professional capacity. (*B. & P.C. 6106*, supra, §480; see *31 Golden Gate L. Rev. 155* [professional discipline for domestic violence]; *92 A.L.R.3d 655* [conduct in capacity of executor or administrator]; *26 A.L.R.4th 170* [election campaign activities as ground for discipline]; *43 A.L.R.4th 1062* [sexual misconduct as basis for discipline].)

The following cases are illustrative:

Jacobs v. State Bar (1933) 219 C. 59, 63, 25 P.2d 401 [assuming that petitioner was acting merely as escrow-holder in transaction].

Lyders v. State Bar (1938) 12 C.2d 261, 265, 83 P.2d 500 [violation of duties as trustee].

Fall v. State Bar (1944) 25 C.2d 149, 160, 153 P.2d 1 [petitioner had ceased to be attorney for complaining party].

Clark v. State Bar (1952) 39 C.2d 161, 166, 246 P.2d 1 [violation of duties as guardian of incompetent].

Lewis v. State Bar (1973) 9 C.3d 704, 713, 108 C.R. 821, 511 P.2d 1173 [attorney induced his limited partners to reconvey their second deed of trust so that he could use property to secure personal obligations; act "involved moral turpitude and was reprehensible whether or not they were clients of his and whether or not any harm was done to them"].

Segretti v. State Bar (1976) 15 C.3d 878, 887, 126 C.R. 793, 544 P.2d 929 ["dirty tricks" in political campaign consisting of circulation of false and fraudulent campaign material in violation of federal law and resulting in federal conviction].

In re Hickey (1990) 50 C.3d 571, 581, 268 C.R. 170, 788 P.2d 684 [repeated violence toward wife and others, resulting from alcohol consumption and leading to conviction for carrying concealed weapon, constituted misconduct warranting discipline; State Bar need not wait until attorney injures client or neglects duties].

In re Kelley (1990) 52 C.3d 487, 494, 497, 276 C.R. 375, 801 P.2d 1126 [two convictions of drunk driving, including one while on probation from first, did not involve moral turpitude, but did constitute "other misconduct warranting discipline"; convictions and surrounding circumstances indicated problem of alcohol abuse, and court need not wait until problem begins to affect law practice].

An attorney may be disciplined for misconduct prior to admission to the bar. (*In re Bogart* (1973) 9 C.3d 743, 749, 108 C.R. 815, 511 P.2d 1167; see *In the Matter of Lybbert* (1993) 2 Cal. State Bar Ct. Rptr. 297, 304 [welfare fraud during law school]; 2 A.L.R.3d 807.) However, the State Bar has no authority over judicial officers; consequently disbarment proceedings cannot be brought against a judge. (*State Bar v. Superior Court* (1929) 207 C. 323, 337, 278 P. 432; see 2 Cal. Proc. (5th), Courts, §69 et seq.)

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 6. Illegal Acts.

1 Witkin Cal. Proc. Attys § 508

[§ 508] Illegal Acts.

Various kinds of illegal activity have been the subject of disciplinary proceedings. (See *Townsend v. State Bar* (1935) 4 C.2d 619, 51 P.2d 879 [false statement in declaration of candidacy for judicial position]; *Bryant v. State Bar* (1942) 21 C.2d 285, 296, 131 P.2d 523 [knowingly drafting document to make usurious transaction appear legal, in violation of Usury Act]; *Werner v. State Bar* (1944) 24 C.2d 611, 618, 150 P.2d 892 [bribery; disbarred]; *Penaat v. State Bar* (1944) 25 C.2d 26, 30, 152 P.2d 442 [false statements in application to Corporation Commissioner; 6 months' suspension]; *Christopher v. State Bar* (1945) 26 C.2d 663, 671, 161 P.2d 1 [unlawful practice of law by justice court judge]; *Libarian v. State Bar* (1952) 38 C.2d 328, 239 P.2d 865 [threat to opposing attorney to prosecute his client for perjury unless claim was paid was attempted extortion]; *Simmons v. State Bar* (1969) 70 C.2d 361, 365, 74 C.R. 915, 450 P.2d 291 [misappropriation of funds as real estate broker]; *In re Kelley* (1990) 52 C.3d 487, 276 C.R. 375, 801 P.2d 1126 [drunk driving]; see also B. & P.C. 6106.1 [advocating overthrow of government by force, violence, or other unconstitutional means as cause for disbarment]; A.B.A. Model Rules of Professional Conduct, Rule 8.4 [types of misconduct]; 13 A.L.R.3d 1010 [participation in collusive or connived divorce proceedings]; 18 A.L.R.3d 1408 [violation of securities regulations]; 43 A.L.R.4th 1062 [sexual misconduct].)

In *Noland v. State Bar* (1965) 63 C.2d 298, 46 C.R. 305, 405 P.2d 129, petitioner was an assistant district attorney who tried many criminal cases. He compiled a log of jurors who had voted not guilty, and submitted a list of them to the county clerk, suggesting that they be deleted from the justice court list. *Held*, this was an attempt to thwart the constitutional and statutory guarantee of an impartial jury; "he was in effect surreptitiously exercising 65 unauthorized peremptory challenges." (63 C.2d 303.)

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B. Commingling Funds or Failing To Account.

1. In General.

1 Witkin Cal. Proc. Attys § 509

[§ 509] In General.

The Rules of Professional Conduct recognize the dangers inherent in commingling money or other property of a client with that of the attorney. *Rules of Professional Conduct, Rule 4-100* (supra, §453) requires the creation of a "Trust Account" or "Client's Funds Account," prohibits commingling except under specified conditions, provides for prompt notification of the receipt of client funds or property and its safekeeping, and provides for record keeping, accounting, and prompt payment or delivery of property on request by the client. (See supra, §453.) As the court said in *Peck v. State Bar* (1932) 217 C. 47, 17 P.2d 112, of former Rule 9: "This salutary rule was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." (217 C. 51.) Because the rule was designed to establish ethical standards, it applies regardless of whether harm results from its violation. (*Zitny v. State Bar* (1966) 64 C.2d 787, 792, 51 C.R. 825, 415 P.2d 521.) (See A.B.A. Model Rules of Professional Conduct, Rule 1.15 [safekeeping property]; *Phillips v. State Bar* (1975) 14 C.3d 492, 500, 121 C.R. 605, 535 P.2d 733 [failure to report receipt of money belonging to client].)

The range of acts, motives, and effects of violation of the Rules of Professional Conduct is wide and the punishment is correspondingly varied. However, the situations fall roughly into two classes: (a) conduct close to misappropriation (infra, §510), and (b) technical violations (infra, §511).

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2. Conduct Close to Misappropriation.

1 Witkin Cal. Proc. Attys § 510

[§ 510] Conduct Close to Misappropriation.

The deliberate act of commingling may be part of a plan to misappropriate the client's property. If so, the act involves moral turpitude, the usual punishment is disbarment (*supra*, §480), and the disciplinary rule need not be invoked. However, if the intent to misappropriate is contested and the case is a doubtful one, or there are mitigating circumstances, the court may impose the penalty of suspension for violation of a rule of professional conduct that does not involve moral turpitude. (See *Mills v. State Bar* (1931) 211 C. 579, 297 P. 19 [mitigating circumstances; 1 year's suspension]; 91 A.L.R.3d 975 [failure to report promptly receipt of money or property]; 94 A.L.R.3d 846 [commingling of funds]; 7 Am.Jur.2d (2007 ed.), Attorneys at Law §63.)

Nearly all the following cases, most of them decided under Rules of Professional Conduct, former Rule 9, involve more than mere failure to account, and the disciplinary measures were severe:

Smuckler v. State Bar (1934) 2 C.2d 80, 86, 38 P.2d 777 ["culpable negligence" but mitigating circumstances; 21/2 years' suspension].

Seavey v. State Bar (1935) 4 C.2d 73, 47 P.2d 281 [both commingling and failure to account; disbarred].

Tatlow v. State Bar (1936) 5 C.2d 520, 55 P.2d 214 [misappropriation and violation of Rule 9; 3 years' suspension].

Dalzell v. State Bar (1936) 6 C.2d 433, 57 P.2d 1300, *supra*, §490 [both; disbarred].

Bruns v. State Bar (1941) 18 C.2d 667, 672, 117 P.2d 327 [both, also fraud and past bad record; disbarred].

Pearlin v. State Bar (1941) 18 C.2d 682, 117 P.2d 341 [both, and no mitigating circumstances; disbarred].

Narlian v. State Bar (1943) 21 C.2d 876, 136 P.2d 553 [both, long continued in spite of prior disciplinary proceedings; disbarred].

Copren v. State Bar (1944) 25 C.2d 129, 152 P.2d 729 [both; 3 years' suspension].

Griffith v. State Bar (1945) 26 C.2d 273, 277, 158 P.2d 1 [both; 3 years' suspension].

Egan v. State Bar (1956) 46 C.2d 370, 294 P.2d 949 [failure to account for money collected from personal injury defendant, false statements to client about collection, conversion of funds to own use; disbarred].

Resner v. State Bar (1960) 53 C.2d 605, 612, 2 C.R. 461, 349 P.2d 67 [deliberate commingling and misappropriation, failure to open trust account after warnings; disbarred].

Bodisco v. State Bar (1962) 58 C.2d 495, 24 C.R. 835, 374 P.2d 803 [settlement below authorized amount, misrepresentation to clients, clients' names signed on release without authority; but full reparation to clients, mitigating circumstances of personal and family problems, and no previous discipline; recommended disbarment reduced to 2 years' suspension].

Mack v. State Bar (1970) 2 C.3d 440, 445, 85 C.R. 625, 467 P.2d 225 [failure to advise client of receipt of funds; misappropriation; short check to client; prior record of misconduct; 5 years' suspension stayed, 1 year's actual suspension].

Black v. State Bar (1972) 7 C.3d 676, 692, 103 C.R. 288, 499 P.2d 968, 2 Cal. Evidence (4th), Witnesses, §372 [attorney loaned estate funds to other clients without approval of court or personal representative; 6 months' suspension].

Himmel v. State Bar (1973) 9 C.3d 16, 19, 23, 106 C.R. 638, 506 P.2d 1014 [attorney drew out more than was due under alleged agreement and failed to disburse funds on behalf of one client; concealed facts regarding mishandled investment for other clients, making repayment only after complaint was filed with State Bar; 9 months' suspension, 3 years' probation].

Fielding v. State Bar (1973) 9 C.3d 446, 451, 107 C.R. 561, 509 P.2d 193 [attorney invested funds held to pay client's medical bills in business with which he was closely connected without client's consent; 6 months' suspension, 3 years' probation].

Silver v. State Bar (1974) 13 C.3d 134, 117 C.R. 821, 528 P.2d 1157 [attorney, without client's authorization, indorsed settlement draft, deposited it in his overdrawn personal bank account, and procrastinated in paying client; 1 year's suspension, 3 years' probation].

Tomlinson v. State Bar (1975) 13 C.3d 567, 119 C.R. 335, 531 P.2d 1119 [disbarred].

Greenbaum v. State Bar (1976) 15 C.3d 893, 905, 126 C.R. 785, 544 P.2d 921 [3 months' suspension, 4 years' probation].

Gassman v. State Bar (1976) 18 C.3d 125, 132 C.R. 675, 553 P.2d 1147 [settlement proceeds deposited in attorney's general bank account and used for office expenses; 1 year's suspension, 2 years' probation].

Hamilton v. State Bar (1979) 23 C.3d 868, 876, 153 C.R. 602, 591 P.2d 1254 [violation of former Rule 8-101 by using trust account for personal purposes and drawing check without sufficient funds; disbarred].

Jackson v. State Bar (1979) 25 C.3d 398, 403, 158 C.R. 869, 600 P.2d 1326 [repeated failure to account on demand; balance in trust account was often below what was due clients; disbarred].

Alberton v. State Bar (1984) 37 C.3d 1, 15, 16, 206 C.R. 373, 686 P.2d 1177 [violation of former Rule 8-101, misappropriation, failure to act competently; no mitigation and no remorse; 5 years' probation, 1 year's actual suspension].

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3. Technical Violation.

1 Witkin Cal. Proc. Attys § 511

[§ 511] Technical Violation.

It is easy to violate *Rules of Professional Conduct, Rule 4-100* by failure to keep a trust account, by deposit of a check intended for the client in a personal account even though a personal check is immediately sent to the client, by taking property of a client for safekeeping without properly giving a receipt, and in other ways. Often it is a negligent rather than a deliberately wrongful act. (See *supra*, §§492, 493.) In cases of this sort, where there is no intent to misappropriate and neither actual loss nor any other harm to the client, the court, while disapproving the conduct, may impose a mild punishment or dismiss the proceeding.

The theory and practice are stated in *Peck v. State Bar* (1932) 217 C. 47, 51, 17 P.2d 112, as follows: "Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him. However, inherently there is danger in such practice for frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney." The court concluded that petitioner intended to offset money retained against expected fees, and ordered 1 year's suspension. (See *Russill v. State Bar* (1941) 18 C.2d 321, 115 P.2d 464 [proceeding dismissed]; *Clark v. State Bar* (1952) 39 C.2d 161, 168, 246 P.2d 1 [keeping client's money in separate envelope in safe was not violation of former rule, but under circumstances, was gross negligence]; *Browne v. State Bar* (1955) 45 C.2d 165, 169, 287 P.2d 745 [failure to report promptly receipt of money; suspension]; *Dudugjian v. State Bar* (1991) 52 C.3d 1092, 278 C.R. 90, 804 P.2d 715 [honest belief that client gave permission to retain settlement funds was not a defense under former rule].)

In *Black v. State Bar* (1962) 57 C.2d 219, 18 C.R. 518, 368 P.2d 118, there was a technical violation of the commingling rule and a failure to maintain proper office records; but petitioner had no prior record of misconduct, and demonstrated good faith by undertaking a reorganization of his accounting procedures. The board's recommendation of 3 years' suspension was rejected, discipline of public reprimand was ordered, and "[t]his opinion shall serve as such reprimand." (57 C.2d 227.)

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4. Misuse of Trust Account.

1 Witkin Cal. Proc. Attys § 512

[§ 512] Misuse of Trust Account.

An attorney is required to deposit all funds received or held by the attorney for the benefit of clients in one or more trust or client accounts. (*Rules of Professional Conduct, Rule 4-100(A)*, supra, §453.) An account so established is a voluntary trust, and members of a firm are liable as cotrustees for misappropriation by one of them if they negligently fail to exercise reasonable supervision. (*Blackmon v. Hale* (1970) 1 C.3d 548, 559, 83 C.R. 194, 463 P.2d 418, supra, §307.)

Rules of Professional Conduct, Rule 4-100 is violated when there is a wilful or deliberate indiscriminate use, or gross management of the client trust account. (*Hamilton v. State Bar* (1979) 23 C.3d 868, 876, 153 C.R. 602, 591 P.2d 1254 [using client trust account for personal convenience on two occasions was considered wilful violation of former rule; disbarment]; *Jackson v. State Bar* (1979) 25 C.3d 398, 403, 158 C.R. 869, 600 P.2d 1326 [balance in trust account was allowed to fall below amount due client; disbarment].)

Baranowski v. State Bar (1979) 24 C.3d 153, 163, 164, 154 C.R. 752, 593 P.2d 613, discussing former Rule 8-101, left open the question whether advance fee payments, as distinguished from retainer fees, are money "received or held for the benefit of clients" that must be deposited in the attorney's trust account. However, *T & R Foods v. Rose* (1996) 47 C.A.4th Supp. 1, 56 C.R.2d 41, concludes that an advance fee payment remains the property of the client until actually earned by the attorney, and that, under *Rules of Professional Conduct, Rule 4-100*, the payment must remain segregated in a trust account until earned. (47 C.A.4th Supp. 6.)

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C. Representing or Acquiring Adverse Interests.

1. Representing Adverse Interests.

1 Witkin Cal. Proc. Attys § 513

[§ 513] Representing Adverse Interests.

(1) *In General.* Representation of adverse interests may be grounds for disciplinary action. (See 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §55; A.B.A. Model Rules of Professional Conduct, Rule 1.7 [general rule against conflict of interest]; 17 *A.L.R.3d* 835 [what constitutes representation of conflicting interests subjecting attorney to disciplinary action]; on *Family C. 8800*, requiring written consents of adopting and natural parents for representation of both in adoption negotiations or proceedings, see 10 *Summary* (10th), *Parent and Child*, §126.)

The Rules of Professional Conduct cover in great detail the subject of conflicting interests and generally require full written disclosure and informed client consent to avoid prohibited conduct. Rule 3-310 addresses representation of adverse interests in situations where:

(a) The attorney has a present or past relationship with a party or witness in the same matter. (*Rules of Professional Conduct, Rules 3-310(B)(1), 3-310(B)(2)*; supra, §439.)

(b) The attorney has a past or present relationship with a person or entity the attorney knows would be affected substantially by the outcome of the matter. (*Rules of Professional Conduct, Rule 3-310(B)(3)*; supra, §439.)

(c) The attorney has an interest in the subject matter of the representation. (*Rules of Professional Conduct, Rule 3-310(B)(4)*; supra, §439.)

(d) The attorney represents multiple clients. (*Rules of Professional Conduct, Rules 3-310(C), 3-310(D)*; supra, §440.)

(e) The attorney has obtained confidences of a past or present client. (*Rules of Professional Conduct, Rule 3-310(E)*; supra, §441.)

(f) The attorney accepts compensation from someone other than the client. (*Rules of Professional Conduct, Rule 3-310(F)*; supra, §442.)

(2) *Nature and Scope of Prohibitions.* The prohibitions in Rule 3-310 are grounded on the fiduciary relationship,

and usually the client merely seeks to disqualify the attorney from acting. (See *supra*, §104 et seq.) The principles determining adverse interest would seem to be identical, whether the proceeding is to disqualify or discipline the attorney. In *Galbraith v. State Bar* (1933) 218 C. 329, 23 P.2d 291, petitioner represented two defendants in criminal proceedings growing out of an automobile accident. Later, without disclosure or consent, he sued his former clients on behalf of persons injured in the accident. The trial judge refused to allow him to appear in the civil action, and in this disciplinary proceeding he was suspended for 3 months. The court relied on *Wutchumna Water Co. v. Bailey* (1932) 216 C. 564, 15 P.2d 505, *supra*, §132, and said of former Rule 5: "A reasonable construction of this rule suggests that the subsequent representation of another against a former client is forbidden not merely when the attorney *will* be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he *may* be called upon to use such confidential information." (218 C. 332.)

In *Sheffield v. State Bar* (1943) 22 C.2d 627, 140 P.2d 376, petitioner represented B in an action for accounting and breach of contract against C. He was discharged and judgment for B was obtained by other counsel. Later petitioner represented C in an action against his former client B for damages for breach of the same contract. Suspension for 3 months was ordered. (See *Richardson v. State Bar* (1942) 19 C.2d 707, 122 P.2d 889 [flagrant case of representation of conflicting interests and long-continued course of fraud; disbarred]; *Arden v. State Bar* (1959) 52 C.2d 310, 317, 341 P.2d 6 [former Rules 5 and 7 were *not* violated where both parties consented to representation].)

In *Gendron v. State Bar* (1983) 35 C.3d 409, 197 C.R. 590, 673 P.2d 260, an attorney provided public defender services to a county under a contract that contained financial disincentives to declaring conflicts of interest. On several occasions he jointly represented multiple defendants without obtaining written waivers of conflict of interest, and in one case he opposed a defendant's request for separate counsel. He also adopted a policy of declaring conflicts at the latest possible stage and only if it appeared that one defendant would testify against another. *Held*, the attorney's actions violated former Rule 4-101 (now Rule 3-310(E)) and former Rule 5-102(B) (now Rule 3-310(C)) and constituted moral turpitude within the meaning of *B. & P.C. 6106* (*supra*, §480). (35 C.3d 423, 424.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Representing or Acquiring Adverse Interests.

2. Acquiring Adverse Interests.

1 Witkin Cal. Proc. Attys § 514

[§ 514] Acquiring Adverse Interests.

(1) *Former Rule.* Former Rule 4 provided that an attorney could not acquire an interest adverse to a client. (See *Black v. State Bar* (1972) 7 C.3d 676, 683, 103 C.R. 288, 499 P.2d 968, 2 Cal. Evidence (4th), Witnesses, §372 [attorney loaned estate funds to other clients without approval of court or personal representative]; *Silver v. State Bar* (1974) 13 C.3d 134, 139, 117 C.R. 821, 528 P.2d 1157 [violation of former Rule 4 where property purchased by attorney at marshal's sale was subject of dispute between client and client's former spouse]; *Baranowski v. State Bar* (1979) 24 C.3d 153, 162, 154 C.R. 752, 593 P.2d 613 [attorney induced client to make loan to him without explaining other, less dangerous forms of investment].)

In *Ames v. State Bar* (1973) 8 C.3d 910, 920, 106 C.R. 489, 506 P.2d 625, the court held that former Rule 4 was not so impermissibly vague as to offend due process, and that its terms were not so overinclusive as to deny equal protection. Petitioners, two attorneys representing junior encumbrancers against the purchaser of realty, in order to provide their clients additional time to protect their interests against a threatened sale under the first deed of trust, purchased the first note and deed of trust. Their agreement with the clients provided for a \$ 3,000 profit and the right to sell the property if they were not paid. They ultimately purchased the property at a sale under their deed of trust. *Held*, private reproval approved.

(a) The prohibition of former Rule 4 that attorneys "shall not acquire an interest adverse to a client" is absolute and recognizes no exceptions. Civil cases upholding transactions with clients after full disclosure (*supra*, §95) are not controlling in a disciplinary proceeding for violation of the rule. (8 C.3d 915, 916.) The professional rules are designed to protect the public, and neither the client's consent nor the fact that an agreement was fair render former Rule 4 inoperative. (8 C.3d 917.)

(b) The agreement was adverse to their clients' interests. The clients were required to waive claims to surplus proceeds from a sale under the first deed of trust; thus the junior lien was rendered valueless by the sale. Moreover, the first deed of trust conflicted with their clients' interests in the pending civil litigation against the defaulting purchaser of the property. (8 C.3d 918, 919.) Moreover, a client need not be actually injured; the possibility of injury is all that is required. (8 C.3d 920.)

(2) *Current Rule. Rules of Professional Conduct, Rule 3-300* (supra, §§436, 437) provides that an attorney must not enter into a business transaction with a client or acquire an ownership, security, or pecuniary interest adverse to the client unless (a) the transaction or acquisition is fair and reasonable to the client and its terms are fully disclosed to the client in writing; (b) the attorney advises the client in writing that the client may consult an independent attorney and allows the client to do so; and (c) the client subsequently gives written consent to the terms of the transaction or acquisition. (See *Ritter v. State Bar* (1985) 40 C.3d 595, 602, 604, 221 C.R. 134, 709 P.2d 1303 [modified retainer agreement involving loan by clients to attorney; although transaction was fair and reasonable, attorney's failure to advise clients to seek independent counsel violated former Rule 5-101; 2 years' probation, 60 days' actual suspension]; *Hawk v. State Bar* (1988) 45 C.3d 589, 598, 247 C.R. 599, 754 P.2d 1096 [securing payment of fees by acquiring note secured by deed of trust in client's property constitutes interest adverse to client; 4 years' probation, 6 months' actual suspension]; *Connor v. State Bar* (1990) 50 C.3d 1047, 1057, 1058, 269 C.R. 742, 791 P.2d 312 [former Rule 5-101 was violated where, although attorney intended to aid client, it was reasonably foreseeable that attorney's acquisition of property interest might become adverse to client]; A.B.A. Model Rules of Professional Conduct, Rule 1.7 [general rule against conflict of interest].)

In *Fletcher v. Davis* (2004) 33 C.4th 61, 14 C.R.3d 58, 90 P.3d 1216, attorney F filed a conversion action against G on behalf of M. In lieu of a cash retainer, M's president, S, orally agreed to grant F a lien on any judgment or settlement. Prior to filing the complaint, F sent S a memorandum of his understanding of the terms of the oral retainer agreement. Although S said he would sign a written retainer agreement, he never did. The conversion action against G resulted in a mistrial. S discharged F and, with new counsel, prevailed in a second conversion action against G. After the trial court approved disbursement of the conversion judgment to other interested parties, F filed an action alleging that defendants G, M, and others were on notice of his lien at the time they stipulated to the disbursements. The trial court sustained defendants' demurrers, and dismissed the action on the grounds that F did not and could not plead facts showing the perfection of a lien on the M conversion judgment. The Court of Appeal reversed, holding that F's lien did not have to be in writing to be valid, and that F did not have to obtain a judgment as to the existence and amount of the lien before asserting a lien. *Held*, Court of Appeal reversed.

(a) An attorney's charging lien is a security interest in the proceeds of litigation. Thus, the question here is whether F's lien was adverse to M's interests. Under the controlling standards set forth in *Ames v. State Bar*, supra, an attorney must avoid circumstances where it is reasonably foreseeable that an acquisition may be adverse to the client's interests. Here, it was reasonably foreseeable that the charging lien could become detrimental to M. "Although a charging lien does not grant an attorney the power to summarily extinguish the client's interest in any recovery, a charging lien could significantly *impair* the client's interest by delaying payment of the recovery or settlement proceeds" until lien disputes are resolved. Therefore, a charging lien is an adverse interest within the meaning of Rule 3-300, and requires the client's informed written consent. (33 C.4th 67, 68.)

(b) Characterizing the charging lien here as adverse within the meaning of *Rules of Professional Conduct, Rule 3-300* does not compromise the public policy favoring attorney liens. The rule does not bar attorneys from obtaining liens on future recoveries, but merely requires the attorney to "explain the transaction fully, to offer fair and reasonable terms, to provide a copy of the agreement, to give the client an opportunity to seek independent legal advice, and to secure the client's written consent." This amounts to little more than presently required for most fee agreements. (33 C.4th 71.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Current Rule. See Shopoff & Cavallo LLP v. Hyon* (2008) 167 C.A.4th 1489, 1524, 85 C.R.3d 268 [charging liens that contravened *Rules of Professional Conduct, Rule 3-300* by failing to provide required disclosures did not invalidate otherwise proper contingent fee agreements].



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1. Early View Prohibiting Advertising.

1 Witkin Cal. Proc. Attys § 515

[§ 515] Early View Prohibiting Advertising.

Advertising by an attorney is a means of soliciting law business, and was formerly a violation of the ethical directives of the A.B.A. Code and similar state rules governing professional conduct. (See *Barton v. State Bar* (1930) 209 C. 677, 682, 289 P. 818 ["It is perhaps by virtue of the fact that the profession of the law has come to be considered by some attorneys solely as 'a highly competitive business' that it became necessary to give legal sanction to a rule which had theretofore been enforced merely by public opinion"]; *Mayer v. State Bar* (1934) 2 C.2d 71, 74, 39 P.2d 206 [the law "is a profession and not a trade. ... It is not a business, using bargain-counter methods to reap large profits for those who conduct it"]; *Libarian v. State Bar* (1943) 21 C.2d 862, 865, 136 P.2d 321.) (For discussions of the earlier restrictions and their historical background, see 24 *Hastings L. J.* 696; 22 *U.C.L.A. L. Rev.* 483.)

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2. First Amendment Right To Advertise.

1 Witkin Cal. Proc. Attys § 516

[§ 516] First Amendment Right To Advertise.

In *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, the Arizona disciplinary rule against advertising, taken from former A.B.A. Rule DR 2-101(B), was held invalid as a violation of First Amendment rights. The court examined and rejected the conventional justifications for the restrictions: adverse effect on professionalism, inherently misleading nature of attorney advertising, adverse effect on the administration of justice, undesirable economic effects, adverse effect on quality of service, and difficulties of enforcement. (For detailed coverage of opinion, see 7 *Summary* (10th), *Constitutional Law*, §329.)

The holding does not preclude (a) restraints on false, deceptive, or misleading advertising, such as claims about quality of services not susceptible to measurement or verification; (b) restraints on in-person solicitation; or (c) reasonable restrictions on the time, place and manner of advertising. And the special problems of advertising on the electronic broadcast media warrant special consideration. (97 S.Ct. 2709, 53 L.Ed.2d 836.) (See *Rules of Professional Conduct*, Rule 1-400, supra, §416 et seq.; A.B.A. Model Rules of Professional Conduct, Rule 7.2 [advertising]); 30 *A.L.R.4th* 742 [advertising as ground for discipline].)

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 3. Permissible and Impermissible Restrictions.

1 Witkin Cal. Proc. Attys § 517

[§ 517] Permissible and Impermissible Restrictions.

In re R.M.J. (1982) 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64, struck down three advertising regulations adopted by the Missouri Supreme Court.

(a) The first specified the wording to be used in listing areas of practice; the appellant's advertisements deviated from the specified wording, but were not shown to be misleading. (*102 S.Ct. 938, 71 L.Ed.2d 75.*)

(b) The second prohibited an attorney from identifying the jurisdictions in which the attorney is licensed to practice; the appellant's advertisements included the information that he was licensed in Missouri and Illinois and stated in large capital letters that he was admitted to practice before the United States Supreme Court. The information concerning state licenses was not misleading and was relevant information in light of the region's geography, and the information concerning the Supreme Court, while in bad taste, had not been shown to be misleading. (*102 S.Ct. 938, 71 L.Ed.2d 75.*)

(c) The third permitted mailing of professional announcement cards only to "lawyers, clients, former clients, personal friends, and relatives"; the appellant was charged with mailing announcement cards to others. While mailings might be difficult to supervise, the record did not show that inability to supervise was the reason for the state restriction on the potential audience, and the state had failed to show that absolute prohibition was the only solution to the problem. (*102 S.Ct. 939, 71 L.Ed.2d 76.*)

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio (1985) 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652*, the Court struck down two Ohio advertising regulations but upheld a third.

(a) An attorney cannot be disciplined for soliciting or accepting legal employment through printed advertisements containing information or advice regarding a specific legal problem, where the information is truthful and nondeceptive. (*105 S.Ct. 2276, 2280, 85 L.Ed.2d 665, 670.*)

(b) A ban on illustrations in advertising by attorneys cannot stand, and an attorney may not be disciplined for use of an accurate and nondeceptive illustration in an advertisement. (*105 S.Ct. 2280, 2281, 85 L.Ed.2d 670, 671.*)

(c) A requirement that an advertisement mentioning contingent-fee rates must disclose that the client might be liable for litigation costs is permissible, and an attorney may be disciplined for failure to meet the disclosure requirements even though the advertisement is otherwise not deceptive. (105 S.Ct. 2281, 2283, 85 L.Ed.2d 671, 673.)

Shapero v. Kentucky Bar Assn. (1988) 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475, followed *Zauderer*, in invalidating a Kentucky Supreme Court rule that prohibited mailing or delivering written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." Petitioner, a member of the bar, proposed to send a letter to potential clients who had foreclosure suits filed against them, advising that they could have foreclosure postponed, and inviting them to call his office for free information.

(a) "Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public. ... [I]f petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query 'Is your home being foreclosed on?,' rather than his observation to the targeted individuals that 'It has come to my attention that your home is being foreclosed on.' " (108 S.Ct. 1921, 100 L.Ed.2d 484.)

(b) "The court below disapproved petitioner's proposed letter solely because it targeted only persons who were 'known to need [the] legal services' offered in his letter, ... rather than the broader group of persons 'so situated that they might in general find such services useful.' ... But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." (108 S.Ct. 1921, 100 L.Ed.2d 484.)

(c) "Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. ... But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. ... The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, ... giving the State ample opportunity to supervise mailings and penalize actual abuses." (108 S.Ct. 1923, 100 L.Ed.2d 486.)

(d) "[S]o long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. '[T]he States may not place an absolute prohibition on certain types of potentially misleading information ... if the information may also be presented in a way that is not deceptive,' unless the State 'assert[s] a substantial interest' that such a restriction would directly advance. ... Nor may a State impose a more particularized restriction without a similar showing." (108 S.Ct. 1924, 100 L.Ed.2d 488.) (See 22 *Loyola L.A. L. Rev.* 887.)

By contrast, in *Florida Bar v. Went For It* (1995) 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541, the Court, in a 5-4 decision, upheld a 30-day moratorium on direct-mail solicitations of accident victims and their families.

(a) The Florida Bar has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by attorneys. Ample statistical and anecdotal data supports the Bar's contentions that the public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly on the legal profession. (115 S.Ct. 2377, 132 L.Ed.2d 551.)

(b) Evidence adduced by the Bar is sufficient to show that the rule targets a concrete, nonspeculative harm. This case differs from *Shapero* in that *Shapero* treated privacy casually, dealt with a broad ban on *all* direct-mail solicitations, and found that the state had not assembled any evidence to demonstrate actual harm caused by the mail. (115 S.Ct. 2378, 132 L.Ed.2d 553.) Here, the Bar is concerned not with citizens' offense in the abstract, but with the demonstrable detrimental effects the offense has on the legal profession. The harm targeted by the Florida Bar cannot be

eliminated by throwing the letters away. The harm is a function of simple receipt of the targeted solicitation within days of accidents. (115 S.Ct. 2378, 132 L.Ed.2d 554.)

(c) The rule is narrow both in scope and duration. The Florida Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. It is reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to citizens, distress that has caused many of them to lose respect for the legal profession. (115 S.Ct. 2380, 132 L.Ed.2d 555.)

The dissent argued that attorneys who communicate their willingness to assist potential clients are engaged in protected speech as established by *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, supra, §516, and that the majority's opinion undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents at the expense of victims most in need of legal assistance. (115 S.Ct. 2383, 132 L.Ed.2d 556.)

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4. False and Misleading Communications.

1 Witkin Cal. Proc. Attys § 518

[§ 518] False and Misleading Communications.

(1) *Rules of Professional Conduct.* Attorney advertising in California is governed by *California Rules of Professional Conduct, Rule 1-400* (supra, §416 et seq.). Rule 1-400 defines both "communication" and "solicitation," contains a number of provisions on specific, prohibited communications, and requires the retention of communications. (On State Bar standards as to communications presumed to violate Rule 1-400, see supra, §418; on statutory regulation of advertising, see *B. & P.C. 6157* et seq., supra, §37 et seq.)

California Rule of Professional Conduct, Rule 1-400(D) generally prohibits a communication or solicitation that is untrue, false, deceptive, or misleading, or is intrusive or coercive. (See supra, §417.)

In *Leoni v. State Bar* (1985) 39 C.3d 609, 614, 628, 217 C.R. 423, 704 P.2d 183, petitioners, bankruptcy attorneys, made mass mailings to defendants in small claims or municipal court actions and to owners of real property that was in foreclosure. The mailings included letters concerning cases pending against the recipients and informational pamphlets prepared by one petitioner. Disciplinary proceedings resulted in a finding of violations of former Rule 2-101(A), and a recommendation of 30 days' suspension. *Held*, the rule was constitutional on its face and as applied.

(a) *Commercial speech.* Petitioners' letter campaign constitutes commercial speech. While the state cannot prohibit this speech, it may regulate it and prohibit it to the extent that the advertising is misleading. (39 C.3d 624, 625.)

(b) *Permissible regulations.* Rule 2-101(A) is a permissible regulation of misleading advertising. Its scope is virtually identical to the prohibition of misleading advertising in *B. & P.C. 17200* and *17500* (see 13 *Summary* (10th), *Equity*, §105 et seq.), and like those statutes it permits an attorney to be disciplined only for wilful breach. However, specific intent to deceive is not required. (39 C.3d 626.)

(c) *Violations.* Petitioners' letters violated former Rule 2-101(A) in three respects. (1) By stating that recipients need \$ 60 to apply for debt relief, but failing to state that petitioners would charge 10 times that amount in attorneys' fees, the letters omitted a fact necessary to make the material not misleading, a violation of Rule 2-101(A)(3). (2) By failing to clearly identify the letters as a communication for employment, petitioners violated Rule 2-101(A)(4). A statement, such as "This is an advertisement," would easily satisfy the requirement of a clear indication. (3) The letters

mailed to defendants against whom cases were pending were bound to cause panic and fear in the lay recipients and therefore violated Rule 2-101(A)(6). (39 C.3d 627.)

(d) *Misleading but not untrue statement.* Although the letters contained misleading statements, none of them contained false or untrue statements; hence, the evidence does not show a violation of Rule 2-101(A)(1). (39 C.3d 627.)

(e) *Future mass advertising.* Rule 2-101 "cannot constitutionally be invoked to totally prohibit all future mass advertising which, due to disclaimers or clarifying language, is not false or misleading. We hope that the State Bar will assist its members in acting in accordance with the Rule rather than, as in the instant case, only initiating disciplinary proceedings." (39 C.3d 628.)

In re Morse (1995) 11 C.4th 184, 44 C.R.2d 620, 900 P.2d 1170, involved an attorney who mailed 4 million solicitations over a 4-year period offering assistance in filing homestead declarations. The solicitation was included in a package of documents sent to prospective customers. A "homestead information sheet" included in the packet failed to explain that state law establishes an automatic homestead exemption under C.C.P. 704.710 et seq., and misleadingly suggested that recording a homestead declaration necessarily prevents the forced sale of a home. At the time of the mailings, B. & P.C. 17537.6, governing the offering or performance of homestead filing services, required important disclosures, and contained a number of representations considered untrue or misleading. Petitioner's mailings were unlawful under B. & P.C. 17537.6, but petitioner argued that B. & P.C. 17537.6 did not apply to him and tenaciously rebuffed all efforts by the State Bar and the Attorney General to halt the improper solicitations. Eventually, petitioner was enjoined from violating the statute and ordered to pay penalties and restitution. (On holding that advertisements were misleading, see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §240.)

While petitioner's appeals were pending, a state bar disciplinary proceeding found that petitioner had violated B. & P.C. 6068(a) (requiring an attorney to support the Constitution and federal and state laws) and had wilfully violated *Rules of Professional Conduct*, Rule 1-400(D)(2). The review department adopted the hearing judge's recommendations of a 1-year stayed suspension and 3 years' probation, but increased actual suspension from 15 to 60 days. Petitioner appealed, and the court on its own motion granted review on whether the level of discipline should be increased. *Held*, actual suspension increased to 3 years.

(a) *First Amendment.* For commercial speech to receive First Amendment protection it must concern lawful activity and not be misleading. *Rules of Professional Conduct*, Rule 1-400(D)(2) requires that advertising matter not be presented or arranged in a manner or format that is false, deceptive, or tends to confuse, deceive, or mislead. Similarly, B. & P.C. 17537.6 requires that statements not be untrue or misleading. Petitioner's mailings were misleading in many respects: they led recipients to believe the material came from the recipient's lender, failed to explain the state's automatic homestead exemption, and suggested that recording a homestead declaration would prevent the forced sale of a home. Thus, the material was unprotected, and the provisions of B. & P.C. 17537.6 did not violate petitioner's right to free commercial speech. (11 C.4th 199.)

(b) *Adequacy of recommended discipline.* The 60-day actual suspension recommended by the review department was insufficient. The primary purpose of disciplinary proceedings and sanctions are the protection of the public, the courts, and the legal profession, and the maintenance of high professional standards. (11 C.4th 205.) The extent of petitioner's wrongdoing and his truculence warrant an actual suspension of 3 years, with a possible reduction to 2 years, to demonstrate the seriousness of the misconduct. (11 C.4th 210.)

(2) *Advertising by Electronic Media.* B. & P.C. 6158 et seq. (supra, §§40, 41) govern advertising by electronic media. An attorney's violation of those provisions may be a cause for discipline. The State Bar may commence an investigation based on a complaint filed by any person claiming a violation. (B. & P.C. 6158.7.)

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 5. Personal Publicity.
 a. In General.

1 Witkin Cal. Proc. Attys § 519

[§ 519] In General.

(1) *Former Rules.* The former A.B.A. Code and former California Rules of Professional Conduct attempted to deal with the ethical problem of indirect attorney advertising through writing, public appearances, and publicity in newspapers, radio, and television. (See, e.g., former A.B.A. Code, DR 2-101 [dealing with public communication, including, but not limited to, television, radio, motion pictures, newspapers, magazines, and books]; California Rules of Professional Conduct, former Rule 2-101 ["A member of the State Bar shall not solicit professional employment by advertisement or otherwise"]; California Rules of Professional Conduct, former Rule 2-105.) (See *Millsberg v. State Bar* (1971) 6 C.3d 65, 75, 98 C.R. 223, 490 P.2d 543 [finding of wilful breach of former Rule; public reproof by opinion where apartment and rental owners' association attorney received legal business after being prominently mentioned in association's magazine as association's attorney and specialist in real estate problems]; *Belli v. State Bar* (1974) 10 C.3d 824, 112 C.R. 527, 519 P.2d 575, *infra*, §520; *Bushman v. State Bar* (1974) 11 C.3d 558, 113 C.R. 904, 522 P.2d 312 [suspension for 1 year based in part on attorney's practice of issuing press releases regarding his many organizational and public activities].)

(2) *Current California Rules of Professional Conduct.* Except as to direct communications to a potential client, *California Rules of Professional Conduct, Rule 1-400* regulates the *content* of the information communicated rather than the *means* of communication. (See *supra*, §416 *et seq.*; on making gifts to media, see *Rules of Professional Conduct, Rule 1-320(C)*, *supra*, §414; and see 4 A.L.R.4th 306 [lawyer publicity as breach of legal ethics].)

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5. Personal Publicity.

b. Using Media for Self-Laudatory Statements.

1 Witkin Cal. Proc. Attys § 520

[§ 520] Using Media for Self-Laudatory Statements.

The former A.B.A. Code condemned the preparation or use, directly or indirectly, of "any form of public communication that contains professional self-laudatory statements calculated to attract lay clients." (Former DR 2-101(A).) Former California Rules of Professional Conduct, Rule 2-101(A) contained a similar prohibition.

Belli v. State Bar (1974) 10 C.3d 824, 112 C.R. 527, 519 P.2d 575, attempted to draw the line between constitutionally protected speech and unethical advertising. Petitioner's agent operated a lecture bureau for celebrities, engaging appearances for fees and taking a percentage as his compensation. Disciplinary proceedings, mainly based on the agent's promotional activities, resulted in a recommendation of a 1-year suspension, reduced by the court to a 30-day suspension.

(a) *Free speech guarantee and test.* When the Bar seeks to discipline an attorney for a communication incident to protected speech, it must show not only that the attorney intended by it to generate business for the attorney's law practice, but also that "the communication or a part thereof was *principally directed* toward this end." (10 C.3d 833.)

(b) *Activities not subject to discipline.* Under this test, three of the grounds for the board's recommendation were untenable:

(1) The public distribution by the agent of a brochure with pictures and biographical sketches of his lecturers, including petitioner. The brochure, covering more than 100 individuals and intended for a narrow group of persons who hire lecturers, was not intended to promote law business; and petitioner's discussion of legal and nonlegal topics at the lectures was constitutionally protected. (10 C.3d 831, 832, 833.)

(2) The efforts of the agent to obtain radio and television appearances for petitioner, e.g., talk-show engagements, during his lecture travels. Although the rule expressly prohibits the use of radio and television to advertise as a means of soliciting employment, attorneys cannot be wholly excluded from the media; and petitioner's behavior was not shown to constitute a solicitation of law business. (10 C.3d 835.)

(3) The display of posters and flyers publicizing the Belli Seminars. There was no showing that these meetings for discussion of law problems and practice were used to generate law business. (10 C.3d 836.)

(c) *Activities subject to discipline.* The following were grounds for disciplinary action:

(1) *Letters* sent by the agent to the press, announcing the 20th anniversary of the Belli Seminars. These described petitioner as a "brilliant attorney" and the "King of Torts"; and they enumerated a list of personalities, including clients, who were expected to attend and pay tribute to him. The language appeared to be primarily directed at soliciting legal business, by suggesting that a client of Belli will be so satisfied that he will attend such a celebration in his honor. "An attorney, in our opinion, cannot advertise that he has performed his services so well that his clients consequently praise him." (10 C.3d 838.)

(2) *Advertisements* promoting Glenfiddich Scotch whiskey. These included the statement that petitioner was "the famous trial lawyer who first employed 'modern demonstrative evidence' in the courtroom," and went on with further praise. (10 C.3d 839.) "[H]e let an advertisement be printed which was unrelated to his lecture and seminar activities and which explicitly trumpeted his talents and accomplishments as an attorney." This amounted to wilful solicitation of professional employment. (10 C.3d 841.)

One justice dissented, observing that petitioner's "flamboyant life style has no doubt offended many a lawyer and judge," but that the record failed to show wilful solicitation of professional employment, and that the majority opinion "casts grave doubt on the propriety of *any* commercial or testimonial use of a lawyer's name, absent clear constitutional protection." (10 C.3d 842.)

In *Jacoby v. State Bar* (1977) 19 C.3d 359, 138 C.R. 77, 562 P.2d 1326, petitioners opened a law office called the "Legal Clinic of Jacoby and Meyers" to provide low cost legal services to people unable to meet indigency standards of legal aid programs but not affluent enough to retain most law firms. They participated in interviews with news reporters, and articles appeared in newspapers and magazines describing the operation. The State Bar, relying on the *Belli* case, brought disciplinary proceedings on the theory that petitioners had engaged in solicitation of clients. *Held*, the conduct was not subject to discipline. Petitioners have a First Amendment right to express their views on these issues in the media, and the public has a First Amendment right to hear their views. "That petitioners may also have suspected the resulting publicity could attract clients does not strip their communication of First Amendment protection." (19 C.3d 373.) (For full discussion of the opinion, see 7 *Summary* (10th), *Constitutional Law*, §330; on right to advertise under *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, see *supra*, §516.)

Under State Bar standards, promulgated pursuant to *Rules of Professional Conduct, Rule 1-400(E)*, a self-laudatory communication is presumed to violate Rule 1-400 unless the communication contains an express disclaimer that the communication does not constitute a guarantee, warranty, or prediction regarding the outcome of a legal matter. (See *supra*, §418.)

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5. Personal Publicity.
c. Publicizing Litigation.

1 Witkin Cal. Proc. Attys § 521

[§ 521] Publicizing Litigation.

(1) *A.B.A. Rules.* The A.B.A. Model Rules of Professional Conduct, Rule 3.6 limits out-of-court statements, with the express goal of striking a balance between protecting the right to a fair trial and safeguarding the right of free expression. (Comment to A.B.A. Model Rules of Professional Conduct, Rule 3.6.)

(2) *California Rules. Rules of Professional Conduct, Rule 5-120*, modeled after A.B.A. Model Rule 3.6, and subject to specified exceptions, generally prohibits an attorney who is presently participating or who has previously participated in an investigation or litigation of a matter from making an extrajudicial statement likely to be disseminated by public communication if the statement is substantially likely of materially prejudicing a related adjudicative proceeding. (See *supra*, §460.) The rule applies to statements made by or on behalf of the attorney, and equally applies to prosecutors and criminal defense counsel. (Discussion to *Rules of Professional Conduct, Rule 5-120*.)

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D. Advertising and Communications.

6. Permissible Listings and Announcements.

1 Witkin Cal. Proc. Attys § 522

[§ 522] Permissible Listings and Announcements.

(1) *In General.* The use of professional cards and the publication of names and brief biographical data in law lists and directories has always been proper. The A.B.A. Model Rules of Professional Conduct, Rule 7.5 contains detailed provisions for the use of firm names and letterheads. *California Rules of Professional Conduct, Rule 1-400* (supra, §416 et seq.) does not contain specific provisions on listings as such. (See *7 Am.Jur.2d* (2007 ed.), *Attorneys at Law* §77; *53 A.L.R.3d* 1261 [announcement of changed address or association]; on the constitutionality of limiting mailings of professional announcement cards to "lawyers, clients, former clients, personal friends, and relatives," see *In re R.M.J.* (1982) 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64, supra, §517.)

(2) *Specialty Identification.* California Rules of Professional Conduct do not prohibit a statement that an attorney is a "certified specialist." However, under *Rules of Professional Conduct, Rule 1-400*, a communication may not state that an attorney is a "certified specialist" unless the attorney holds a current certificate as a specialist and the communication states the complete name of the entity that granted the certification. (*California Rules of Professional Conduct, Rule 1-400(D)(6)*; see *Peel v. Attorney Registration & Disciplinary Com. of Illinois* (1990) 496 U.S. 91, 110 S.Ct. 2281, 2293, 110 L.Ed.2d 83, 101 [attorney's truthful statement on letterhead that he was certified as trial specialist by National Board of Trial Advocacy, a private organization, was protected by First Amendment].)

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E. Solicitation and Ambulance Chasing.

1. Personal Solicitation.

a. In General.

1 Witkin Cal. Proc. Attys § 523

[§ 523] In General.

(1) *Rules of Professional Conduct. Rules of Professional Conduct, Rule 1-400(C)* (supra, §417) prohibits solicitation of prospective clients with whom the attorney or law firm has no family or prior professional relationship, unless the solicitation is constitutionally protected. (See A.B.A. Model Rules of Professional Conduct, Rule 7.3 [direct contact with prospective clients]; 5 *A.L.R.4th* 866 [solicitation of business by or for attorney]; 16 *Santa Clara L. Rev.* 215 [solicitation in class actions]; 11 *Santa Clara Lawyer* 427 [proposing various methods for curbing solicitation in personal injury litigation]; on solicitation of civil liberties cases, see *infra*, §525.)

(2) *Decisions.* Most of the cases deal with some form of "ambulance chasing" (*infra*, §527), but there are a few illustrations of improper personal solicitation, usually punished by a brief period of suspension. (See *Fish v. State Bar* (1931) 214 C. 215, 221, 4 *P.2d* 937 [solicitation of personal injury case]; *Recht v. State Bar* (1933) 218 C. 352, 23 *P.2d* 273 [solicitation coupled with representation of adverse interests]; *Sawyer v. State Bar* (1934) 220 C. 702, 711, 32 *P.2d* 369 [solicitation of stockholders by personally directed "research bureau"]; *Ewell v. State Bar* (1934) 2 *C.2d* 209, 215, 40 *P.2d* 264 [solicitation of prisoner in county jail]; *Utz v. State Bar* (1942) 21 *C.2d* 100, 105, 130 *P.2d* 377; *Friday v. State Bar* (1943) 23 *C.2d* 501, 504, 144 *P.2d* 564 [solicitation of employment from creditor of decedent's estate]; *Mitton v. State Bar* (1958) 49 *C.2d* 686, 321 *P.2d* 13 [solicitation of personal injury case, after learning of accident from police report; 3 months' suspension]; *Younger v. State Bar* (1974) 12 *C.3d* 274, 287, 113 *C.R.* 829, 522 *P.2d* 5 [personal solicitation; 6 months' suspension]; *Kelson v. State Bar* (1976) 17 *C.3d* 1, 130 *C.R.* 29, 549 *P.2d* 861; *Ohralik v. Ohio State Bar Assn.* (1978) 436 *U.S.* 447, 98 *S.Ct.* 1912, 56 *L.Ed.2d* 444, *infra*, §524.)

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1. Personal Solicitation.

b. Constitutionality of Restrictions.

1 *Witkin Cal. Proc. Attys* § 524

[§ 524] Constitutionality of Restrictions.

In *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444, an attorney learned of an automobile accident involving two young victims. He solicited one while she was in the hospital and the other on the day she came home, obtaining from each agreements for representation on a one-third contingent fee. The Ohio Board of Commissioners on Grievance and Discipline found his conduct in violation of disciplinary rules. The Ohio Supreme Court adopted the findings and imposed the penalty of indefinite suspension. *Held*, affirmed.

(a) *Commercial and noncommercial speech distinguished.* *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, *supra*, §516, does not control this case: "We have not discarded the 'common sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. ... To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (98 S.Ct. 1918, 56 L.Ed.2d 453.)

(b) *Validity of restriction on solicitation.* In-person solicitation of remunerative employment is a business transaction in which speech is an essential but subordinate component; hence, the level of appropriate judicial scrutiny is lowered. (98 S.Ct. 1919, 56 L.Ed.2d 454.) The disciplinary rules are an appropriate regulation. As with advertising, the ban on solicitation originated as a rule of professional etiquette, but today other interests are served by it: The substantive evils are said to be "stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." (98 S.Ct. 1921, 56 L.Ed.2d 457.) Clearly the state has a legitimate and compelling interest in preventing those aspects that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct. (98 S.Ct. 1922, 56 L.Ed.2d 457.) However, appellant's insistence that proof of actual overreaching or injury to the solicited client be shown misconceives the nature of the state's interest. The rules "are prophylactic measures whose objective is the prevention of harm." (98 S.Ct. 1923, 56 L.Ed.2d 459.) The efficacy of the state's effort would be

substantially diminished if it were required to prove actual injury. (98 S.Ct. 1924, 56 L.Ed.2d 460.)

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1. Personal Solicitation.

c. Distinction: Free Services in Civil Liberties Case.

1 Witkin Cal. Proc. Attys § 525

[§ 525] Distinction: Free Services in Civil Liberties Case.

In re Primus (1978) 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417, invokes the First Amendment to distinguish *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444, supra, §524. P, a South Carolina attorney, was associated with others in a private law firm, and was also associated with the American Civil Liberties Union (A.C.L.U.). As a consultant to the Council on Human Relations, a nonprofit organization, P addressed a meeting of pregnant women who were threatened with sterilization as a condition to receipt of medical assistance under the Medicaid program, and advised them of their legal rights. Later P wrote a letter to one of the women offering free legal representation by the A.C.L.U. if they wished to sue the doctor who had performed the operations. The South Carolina Board of Commissioners on Grievances and Discipline found this conduct to be solicitation in violation of former disciplinary rules, and the state Supreme Court upheld the finding and penalty of a reprimand. *Held*, reversed.

(a) *Nature of the issue and distinctions.* *Ohralik* upholds the prohibition of in-person solicitation for pecuniary gain. P did not engage in commercial solicitation, but made an offer of free legal assistance in connection with an allegedly unconstitutional invasion of a right; and her actions were taken to express personal political beliefs and to advance the civil liberties objectives of the A.C.L.U. The issue is whether these differences materially affect the scope of state regulation. (98 S.Ct. 1899, 1900, 56 L.Ed.2d 428.)

(b) *Right of collective activity.* *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, infra, §534, and its progeny establish the principle that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the *First Amendment*. (98 S.Ct. 1901, 56 L.Ed.2d 430.) Hence, " 'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.' " (98 S.Ct. 1902, 56 L.Ed.2d 431.)

(c) *State's theories are unacceptable.* The state has not drawn a meaningful distinction between the N.A.A.C.P. and the A.C.L.U. (1) Both engage in educational and lobbying activities, and devote funds and energies to an extensive program of assisting litigation. (2) For both, litigation is not a technique of resolving private differences but a form of political expression and association. (3) Any financial benefit from the litigation involved in this case would be to the organization, not to P as an attorney. (98 S.Ct. 1902, 1903, 56 L.Ed.2d 431, 432.)

(d) *Strict scrutiny test applies.* The A.C.L.U. engages in litigation as a vehicle for effective political expression and association; and the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. (98 S.Ct. 1904, 56 L.Ed.2d 433.) Hence, P's letter comes within the First Amendment protection of associational freedoms, and the state's action in punishing must withstand the exacting scrutiny applicable to limitations on First Amendment rights. (98 S.Ct. 1905, 56 L.Ed.2d 434.) The broad disciplinary rules permit punishment for mere solicitation unaccompanied by proof of any of the substantive evils sought to be prevented. Where political expression or association is at issue, this degree of imprecision, permissible in commercial affairs, cannot be applied to P's activity on behalf of the A.C.L.U.; i.e., she may not be disciplined unless her activity in fact involved the type of misconduct at which the prohibition was directed. No such showing was made here. (98 S.Ct. 1906, 1907, 56 L.Ed.2d 436, 437.)

(e) *Conclusion.* "At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply 'propose[s] a commercial transaction.' ... In the context of political expression and association, however, a State must regulate with significantly greater precision." (98 S.Ct. 1908, 56 L.Ed.2d 438.) One justice dissented. (See 92 Harv. L. Rev. 185; on *Rules of Professional Conduct, Rule 1-400*, based in part on *Primus*, see supra, §416 et seq.)

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1. Personal Solicitation.

d. Distinction: Discovery of Evidence.

1 Witkin Cal. Proc. Attys § 526

[§ 526] Distinction: Discovery of Evidence.

It is entirely proper in multiple-claimant accidents for an attorney representing one victim to call on others in the course of investigation and development of evidence. (*Ashe v. State Bar* (1969) 71 C.2d 123, 133, 77 C.R. 233, 453 P.2d 737.)

In *Colonial Life & Acc. Ins. Co. v. Superior Court* (1982) 31 C.3d 785, 183 C.R. 810, 647 P.2d 86, plaintiff administrator of a decedent's estate brought an action against Colonial Ins. Co. and its claims adjusters, E and S, seeking general and punitive damages based on defendants' conduct in the settlement of a claim of the decedent under an accident policy. Plaintiff then sought discovery of the names and addresses of all persons whose claims for benefits under Colonial were assigned to S for settlement. The evidence sought (of instances of unfair settlement practices) was clearly relevant on the issue of violation of *Ins.C. 790.03(h)* (see 2 *Summary* (10th), *Insurance*, §252) and on the claim for punitive damages. (31 C.3d 790, 791, 792.) However, Colonial contended that the trial judge should prohibit plaintiff's counsel from seeking employment from persons whose claims were handled by S. *Held*, no such order was required.

(a) It was proper for plaintiff's attorney to contact other Colonial claimants for the purpose of developing evidence (31 C.3d 794, citing *Ashe* and the text), and the judge's protective order barring the attorney from "making any use thereof except for preparation for trial and trial in this action" was a sufficient bar to direct solicitation of clients. (31 C.3d 794.)

(b) To the extent that plaintiff's attorney, on request, provides information to other claimants that causes them to recognize legal problems, his behavior is proper; and, though accepting employment from unsolicited advice is improper, the Rules of Professional Conduct apply, and there is no reason why the trial judge should independently enforce the rules by a protective order. (31 C.3d 795.)

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2. Solicitation Through Others.

a. In General.

1 *Witkin Cal. Proc. Attys* § 527

[§ 527] In General.

(1) *Types of Solicitation.* "Ambulance chasing" usually means the solicitation of the business of plaintiffs in personal injury cases, either directly by the attorney (see *supra*, §523) or through "runners," "cappers," "steerers," "chasers," or "touters." (See *Hildebrand v. State Bar* (1950) 36 C.2d 504, 523, 225 P.2d 508 [concurring opinion]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §76; 2 *So. Cal. L. Rev.* 167; 3 *Stanf. L. Rev.* 549; 5 *A.L.R.4th* 866 [solicitation of business by or for attorney].)

(2) *Statutes.* An attorney who lends his or her name to be used as an attorney by another person not an attorney is subject to disbarment or suspension. (*B. & P.C. 6105.*) Further, it is unlawful to act, or to solicit another person to act, as a runner or capper. (*B. & P.C. 6152(a)*; see *Estate of Wright* (2001) 90 C.A.4th 228, 235, 108 C.R.2d 572 [heir hunter securing from heir general power of attorney in favor of attorney representing heir hunter amounted to solicitation of business for attorney in violation of *B. & P.C. 6152*].) Moreover, a contract for professional services secured through the services of a runner or capper is void. (*B. & P.C. 6154.*) (On disposition of attorneys' fees recovered under void contract, see *B. & P.C. 6154.*)

A runner or capper who solicits business for an attorney is guilty of a misdemeanor, and if a public employee (e.g., in a jail, hospital or court), may also lose the position. (*B. & P.C. 6151 et seq.*; see *People v. Levy* (1935) 8 C.A.2d Supp. 763, 768, 50 P.2d 509 [city ordinance prohibiting solicitation of tort claim was valid].) The unlawful solicitation provisions of *B. & P.C. 6151 et seq.* also apply to the solicitor of business for an out-of-state attorney. (*B. & P.C. 6151(a).*)

Solicitation by use of runners and cappers is not a constitutionally protected form of speech. (*In re Arnoff* (1978) 22 C.3d 740, 746, 150 C.R. 479, 586 P.2d 960; *Kitsis v. State Bar* (1979) 23 C.3d 857, 863, 153 C.R. 836, 592 P.2d 323.)

(3) *Rules of Professional Conduct.* The Rules of Professional Conduct similarly prohibit compensating a person or entity for the purpose of recommending or securing employment for an attorney or law firm. (*Rules of Professional Conduct, Rule 1-320(B)*, *supra*, §414.)

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2. Solicitation Through Others.

b. Prohibited Acts.

1 *Witkin Cal. Proc. Attys* § 528

[§ 528] Prohibited Acts.

(1) *Use of Unlicensed Solicitors.* Under prevailing rules (*supra*, §527), using unlicensed solicitors and splitting fees with, or making payments to, anyone "bringing in" a case are improper. (See *Fish v. State Bar* (1931) 214 C. 215, 221, 4 P.2d 937; *Roth v. State Bar* (1937) 8 C.2d 656, 67 P.2d 337; *Waterman v. State Bar* (1939) 14 C.2d 224, 226, 93 P.2d 95 [coupled with fraud and bad record, disbarred]; *Utz v. State Bar* (1942) 21 C.2d 100, 107, 130 P.2d 377 [hiring and splitting fees with "law clerk" who operated heir-hunting company, coupled with misconduct toward court; 2 years' suspension]; *McGregor v. State Bar* (1944) 24 C.2d 283, 148 P.2d 865 [allowing collection agent to use name, coupled with misappropriation and prior suspension; disbarred]; *Higgins v. State Bar* (1956) 46 C.2d 241, 293 P.2d 455 [investigators hired to call on personal injury victims and sign contracts engaging petitioner as attorney; 6 months' suspension]; *Honoroff v. State Bar* (1958) 50 C.2d 202, 323 P.2d 1003 [employment of known "capper" or "runner" to solicit railroad accident case; 9 months' suspension]; *Best v. State Bar* (1962) 57 C.2d 633, 21 C.R. 589, 371 P.2d 325 [criminal business obtained through solicitation of bail bondsman]; *Linnick v. State Bar* (1964) 62 C.2d 17, 21, 41 C.R. 1, 396 P.2d 33 [compensated another for referrals of personal injury cases]; *Younger v. State Bar* (1974) 12 C.3d 274, 286, 287, 113 C.R. 829, 522 P.2d 5 [use of cappers; 6 months' suspension]; *Geffen v. State Bar* (1975) 14 C.3d 843, 855, 122 C.R. 865, 537 P.2d 1225; *Urbano v. State Bar* (1977) 19 C.3d 16, 136 C.R. 572, 560 P.2d 1; *Goldman v. State Bar* (1977) 20 C.3d 130, 141 C.R. 447, 570 P.2d 463; *In re Arnoff* (1978) 22 C.3d 740, 150 C.R. 479, 586 P.2d 960; *Kitsis v. State Bar* (1979) 23 C.3d 857, 153 C.R. 836, 592 P.2d 323; 6 A.L.R.3d 1446 [fee splitting]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §73.)

(2) *Claim Adjustment Organizations.* In the early days of the State Bar an attempt was made to circumvent the prohibition as follows: A layman "adjuster" of claims, usually with a staff of runners, solicited the claims of persons injured in accidents, and undertook to "adjust" their claims by settlement or suit, for a contingent fee. The adjuster employed attorneys on a regular salary, a special fee for each suit, or a share of the contingent fee. In a number of cases these activities were denounced as a form of ambulance chasing, and the acts of the lawyers were held to constitute assisting unlicensed persons to practice law. (See *Townsend v. State Bar* (1930) 210 C. 362, 364, 291 P. 837; *Smith v. State Bar* (1930) 211 C. 249, 294 P. 1057; *Shaw v. State Bar* (1931) 212 C. 52, 297 P. 532; *Smallberg v. State Bar* (1931) 212 C. 113, 297 P. 916; *Howe v. State Bar* (1931) 212 C. 222, 298 P. 25; *Irving v. State Bar* (1931) 213 C. 81, 1

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2. Solicitation Through Others.

c. Distinction: Attorney Referral Service.

1 Witkin Cal. Proc. Attys § 529

[§ 529] Distinction: Attorney Referral Service.

An attorney's participation in an attorney referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service is encouraged by the State Bar. Thus, participation is not, of itself, a violation of the Rules of Professional Conduct. (Discussion to *Rules of Professional Conduct, Rule 1-600*, supra, §420.) (On attorney referral services, see supra, §11 et seq.)

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1. Statutory Prohibition and Rules.

1 Witkin Cal. Proc. Attys § 530

[§ 530] Statutory Prohibition and Rules.

(1) *Statutory Prohibition.* An attorney or firm that employs an attorney who has resigned or is suspended or disbarred may not permit the attorney to practice or hold himself out as practicing law. Further, the attorney must be supervised in assigned duties. A wilful violation constitutes a cause for discipline. (*B. & P.C. 6133.*)

(2) *Rules of Professional Conduct.* Under California Rules of Professional Conduct attorneys are prohibited from (a) aiding nonattorneys in the practice of law (*Rules of Professional Conduct, Rule 1-300(A)*, supra, §413); (b) sharing fees with nonattorneys (*Rules of Professional Conduct, Rule 1-320(A)*, supra, §414); and (c) forming a partnership with a nonattorney (*Rules of Professional Conduct, Rule 1-310*, supra, §414). (See A.B.A. Model Rules of Professional Conduct, Rule 5.4 [prohibiting fee sharing and partnership with nonattorney]; 6 *A.L.R.3d 1448* [splitting fees with layperson as ground for disciplinary proceeding].)

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2. Illustrations.

1 *Witkin Cal. Proc. Attys* § 531

[§ 531] Illustrations.

Former Rule 3, similar to Rule 1-300(A), was interpreted and applied in the following cases:

In *Crawford v. State Bar* (1960) 54 C.2d 659, 7 C.R. 746, 355 P.2d 490, petitioner's father, an attorney with a large practice, was disbarred. Subsequently, petitioner and his father maintained an office in their joint names ("Crawford & Crawford" on window, letterhead, etc.), while the father continued to do tax, probate, real estate, and other legal work. The father refrained from court appearances or use of the designation "attorney," but they shared the fees. *Held*, petitioner was publicly reprovved (by this opinion).

(a) *Sharing fees with layman*. Petitioner, relying on *Johnson v. Davidson* (1921) 54 C.A. 251, 257, 202 P. 159, contended that an attorney may employ a person to do office and law clerk work and agree to pay a fixed percentage of receipts from clients. The *Johnson* case, decided before Rule 3, dealt only with the question whether there was a partnership; later opinions and Ethics Committees have repeatedly disapproved of this type of hiring. Hence, "it is apparent that payment of a percentage to Howard as an employee in itself would violate the provision of rule 3 that an attorney shall not directly or indirectly share compensation arising out of or incidental to professional employment. Insofar as *Johnson v. Davidson* is inconsistent with the views expressed herein, it is overruled." (54 C.2d 666.)

(b) *Use of firm name "Crawford & Crawford."* Petitioner contended that this was justified by the practice of retaining the names of deceased partners. "That practice, however, is proper only if local custom permits it and does not mislead. The use of the name here is not in accordance with local custom and it does mislead, even if, as petitioner testified, his father told all clients of his disbarment. There was evidence that clients came to Howard for services that could only be performed because of the arrangement with petitioner. There was also evidence that Howard's business served as a feeder for petitioner's practice. Whether or not there was an actual partnership, and whether or not Howard was actually practicing law, the acts encompassed by the board's findings are proscribed by rule 3." (54 C.2d 666.)

(c) *Aiding and abetting layman's practice*. The father gave "friendly advice" on a mining claim, but a fee was charged by the firm; the father handled a probate matter, including client conferences, and petitioner merely appeared in court; the father handled an escrow involving legal questions, a loan and a dissolution of partnership; and the father performed routine services unrelated to his personal tax practice and the firm charged fees for them. These acts

supported the finding that petitioner aided and abetted his father's practice of law. "Although Howard's services might lawfully have been performed by title companies, insurance companies, brokers, and other laymen, it does not follow that when they are rendered by an attorney, or in his office, they do not involve the practice of law. People call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel. Attorneys must conform to professional standards in whatever capacity they are acting in a particular matter." (54 C.2d 667.)

In *Bluestein v. State Bar* (1974) 13 C.3d 162, 118 C.R. 175, 529 P.2d 599, petitioner was disciplined for violating former Rule 3 by aiding L, with knowledge that L was not licensed in California, to advise a client regarding Spanish law. L represented to petitioner that he was admitted to practice in New York and had practiced in Europe when in fact he was not licensed in any state. Obtaining offices adjacent to petitioner's for a separate purpose, L offered to assist petitioner on matters involving foreign contacts or foreign law. Petitioner added to his letterhead L's name followed by "Of Counsel." Thereafter petitioner was consulted by clients concerning the arrest of a member of their family in Spain on a narcotics charge. Petitioner introduced L to them in his office as an attorney in New York who had practiced in Europe. L then independently performed services in the Spanish matter, for which he was paid directly by the clients. *Held*, petitioner wilfully aided L to practice law.

(a) *Advice on foreign law as unlawful practice.* Giving advice on the law of a foreign country constitutes law practice restricted to active members of the State Bar under B. & P.C. 6125 (supra, §379). The reasons are those stated in the following language from a New York case: "Protection of the members of the lay public of our State, when they seek legal advice ... is the basis of the requirements of licensing of attorneys by the State, and this protection must be deemed to embrace whatever kind of law or legal rights the layman seeks advice on. ... When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter. ... Moreover, the conduct of attorneys admitted here may be regulated by our courts ... and dealt with when they engage in unethical practices. ... A foreign law specialist, on the other hand, is not subject to discipline; he need not be a lawyer of any jurisdiction; he may be without good character; and his activities may not even be regulated under the present state of the law." (13 C.3d 174.)

(b) *Aiding unlawful practice by holding out unlicensed person as attorney.* Petitioner asserted that L did no more at petitioner's request than assist the clients in obtaining counsel in Europe, and that the assistance is protected by the First Amendment and is not the practice of law. Whether or not L in fact gave advice in California regarding Spanish law, petitioner aided him to practice law when he operated so as to lead toward L's doing so by (1) introducing L to the clients at petitioner's office, (2) informing the clients that L was an attorney in New York and had practiced law in Europe, (3) conveying to the clients the impression that L was associated in some way with petitioner, and (4) allowing L to consult with the clients in California without supervision by a member of the State Bar. If properly charged, petitioner could also have been disciplined for aiding L's unauthorized practice by including L's name on petitioner's letterhead followed by "Of Counsel." (13 C.3d 175.) (See *Ridley v. State Bar* (1972) 6 C.3d 551, 558, 99 C.R. 873, 493 P.2d 105 [nonattorney, with petitioner's knowledge, advised and consulted with client]; *Gassman v. State Bar* (1976) 18 C.3d 125, 132 C.R. 675, 553 P.2d 1147 [fees split with paralegal violated rule].)

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1. Development of the Law.

a. Early Theory of Unethical Conduct.

1 Witkin Cal. Proc. Attys § 532

[§ 532] Early Theory of Unethical Conduct.

The practice of law by a nonprofessional person or body, whether incorporated or unincorporated, is unlawful, and the *organization* can be prohibited from engaging in unlawful practice. (See *supra*, §386.) The activity may also be attacked by bringing disciplinary proceedings against the *attorney*, on the theory that it is improper to use the organization as a means of obtaining business from its members.

However, the early ethical rules failed to provide a workable or consistent test for legal and illegal activities of organizations and their attorneys. (For general discussions, see *54 Cal. L. Rev. 1356*; *7 Harv. L. Rev. 416*; *72 Harv. L. Rev. 1342*; *78 Harv. L. Rev. 205*; *12 U.C.L.A. L. Rev. 279* [symposium on group legal services]; *11 A.L.R.3d 1206* [maintenance of attorney referral system by organization having no legal interest in proceedings]; for exceptions and distinctions, see *infra*, §533 et seq.)

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1. Development of the Law.

b. Labor Union Counsel.

1 Witkin Cal. Proc. Attys § 533

[§ 533] Labor Union Counsel.

The traditional opposition to group practice was severely tested in several cases dealing with arrangements by labor unions to obtain legal advice and representation for their members.

The decision in *Hildebrand v. State Bar* (1950) 36 C.2d 504, 225 P.2d 508, took the conventional approach, but with a strong dissent. The Brotherhood of Railroad Trainmen, a national labor union, established a Legal Aid Department as a service to its members. The purpose was to assist them in procuring experienced personal injury lawyers to bring actions on their claims against railroads at less than the usual contingent fees. Regional counsel were designated in a number of territorial zones, and members were urged to employ them for personal injury actions. In the latest arrangement the attorney charged a 25% contingent fee on the net recovery after deducting court costs advanced, and the attorney paid investigators and other assistants on the union staff the reasonable value of their services. *Held*, petitioner, regional counsel for the union, was guilty of a violation of former Rules 2 and 3, for the plan involved wholesale solicitation of professional employment for the attorney by union officials and agents, and also compensation to the union (mainly by attracting dues-paying members because of the benefits of the plan). Emphasizing the strict view that any form of solicitation is bad in itself, the court found no significance in "the worthiness of the Legal Aid Department as an enterprise established by the Brotherhood to render valuable services to its members in providing the means for appropriate presentation of their damage claims." (36 C.2d 514.) However, in view of the conflict of authority elsewhere and no prior decision in California, the court laid down the rule prospectively, and dismissed the proceeding against petitioner.

Two opinions concurring in the order of dismissal but dissenting from the holding made the following points:

(a) The origin of the activity was not a scheme of attorneys to build up law business by solicitation; the union developed the plan when it found on investigation that its members were improvidently releasing claims at the persuasion of railroad claims adjusters, and were getting unsatisfactory legal representation by incompetent or overpriced lawyers. (36 C.2d 521.)

(b) The activity, in object and operation, was similar to that of liability insurance companies and trade associations,

which employ lawyers to represent the interests of their policyholders or members. (36 C.2d 516, 524.)

(c) The activity does not involve the evils associated with lay practice of the law or ambulance chasing, but is socially desirable. "The Brotherhood's plan in no way lowers the dignity of the profession. It does not lead the railroad employees to incompetent counsel. There is no conflict in the interests of the Brotherhood and its members, and therefore no danger that the attorneys recommended by the Brotherhood will be faced with conflicting allegiances. There is no interference with the direct attorney-client relationship; the members are free to retain or reject the attorneys recommended by the Brotherhood and they deal directly with the attorneys themselves." (36 C.2d 527.)

The majority opinion in *Hildebrand* was the subject of much critical comment. (See 64 Harv. L. Rev. 1374; 3 Stanf. L. Rev. 549; 11 Stanf. L. Rev. 394; 44 A.B.A.J. 437, 1056.)

The view of the dissenters in *Hildebrand* prevailed in the celebrated case of *Brotherhood of Railroad Trainmen v. Virginia* (1964) 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89. The Brotherhood, to meet the evils of persuasive claims adjusters and unsatisfactory plaintiffs' lawyers, organized a Department of Legal Counsel: In 16 regions a lawyer or firm was chosen, and, after the injury or death of a worker, the local Brotherhood official would recommend counsel to the worker or his survivors. The Virginia State Bar obtained an injunction against this channeling of claims to selected lawyers. The Supreme Court reversed, on the constitutional theory set forth in *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, *infra*, §534: "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers." (84 S.Ct. 1118, 12 L.Ed.2d 94.) (For discussion of *Brotherhood*, see 54 Cal. L. Rev. 1356; 78 Harv. L. Rev. 165, 205; 79 Harv. L. Rev. 416; 12 U.C.L.A. L. Rev. 279; and see also 11 A.L.R.3d 1206.)

Brotherhood was followed in *United Mine Workers of America, Dist. 12 v. Illinois State Bar Assn.* (1967) 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426. The union employed an attorney on a salary basis. The employee was free to obtain his or her own counsel and to make his or her own decision on settlement, and received the entire amount paid by settlement or award. Thus, the attorney's compensation was solely his union salary, and the plan involved hiring the attorney by the union. The court held that this activity could not be enjoined as illegal practice. (See 82 Harv. L. Rev. 138.)

The *Brotherhood* view was reaffirmed in *United Trans. Union v. State Bar of Michigan* (1971) 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339. The Brotherhood of Railroad Trainmen adopted a plan of recommending selected attorneys to its members for F.E.L.A. cases, securing a commitment from them to charge no more than 25% of the recovery. As a result, the union's Chicago attorneys represented many Michigan claimants. The Michigan State Bar obtained an injunction. *Held*, reversed. "At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. That was the holding in *United Mine Workers*, *Trainmen*, and *NAACP v. Button*." (91 S.Ct. 1082, 28 L.Ed.2d 347.)

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c. Civil Rights Counsel.

1 Witkin Cal. Proc. Attys § 534

[§ 534] Civil Rights Counsel.

In *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, petitioner was a New York nonprofit membership corporation licensed to do business in Virginia. Its activities were directed toward the elimination of racial barriers depriving black citizens of civil rights. It had staff counsel available for litigation, and frequently accepted cases pursuant to forms signed by litigants who did not engage a particular attorney. In 1956, Virginia amended its runner or capper statute to include within the definition an agent for an individual or organization that retains a lawyer in connection with an action to which it is not a party. *Held*, the statute, ostensibly a regulation of professional misconduct, was in effect an unconstitutional limitation on First Amendment freedoms. (See 7 *Summary* (10th), *Constitutional Law*, §383.) Assisting persons in obtaining vindication of constitutional rights totally lacks the intent to stir up litigation for private gain or other improper motive, which was the essence of the common law offenses; there is no great profit in lawsuits attacking racial discrimination and no attempt was made to deprive other lawyers of the business. (83 S.Ct. 343, 9 L.Ed.2d 424.)

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2. Authorized Legal Service Programs.

1 Witkin Cal. Proc. Attys § 535

[§ 535] Authorized Legal Service Programs.

Rules of Professional Conduct, Rule 1-600 (supra, §420) covers all forms of legal service programs. Essentially, an attorney may participate in a nongovernmental program, activity, or organization that furnishes, recommends, or pays for legal services provided the entity does not allow a third person or organization to interfere with the attorney's independence of professional judgment or interfere with the client-lawyer relationship. Further, the entity may not allow unlicensed persons to practice law or any third person or organization to receive any part of the attorney's fee except where permitted by the Rules of Professional Conduct. (*Rules of Professional Conduct, Rule 1-600(A).*) A "nongovernmental program, activity, or organization" includes group, prepaid, and voluntary legal service programs, activities, or organizations. (Discussion to *Rules of Professional Conduct, Rule 1-600(A).*)

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1 Witkin Cal. Proc. Attys § 536

[§ 536] Rules of Professional Conduct.

Rules of Professional Conduct, Rule 2-100 (supra, §§422, 423) prohibits an attorney representing a client from communicating directly or indirectly about the subject matter of the representation with a party the attorney knows is represented by counsel unless counsel consents.

The rule reflects a consistent position taken by the Rules of Professional Conduct, and has been described as "necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice. ... It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided." (*Mitton v. State Bar* (1969) 71 C.2d 525, 534, 78 C.R. 649, 455 P.2d 753.) (See *Carpenter v. State Bar* (1930) 210 C. 520, 292 P. 450 [3 months' suspension]; *Turner v. State Bar* (1950) 36 C.2d 155, 222 P.2d 857 [same]; *Abeles v. State Bar* (1973) 9 C.3d 603, 609, 108 C.R. 359, 510 P.2d 719 ["a party represented by counsel" construed to include "a party who has counsel of record whether or not that counsel was in fact authorized to act for the party"]; *In re Marriage of Wickander* (1986) 187 C.A.3d 1364, 1367, 232 C.R. 621 [signing marriage settlement agreement and declaration for default dissolution without attorney being present]; A.B.A. Model Rules of Professional Conduct, Rule 4.2 [communication with persons represented by counsel], Rule 4.3 [dealing with unrepresented persons]; 26 A.L.R.4th 102 [communication with party represented by counsel as ground for disciplining attorney].)

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 2. Violation of Rule.

1 Witkin Cal. Proc. Attys § 537

[§ 537] Violation of Rule.

For a violation of the rule against communication, the trial judge may disqualify the attorney from acting as counsel in an action related to the subject of controversy, where the misconduct will have a continuing effect on the proceedings before the court. (*Chronometrics v. Sysgen* (1980) 110 C.A.3d 597, 607, 168 C.R. 196 [disqualification of attorney affirmed, but order disqualifying law firm was an abuse of discretion, with no purpose but punitive one].) (See 26 A.L.R.4th 102 [communication with party represented by counsel as ground for disciplining attorney].)

In *Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 C.A.3d 116, 230 C.R. 461, plaintiff, a corporation, consented to the assignment of a lease to defendant. After a change in management, W, who as president and a director had consented to the assignment, was discharged as president but remained as director. Plaintiff then filed an unlawful detainer action which in effect repudiated the consent to the assignment. S, the attorney for defendant, arranged a meeting with W, at which W informed S of various matters of record, including the fact of a related proceeding, but disclosed nothing confidential. Plaintiff, relying on former Rule 7-103 (now *Rules of Professional Conduct, Rule 2-100*), moved to disqualify S. The trial judge concluded that the interview with W violated the rule, disqualified S and his firm, and prohibited the disclosure or use of information or documents obtained from W. *Held*, disqualification of S affirmed, but disqualification of his firm reversed.

(a) *The interview violated former Rule 7-103.*

(1) A Los Angeles County Bar Association opinion, which concludes that opposing counsel should not have ex parte contact with corporate employees, is persuasive with respect to directors as well. (186 C.A.3d 128, 129.) They control the corporation, including litigation in which it is involved, and corporate counsel's ability to communicate freely with directors would be undermined if opposing counsel could contact them ex parte. (186 C.A.3d 129, 130.)

(2) The argument that W was no longer in the control group of plaintiff, and that contact with him therefore was permissible, must be rejected. (186 C.A.3d 127.) Although no longer president, W remained a director and hence in a position where he was "potentially privy to privileged information about the litigation." (186 C.A.3d 128.) The question

of an attorney's authority to act for a party must first be raised in the trial court. S should have sought the trial court's approval before communicating with W. Because S did not do so he violated Rule 7-103. (186 C.A.3d 130, 131.)

(b) *Disqualification of attorney was proper.* As noted in *Chronometrics*, disqualification is justified when the misconduct will have a continuing effect on the proceedings, but not if the only purpose is punitive. (186 C.A.3d 132.) Because S created the predicament and might possess an unfair advantage as a result of his interview with W, the order disqualifying him was proper. (186 C.A.3d 133.)

(c) *Disqualification of the law firm was improper.*

(1) The federal standard, which the trial judge apparently followed, permits disqualification on the mere possibility that confidential information was obtained. This conflicts with California precedent, and specifically with the balancing approach used in *William H. Raley Co. v. Superior Court* (1983) 149 C.A.3d 1042, 197 C.R. 232, supra, §114, and the standard employed in *Chronometrics*. (186 C.A.3d 133, 134.) These cases permit disqualification only if the conduct will have a continuing effect, not where it *might*. "Disqualification must be *necessary*." (186 C.A.3d 134.)

(2) To determine if disqualification is necessary, prejudice must be considered, and the moving party has the burden of proof. The purpose of Rule 7-103 is to protect the integrity of the attorney-client relationship, and the record here contains no evidence of any prejudicial revelation of the kind the rule is designed to prevent. (186 C.A.3d 135, 136.) Because there was no showing of prejudice, disqualification of the entire law firm was unduly punitive and an abuse of discretion. (186 C.A.3d 136.)

(d) *Exclusionary remedy rejected.* The order prohibiting use of the information obtained, to the extent it applies to S, is proper. (186 C.A.3d 136, 137.) Beyond that, however, the order is unworkable. No California precedent has approved an exclusionary remedy where attorney disqualification is involved, and *Chronometrics* rejects that approach. Plaintiff may object to specific items of evidence that are privileged, and those objections may be resolved by means of in camera proceedings. (186 C.A.3d 137, 138.) (See *Bell v. 20th Century Ins. Co.* (1989) 212 C.A.3d 194, 197, 260 C.R. 459 [discussing *Mills Land and Water Co.* theory of balancing of competing interests]; *La Jolla Cove Motel & Hotel Apartments v. Superior Court* (2004) 121 C.A.4th 773, 784, 17 C.R.3d 467, supra, §§422, 423 [in corporate dissolution action brought by minority shareholders, ex parte contact between plaintiffs' attorneys and corporate directors neither violated rule against communication with adverse party nor required disqualification, because directors represented plaintiffs' interests and had separate counsel who consented to contact; distinguishing *Mills Land & Water Co.*]; *Baugh v. Garl* (2006) 137 C.A.4th 737, 744, 40 C.R.3d 539 [even if ex parte conversation occurred as claimed by defendant, motion to disqualify was properly denied where trial judge determined that conversation would have no continuing effect on proceedings; following rule of *Chronometrics*].)

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a. Communication With Adverse Party.

3. Distinction: Communication With Former Employees of Corporation.

1 Witkin Cal. Proc. Attys § 538

[§ 538] Distinction: Communication With Former Employees of Corporation.

In *Bobelev v. Superior Court* (1988) 199 C.A.3d 708, 245 C.R. 144, plaintiffs, former waitresses at defendant's Hilton Hotel, brought a sex and age discrimination suit, alleging that they were forced out of their jobs when defendant decided to "upgrade" its restaurant facilities by replacing waitresses with waiters. Plaintiffs' counsel asked M, a former assistant maitre d' at the hotel, to meet with her and provide a witness statement. Defendant's counsel then wrote a letter to plaintiffs' counsel warning that any contact with former or current employees would be regarded as a violation of former Rule 7-103 (now *Rules of Professional Conduct, Rule 2-100*). Plaintiffs' counsel sought an order declaring their right to interview all former employees and nonmanagerial current employees. The trial judge refused to issue the order, ruling that the danger of prejudice was such that plaintiffs should use the deposition procedure to obtain the desired information. *Held*, mandamus issued to compel entry of an order permitting some of the requested contact.

(a) Rule 7-103 was designed to preserve the confidentiality of attorney-client communications, and in *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 2 Cal. Evidence (4th), Witnesses, §126, the Court held that the prohibition against ex parte contact extended to all employees of a corporation, not merely those constituting the control group. However, *Upjohn and Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 C.A.3d 116, 230 C.R. 461, supra, §537, left undecided the question whether the prohibition extended to former employees who were not members of the corporation's control group. (199 C.A.3d 713.)

(b) "In determining how far to extend the protection of rule 7-103, we must weigh plaintiffs' need to obtain information which may be too expensive or impractical to collect through formal discovery against Hilton's interest in preventing disclosure of privileged attorney-client communications." (199 C.A.3d 713.) The concerns expressed in *Upjohn and Mills* are less evident in the case of former nonmanagerial employees. "These individuals are third-party witnesses who, as the respondent court correctly stated, are 'fair game' for opposing counsel. They are not sufficiently identified with the corporation to be considered 'parties represented by counsel,' and they are less likely than current employees to be privy to privileged communications. The corporation cannot bring former employees back into the fold for purposes of a lawsuit merely because there is a risk that the former employee might disclose unfavorable facts." (199 C.A.3d 713.)

(c) Plaintiffs' counsel has no desire to delve into privileged communications, and defendant demonstrated its ability to protect itself by its "warning letter"; it may seek a protective order with respect to any former employees who may be parties to privileged communications. (199 C.A.3d 714.)

(d) "[B]y requiring plaintiffs to limit their contact with Hilton's ex-employees to formal discovery procedures, the respondent court has made this litigation so costly for plaintiffs that they cannot pursue their case. Not every witness's testimony is worth the price of a deposition; in fact, many of the former employees which plaintiffs want to interview may not be able to provide any relevant information at all. With respect to former employees who are not currently members of Hilton's 'control group,' the minimal risk that privileged communications will be disclosed does not justify the restrictions which the respondent court placed upon plaintiffs." (199 C.A.3d 714.)

(e) "Plaintiffs may not contact ex parte any current employees of Hilton or any former employees who remain members of Hilton's 'control group.' ... Plaintiffs may contact ex parte any of Hilton's former employees, whether or not they were managerial employees. Plaintiffs may inquire about relevant facts but not about any privileged communications concerning those facts. Hilton may seek a protective order with respect to any former employee who Hilton knows or suspects is privy to privileged information and believes there is a real danger that such information might be disclosed if the employee is interviewed ex parte." (199 C.A.3d 714.) (See *Nalian Truck Lines v. Nakano Warehouse & Trans. Corp.* (1992) 6 C.A.4th 1256, 1262, 8 C.R.2d 467 [following *Bobeles*]; *Continental Ins. Co. v. Superior Court* (1995) 32 C.A.4th 94, 119, 37 C.R. 2d 843 [discussing *Bobeles* and following *Nalian Truck Lines*]; 57 A.L.R.5th 633 [right of attorney to conduct ex parte interviews with former corporate employees].) (On nature and scope of *Rules of Professional Conduct*, Rule 2-100(B), dealing with communications with former employees, see *supra*, §423.)

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b. Inadvertently Receiving Privileged Material.

1 *Witkin Cal. Proc. Attys* § 539

[§ 539] Inadvertently Receiving Privileged Material.

In *State Comp. Ins. Fund v. WPS* (1999) 70 C.A.4th 644, 82 C.R.2d 799, involving an underlying workers' compensation insurance dispute, pursuant to a discovery request, plaintiff inadvertently sent to defendant's outside counsel claim summary forms that were clearly marked as privileged. Outside counsel gave some of the privileged material to an expert witness, who in turn provided them to an attorney who was pursuing a different claim against plaintiff. When plaintiff discovered the error and demanded the return of the material, defendant's outside counsel refused. The trial judge found that the material was privileged and was inadvertently produced, that the privilege was not waived, and that refusal to return the material was a violation of counsel's ethical obligations. He imposed a monetary sanction under C.C.P. 128.5 (7 Cal. Proc. (5th), Trial, §227). *Held*, reversed; although the trial judge's findings were in large part correct, the imposition of sanctions was not proper.

(a) *Inadvertent disclosure did not result in waiver of the privilege.* As the claim summary forms were prepared in the course of the attorney-client relationship between State Fund and its counsel, they were communications protected by the attorney-client privilege. (70 C.A.4th 651.) State Fund itself, not its counsel, was the holder of the privilege, and, in determining whether the privilege was waived, the appropriate inquiry is whether any statement or conduct by State Fund indicates that it consented to the disclosure by counsel. The circumstances indicate that it did not: the forms themselves were designed to make clear that they were confidential communications; attorneys from the firm that acted as State Fund's outside counsel testified that they followed procedures designed to ensure that no privileged documents were produced to opposing counsel; and the attorney who sent the forms to WPS's counsel testified that he had done so unintentionally. The promptness of State Fund's actions to secure return of the documents is another indication that disclosure was never intended. "[W]e hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." (70 C.A.4th 654.)

(b) *Sanctions award was not justified.* In awarding sanctions under C.C.P. 128.5, the trial judge relied on a formal opinion of the American Bar Association. But the A.B.A. Model Rules of Professional Conduct relied on in that opinion have not been adopted in California and have no legal force of their own. "The finding that an attorney has engaged in conduct contrary to an ABA formal opinion does not establish an obligatory standard of conduct imposed on California lawyers. Consequently it may not perforce be equated to a failure to act in good faith such that sanctions are warranted."

(70 C.A.4th 656.)

(c) *Standard for future application.* The A.B.A. opinion, while not controlling in this case, permits the formulation of a standard for future application. Thus, when a lawyer receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving the materials (1) should refrain from examining the materials any more than is essential to ascertain if they are privileged, and (2) must immediately notify the sender of the error. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. (70 C.A.4th 656.) However, a lawyer seeking to hold another lawyer accountable for misuse of inadvertently disclosed materials bears the burden of demonstrating inadvertence. Otherwise, an attorney might seek to gain an advantage by deliberately sending confidential material and then bringing a motion to disqualify the receiving lawyer. This does not mean that disqualification might not be the appropriate remedy where the standard promulgated above has been violated and "other factors compel disqualification." (70 C.A.4th 657.)

The rule was applied and disqualification of counsel was proper in *Rico v. Mitsubishi Motors Corp.* (2007) 42 C.4th 807, 68 C.R.3d 758, 171 P.3d 1092. During a deposition of plaintiffs' expert witness at the offices of plaintiffs' counsel, plaintiffs' attorney J somehow acquired defense counsel's private notes regarding a strategy session involving defense counsel and defense experts. J admitted that he knew "within a minute or two" that the document related to defendants' case and would be a powerful impeachment tool against a defense expert. J copied the document, scrutinized and annotated it, gave copies to his cocounsel and experts, and used the material during the deposition of the defense expert. When defense counsel discovered that the material used was a copy of his strategy session notes, defendants moved to disqualify plaintiffs' counsel and their experts on the ground that they had used defense counsel's work product and that J's unethical use and distribution of the notes "irremediably prejudiced defendants." The trial court agreed. *Held*, affirmed.

(a) The notes were a summary of the strategy session prepared by a paralegal working with defense counsel and were edited by and contained the thoughts of defense counsel. Thus, the notes reflected both strategy and defense counsel's thoughts about important issues in the case. As such, the notes were absolutely protected work product. (42 C.4th 815.)

(b) Under *State Comp. Ins. Fund v. WPS*, once J knew that he possessed protected material, he had an ethical duty to advise defense counsel. J admitted that he knew within moments the nature of the material and its value. At that point he should have notified defense counsel. Instead, he scrutinized it, annotated it, disseminated copies to his defense team, and then used the material in an attempt to impeach a defense expert. Given the totality of J's action, disqualification was the proper remedy. (42 C.4th 819.)

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 1. Conduct Toward Other Side.
 c. Violation of Known Custom.

1 Witkin Cal. Proc. Attys § 540

[§ 540] Violation of Known Custom.

The former A.B.A. Code stated the traditional rule that an attorney must not fail to comply with "known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply." (See *Bryant v. State Bar* (1942) 21 C.2d 285, 296, 131 P.2d 523 [enforcement of informal stipulations]; *Dahlin v. Moon* (1956) 141 C.A.2d 1, 5, 296 P.2d 344 [attorney should not take default without notice contrary to assurances given to opposing counsel]; *Frank E. Beckett Co. v. Bobbitt* (1960) 180 C.A.2d Supp. 921, 925, 4 C.R. 833 [same].)

In *Bernath v. Wilson* (1957) 149 C.A.2d 831, 309 P.2d 87, counsel for plaintiff, after an agreement with defendant's counsel to extend time to plead, secretly entered a default. He then waited for the 6-month period of C.C.P. 473 to elapse before having judgment by default entered. *Held*, this showing was sufficient for equitable relief against the judgment (see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §228). The court quoted former A.B.A. Canons 25 and 32, and the Code of Trial Conduct of the American College of Trial Lawyers, §9(a): "A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom. When he knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed." (149 C.A.2d 835.)

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2. Improper Support of Client's Cause.

1 Witkin Cal. Proc. Attys § 541

[§ 541] Improper Support of Client's Cause.

(1) *California Statutes. B. & P.C. 6068* contains significant provisions on the duties of an attorney:

(a) An attorney must counsel or maintain only those actions, proceedings, or defenses that appear to the attorney as legal or just, except the defense of a person charged with a public offense. (*B. & P.C. 6068(c).*)

(b) An attorney must employ, for the purpose of maintaining the causes confided to the attorney, only those means that are consistent with truth. (*B. & P.C. 6068(d).*) (On attorney's withdrawal from representation where client intends to commit perjury, see *Nix v. Whiteside* (1986) 475 U.S. 157, 106 S.Ct. 988, 997, 999, 89 L.Ed.2d 123, 137, 141, *supra*, §73.)

(c) An attorney is under a duty not to encourage either the commencement or the continuance of an action or proceeding from corrupt motives of passion or interest. (*B. & P.C. 6068(g).*) (See *Sorensen v. State Bar* (1991) 52 C.3d 1036, 1044, 1045, 277 C.R. 858, 804 P.2d 44 [attorney, involved in billing dispute with court reporter over \$ 94.05 fee for transcript, filed action against reporter for fraud and deceit; attorney's actions were motivated by spite and vindictiveness and violated his duties under *B. & P.C. 6068*]; 85 A.L.R.4th 544 [bringing frivolous claim as ground for discipline].)

(2) *California Rules of Professional Conduct.* The Rules of Professional Conduct treat the following related areas:

(a) Acceptance of improper employment. (*Rules of Professional Conduct, Rule 3-200, supra, §434.*)

(b) Advising violation of the law. (*Rules of Professional Conduct, Rule 3-210, supra, §435.*)

(c) Threatening prosecution. (*Rules of Professional Conduct, Rule 5-100, supra, §458.*)

(d) Contact with witnesses. (*Rule of Professional Conduct, Rule 5-310, supra, §464.*)

(e) Suppression of evidence. (*Rules of Professional Conduct, Rule 5-220, supra, §461.*)

(f) Duties of prosecutors. (*Rules of Professional Conduct, Rule 5-110*, supra, §459.)

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1 Witkin Cal. Proc. Attys § 542

[§ 542] Misconduct in Other Jurisdiction.

An attorney's commission of professional misconduct in another jurisdiction is grounds for discipline in California. (*B. & P.C. 6049.1*.) A certified copy of a final order made by a court or other duly authorized disciplinary body in another jurisdiction, determining that a State Bar member committed professional misconduct in the other jurisdiction, is "conclusive evidence that the member is culpable of professional misconduct" in California (*B. & P.C. 6049.1(a)*), unless found otherwise in an expedited disciplinary proceeding (*B. & P.C. 6049.1(b)*); *infra*, §650). (See *In the Matter of Jenkins* (2000) 4 Cal. State Bar Ct. Rptr. 157, 162 [revocation of respondent's Michigan law license and removal as Michigan state trial judge for corrupt misconduct]; *In the Matter of Kauffman* (2001) 4 Cal. State Bar Ct. Rptr. 213, 216 [Illinois disciplinary order conclusively established respondent's culpability in California]; *In the Matter of Freydl* (2001) 4 Cal. State Bar Ct. Rptr. 349, 355 [misconduct found by Michigan Bar resulting in suspension warranted discipline in California].)

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See *43 A.L.R.6th* 163 [reciprocal discipline of attorneys--criminal conduct]; *44 A.L.R.6th* 75 [reciprocal discipline of attorneys--noncriminal misconduct towards clients not involving client funds]; *45 A.L.R.6th* 175 [reciprocal discipline of attorneys--commingling or other mishandling of client funds].



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1. In General.

1 Witkin Cal. Proc. Attys § 543

[§ 543] In General.

When an act calling for disciplinary action has been proved (other than a criminal conviction justifying disbarment; see *supra*, §466), the question of the extent of discipline arises, i.e., disbarment, suspension, or mere reproof.

There are no fixed standards; the appropriate penalty is usually determined after a consideration of all of the facts of the particular case and the previous record of the attorney. Various circumstances or events, favorable or unfavorable, will enter into the decision at the State Bar trial (*infra*, §579 et seq.) or in the Supreme Court (*infra*, §613 et seq.). As a result, the same kind of offense has received widely varying types of punishment. (See *infra*, §§605 et seq., 620 et seq.; on effect of specific mitigating and aggravating circumstances, see *infra*, §544 et seq.)

A number of cases have considered the existence and effect of mitigating and aggravating circumstances. The following are illustrative:

Yokozeki v. State Bar (1974) 11 C.3d 436, 450, 451, 113 C.R. 602, 521 P.2d 858 [reviewing numerous mitigating and aggravating circumstances].

Toll v. State Bar (1974) 12 C.3d 824, 832, 117 C.R. 427, 528 P.2d 35 [mitigating]; *In re Kremer* (1975) 14 C.3d 524, 531, 121 C.R. 600, 535 P.2d 728, *infra*, §624 [mitigating]; *In re Dedman* (1976) 17 C.3d 229, 234, 130 C.R. 504, 550 P.2d 1040 [mitigating].

Segretti v. State Bar (1976) 15 C.3d 878, 888, 126 C.R. 793, 544 P.2d 929 [mitigating: no prior disciplinary record, outstanding career in Judge Advocate General's Corps, only 30 years old at time of misconduct, acts not committed in capacity as attorney, subsequent expressions of regret and cooperation with investigating agencies, criminal conviction suffered and time served, voluntary abstention from practice of law during disciplinary proceedings].

Price v. State Bar (1982) 30 C.3d 537, 179 C.R. 914, 638 P.2d 1311 [mitigating: no prior disciplinary record, mental and emotional stress due to heavy caseload, cooperation and remorse throughout proceedings, inability to practice law for 18 months pending criminal and civil service proceedings, good reputation and civic involvement].

In re Mudge (1982) 33 C.3d 152, 156, 187 C.R. 779, 654 P.2d 1307 [mitigating: no prior bad record, severe

domestic and financial difficulties, full restitution, and cooperation during disciplinary proceedings; 3 years' suspension was sufficient discipline although misappropriation would ordinarily warrant disbarment].

Waysman v. State Bar (1986) 41 C.3d 452, 459, 224 C.R. 101, 714 P.2d 1239 [mitigating: single offense was atypical and due to negligence and alcohol problem, now under control; immediate acknowledgment of wrongdoing and prompt efforts at restitution; exemplary conduct following misconduct].

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2. Previous Record or Character.

a. Good Record or Character.

1 Witkin Cal. Proc. Attys § 544

[§ 544] Good Record or Character.

(1) *Good Record*. An attorney's past good conduct is a strong factor suggesting a lighter punishment, as the following cases reflect:

Signer v. State Bar (1939) 13 C.2d 151, 154, 157, 88 P.2d 127 [attorney's voluntary 15-month withdrawal from practice, previous good record, and subsequent good conduct].

Linney v. State Bar (1943) 21 C.2d 688, 690, 134 P.2d 757 [73-year-old attorney; member of bar for many years with no prior disciplinary action].

Crawford v. State Bar (1960) 54 C.2d 659, 669, 7 C.R. 746, 355 P.2d 490, supra, §531 [no prior discipline, good reputation].

In re Jones (1971) 5 C.3d 390, 400, 96 C.R. 448, 487 P.2d 1016 [no prior disciplinary record, good reputation as lawyer, businessman, civic and social leader, and honorable record in Air Force].

In re Higbie (1972) 6 C.3d 562, 573, 99 C.R. 865, 493 P.2d 97 [no prior disciplinary record, good reputation among clients and in community].

In re Fahey (1973) 8 C.3d 842, 848, 106 C.R. 313, 505 P.2d 1369, supra, §472 [no failure to perform professional duties and no prior record of discipline].

Mrakich v. State Bar (1973) 8 C.3d 896, 907, 106 C.R. 497, 506 P.2d 633 [no prior record].

Ames v. State Bar (1973) 8 C.3d 910, 921, 106 C.R. 489, 506 P.2d 625, supra, §514 [no prior record and client's consent].

Bradpiece v. State Bar (1974) 10 C.3d 742, 747, 111 C.R. 905, 518 P.2d 337 [10 years of practice without prior misconduct; factor in reducing discipline for misappropriation of minor's settlement].

Doyle v. State Bar (1976) 15 C.3d 973, 979, 126 C.R. 801, 544 P.2d 937 [no prior disciplinary action, candor and cooperation in disciplinary proceedings, remorse, and efforts to rehabilitate self].

Price v. State Bar (1982) 30 C.3d 537, 549, 179 C.R. 914, 638 P.2d 1311 [no prior disciplinary action, mental and emotional stress from long hours and heavy case load, efforts at self-help, cooperation and remorse throughout proceedings].

Kelly v. State Bar (1991) 53 C.3d 509, 519, 520, 280 C.R. 298, 808 P.2d 808 [commingling of funds and misappropriation of \$ 750 through negligence; in light of mitigating factors, including 13 years of practice with no prior disciplinary record, lack of serious injury to clients, and absence of wrongful intent, 120 days' actual suspension was adequate].

Lipson v. State Bar (1991) 53 C.3d 1010, 1021, 1022, 281 C.R. 775, 810 P.2d 1007 [over 42 years of practice with no other disciplinary record warranted suspension rather than disbarment for misappropriation of funds].

(2) *Good Character*. Similar in nature and effect, though established by a different method of proof, is *good character*, shown by reputation evidence or written testimonials. (*Barbee v. State Bar* (1931) 213 C. 296, 300, 2 P.2d 353; *Gray v. State Bar* (1936) 7 C.2d 177, 180, 59 P.2d 1033; see 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §§65, 69.)

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2. Previous Record or Character.

b. Bad Record.

1 *Witkin Cal. Proc. Attys* § 545

[§ 545] Bad Record.

A bad record is frequently considered in *aggravation*, as justifying a more severe penalty, or as indicating that the petitioner has so demonstrated a lack of fitness to practice that the extreme penalty of disbarment is appropriate.

In *Marsh v. State Bar* (1934) 2 C.2d 75, 79, 39 P.2d 403, the court said: "If such mitigating circumstances may be considered in alleviating or lightening the penalty, does it not follow that incriminating circumstances, such as the previous poor record of an accused, his years of practice, knowledge of wrong-doing, repeated misconduct, etc., may likewise be considered in determining whether or not a more severe penalty should be imposed? The fact that an offense is a repetition of offenses for which an accused has previously been disciplined shows that the wrong is not unintentional but is done deliberately with knowledge that such conduct is forbidden and thus it merits a greater penalty." (On disbarment or suspension after conviction of crime involving moral turpitude, see *B. & P.C. 6102(e)*, supra, §466 et seq.; on admissibility of prior proceeding, see *infra*, §593.)

This factor appears in numerous decisions:

Mills v. State Bar (1936) 6 C.2d 565, 567, 58 P.2d 1273 [prior suspension].

Dudney v. State Bar (1937) 8 C.2d 555, 562, 66 P.2d 1199 [prior reprimand and prior suspension].

Moura v. State Bar (1941) 18 C.2d 31, 112 P.2d 629 [prior private reprimand].

Hennessy v. State Bar (1941) 18 C.2d 685, 687, 117 P.2d 326 [prior suspension and other complaints].

Cheleden v. State Bar (1942) 20 C.2d 133, 140, 124 P.2d 1 [many prior complaints, though no prior disciplinary order].

Petersen v. State Bar (1943) 21 C.2d 866, 871, 136 P.2d 561 [two prior suspensions].

Narlian v. State Bar (1943) 21 C.2d 876, 885, 136 P.2d 553 [prior disciplinary proceedings].

Herron v. State Bar (1944) 24 C.2d 53, 65, 67, 147 P.2d 543 ["there can be no doubt that any lawyer who is guilty of successive breaches of duty with relation to the management of his clients' affairs should be deprived of the license"].

McGregor v. State Bar (1944) 24 C.2d 283, 288, 148 P.2d 865 [prior suspension].

Egan v. State Bar (1956) 46 C.2d 370, 374, 294 P.2d 949 [prior public reprovals and suspension].

Eschwig v. State Bar (1969) 1 C.3d 8, 81 C.R. 352, 459 P.2d 904 [prior reproval, reprimand, disbarment, and reinstatement; disbarred].

Simmons v. State Bar (1970) 2 C.3d 719, 731, 87 C.R. 368, 470 P.2d 352 [two prior suspensions, disbarment].

Alkow v. State Bar (1971) 3 C.3d 924, 935, 92 C.R. 278, 479 P.2d 638 [two prior suspensions; disbarment].

Sevin v. State Bar (1973) 8 C.3d 641, 646, 105 C.R. 513, 504 P.2d 449 [previous similar misappropriation of client's funds].

Fielding v. State Bar (1973) 9 C.3d 446, 452, 107 C.R. 561, 509 P.2d 193 [prior misappropriation of funds].

Lewis v. State Bar (1973) 9 C.3d 704, 715, 108 C.R. 821, 511 P.2d 1173 [prior discipline, for mishandling of tax funds, which occurred after fraud for which pending discipline sought].

Schullman v. State Bar (1976) 16 C.3d 631, 635, 128 C.R. 671, 547 P.2d 447 [five prior disciplinary proceedings in 12-year period, three on grounds identical to present charge; disbarment].

Hamilton v. State Bar (1979) 23 C.3d 868, 872, 153 C.R. 602, 591 P.2d 1254 [wilful noncompliance with order to notify clients of disciplinary action].

Mephram v. State Bar (1986) 42 C.3d 943, 949, 232 C.R. 152, 728 P.2d 222 [petitioner had substantial record of discipline, misconduct in present case occurred during prior disciplinary proceedings, and petitioner was in violation of probation in previous case at time of hearings on current matter].

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3. Intent or Motive.

1 *Witkin Cal. Proc. Attys* § 546

[§ 546] Intent or Motive.

Innocent intent or good motive are not complete defenses. (See *Pickering v. State Bar* (1944) 24 C.2d 141, 145, 148 P.2d 1.) They are, however, important factors in mitigating the penalty. (*Schaffer v. State Bar* (1931) 212 C. 367, 369, 298 P. 994; *Gray v. State Bar* (1936) 7 C.2d 177, 180, 59 P.2d 1033; *McGrath v. State Bar* (1943) 21 C.2d 737, 741, 135 P.2d 1; *Hallinan v. State Bar* (1948) 33 C.2d 246, 249, 200 P.2d 787; *Crawford v. State Bar* (1960) 54 C.2d 659, 669, 7 C.R. 746, 355 P.2d 490 [misdirected filial devotion]; *Grove v. State Bar* (1965) 63 C.2d 312, 316, 46 C.R. 513, 405 P.2d 553, supra, §497 [act may have been only "a spur of the moment decision motivated by an overzealous regard for his client's interest"]; *In re Higbie* (1972) 6 C.3d 562, 573, 99 C.R. 865, 493 P.2d 97 [petitioner sought no personal enrichment; his actions "were prompted almost entirely by the malevolent invitations of an informer"]; *In re Fahey* (1973) 8 C.3d 842, 851, 106 C.R. 313, 505 P.2d 1369, supra, §472 [lack of recollection was result of poor records, not of intent to conceal truth]; *Ames v. State Bar* (1973) 8 C.3d 910, 921, 106 C.R. 489, 506 P.2d 625, supra, §514 [petitioners believed they acted in best interests of clients and had no intent to deceive]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §§65, 69; 40 *A.L.R.3d* 169, 194 [lack of intent to deceive court as mitigating factor where charge is fabrication or suppression of evidence].) (On duress as factor, see *In re Arnoff* (1978) 22 C.3d 740, 746, 150 C.R. 479, 586 P.2d 960 [recognizing possibility of defense, but finding facts insufficient to support it].)

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4. Inexperience or Personal Difficulties.

1 *Witkin Cal. Proc. Attys* § 547

[§ 547] Inexperience or Personal Difficulties.

(1) *Youth and Inexperience.* Youth and inexperience of the petitioner is a reason for a milder punishment than the offense would ordinarily demand. (See *Smith v. State Bar* (1930) 211 C. 249, 258, 294 P. 1057; *Dudney v. State Bar* (1931) 214 C. 238, 240, 4 P.2d 770; *Hall v. State Bar* (1938) 12 C.2d 462, 465, 85 P.2d 870; *Bryant v. State Bar* (1942) 21 C.2d 285, 299, 131 P.2d 523; *Crawford v. State Bar* (1960) 54 C.2d 659, 669, 7 C.R. 746, 355 P.2d 490.)

(2) *Financial and Other Personal Difficulties.* Matters such as illness, domestic trouble, etc., are also considered in mitigation. (See *Smuckler v. State Bar* (1934) 2 C.2d 80, 87, 38 P.2d 777 [illness]; *Hill v. State Bar* (1935) 2 C.2d 622, 42 P.2d 629 [alcoholism]; *Egan v. State Bar* (1938) 10 C.2d 458, 462, 75 P.2d 67 [financial difficulties]; *Glenn v. State Bar* (1939) 14 C.2d 318, 327, 94 P.2d 43 [same]; *Anderson v. State Bar* (1941) 17 C.2d 375, 377, 110 P.2d 1 [illness of mother, straitened financial circumstances]; *Prime v. State Bar* (1941) 18 C.2d 56, 62, 112 P.2d 881 [illness, financial difficulties]; *Schullman v. State Bar* (1963) 59 C.2d 590, 600, 30 C.R. 834, 381 P.2d 658, *infra*, §627 [heavy financial burdens caused by sickness and domestic problems]; *Noland v. State Bar* (1965) 63 C.2d 298, 303, 46 C.R. 305, 405 P.2d 129 [family in need]; *In re Jones* (1971) 5 C.3d 390, 400, 96 C.R. 448, 487 P.2d 1016 [illness and financial difficulties; 66 years old]; *Bradpiece v. State Bar* (1974) 10 C.3d 742, 747, 111 C.R. 905, 518 P.2d 337 [financial and domestic difficulties resolved]; *In re Cohen* (1974) 11 C.3d 935, 943, 114 C.R. 611, 523 P.2d 651 [domestic difficulties and alcoholism resolved]; *Doyle v. State Bar* (1976) 15 C.3d 973, 979, 126 C.R. 801, 544 P.2d 937 [serious illness necessitating hospitalization and frequent medical treatment, financial difficulties, domestic problems; also no prior disciplinary record, remorse, and efforts to rehabilitate himself]; *Athearn v. State Bar* (1977) 20 C.3d 232, 142 C.R. 171, 571 P.2d 628 [domestic difficulties and other extenuating circumstances warranted 1-year suspension instead of disbarment for misappropriation]; *Inniss v. State Bar* (1978) 20 C.3d 552, 557, 143 C.R. 408, 573 P.2d 852 ["Where ... mitigating circumstances are present, this court has tended to order actual suspension of six months or less"]; *Smith v. State Bar* (1984) 37 C.3d 17, 25, 206 C.R. 545, 687 P.2d 259 [illness and personal and financial problems, no prior disciplinary record, remorse, with rehabilitation in progress; 1 year's actual suspension for misappropriation and failure to perform services]; *In re Leardo* (1991) 53 C.3d 1, 10, 11, 278 C.R. 689, 805 P.2d 948 [addiction to opiates resulting from legitimate medical treatment and inability to obtain prescribed medication, full rehabilitation; recommendation of disbarment rejected].)

In a few cases the showing of these mitigating factors has been held inadequate. (See *Persion v. State Bar* (1973) 9

C.3d 456, 461, 107 *C.R.* 708, 509 *P.2d* 524 [misappropriation to maintain high standard of living expected by wife; no attempt to borrow on substantial personal holdings]; *In re Wright* (1973) 10 *C.3d* 374, 382, 110 *C.R.* 348, 515 *P.2d* 292 [financial and domestic difficulties were not influential where there was no change of attitude]; *Goldman v. State Bar* (1977) 20 *C.3d* 130, 141 *C.R.* 447, 570 *P.2d* 463 [attorneys in practice 10 years suspended 1 year for employing cappers despite pleas of inexperience].)

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5. Insanity or Emotional Instability.

1 *Witkin Cal. Proc. Attys* § 548

[§ 548] Insanity or Emotional Instability.

(1) *In General.* Insanity or emotional instability at the time of the acts giving rise to disciplinary proceedings are recognized as possible defenses to charges of misconduct or as matters in mitigation. (See *Hyland v. State Bar* (1963) 59 C.2d 765, 774, 31 C.R. 329, 382 P.2d 369 [dictum: if attorney's mental incompetence "renders him unable to form the intent that is an element of the offenses charged, then he should not be disciplined for the offenses" charged, but he should be prohibited from practicing law as long as mental incompetence lasts]; *In re Fahey* (1973) 8 C.3d 842, 850, footnote 4, 106 C.R. 313, 505 P.2d 1369, supra, §472 [evidence of psychiatric condition tended to negate fraudulent intent, and established that ability to discharge professional duties was not affected]; *Bradpiece v. State Bar* (1974) 10 C.3d 742, 747, 111 C.R. 905, 518 P.2d 337 [psychiatric help to resolve problems and prognosis good]; *In re Cohen* (1974) 11 C.3d 935, 939, 943, 114 C.R. 611, 523 P.2d 651 [grand theft committed while alcoholic, a condition precipitated by death of son; subsequent psychiatric care and rehabilitation]; *Price v. State Bar* (1982) 30 C.3d 537, 179 C.R. 914, 638 P.2d 1311 [prosecutor's mental and emotional stress due to heavy caseload; prior request for office transfer denied]; *McKnight v. State Bar* (1991) 53 C.3d 1025, 1038, 1039, 281 C.R. 766, 810 P.2d 998 [misappropriation of over \$ 17,000, due partly to manic-depressive condition, warranted suspension rather than disbarment]; *In the Matter of Trousil* (1990) 1 Cal. State Bar Ct. Rptr. 229, 241 [no further misconduct since diagnosis and treatment of manic-depressive disorder as mitigating factor]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §98; 26 *A.L.R.4th* 995 [mental or emotional disturbance as defense to or mitigation of charges against attorney in disciplinary proceeding].)

(2) *Heavy Burden of Proof.* The attorney has a heavy burden of proof on this issue. (See *In re Freiburghouse* (1959) 52 C.2d 514, 516, 342 P.2d 1 [petitioner spent 1 month in sanitarium after committing offenses and received periodic psychiatric treatment; *held*, no mitigating circumstances and disbarment ordered].)

In *Grove v. State Bar* (1967) 66 C.2d 680, 58 C.R. 564, 427 P.2d 164, petitioner offered psychiatric testimony of impaired capacity to form sound judgments. This, said the court, was not an excuse for habitual neglect of his clients' affairs: "We realize that in many cases psychoneurotic problems may underlie professional misconduct and moral turpitude. In this area our duty lies in the assurance that the public will be protected in the performance of the high duties of the attorney rather than in an analysis of the reasons for his delinquency. Our primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause, emotional or otherwise, for the attorney's

failure to do so." (66 C.2d 685.) (See *Snyder v. State Bar* (1976) 18 C.3d 286, 133 C.R. 864, 555 P.2d 1104 [attorney disbarred for admitted multiple acts of fraud and abuse of process despite psychiatric testimony that his professional judgment was impaired by emotional disorder; following *Grove*].)

In re Lamb (1989) 49 C.3d 239, 260 C.R. 856, 776 P.2d 765, approved a recommendation of disbarment despite a strong showing of mitigating circumstances. Petitioner, with no prior record of discipline, took and passed the bar examination for her husband after he had failed to pass on several prior occasions. She pleaded nolo contendere to charges of felony false personation, and received a sentence of a fine and probation. In the State Bar proceeding, evidence was introduced of her pregnancy and chronic diabetes.

(a) "Petitioner's case has sympathetic aspects, and her expressions of contrition seem genuine. Nevertheless, her deceitful crime was exceptionally serious. Considering the public danger inherent in bar exam cheating, and the criminal dishonesty and moral turpitude involved, '[o]nly ... the most compelling mitigating circumstances' could prevent disbarment." (49 C.3d 241, 242, citing State Bar Standards for Attorney Sanctions for Professional Misconduct.)

(b) "Petitioner's deceitful acts were of exceptional gravity. Her conduct threatened innumerable clients with significant injury through unknowing exposure to an unqualified practitioner. It undermined the integrity of the State Bar's admission system, on which public confidence in the competence of attorneys is founded." (49 C.3d 245, 246.)

One justice dissented, and after reviewing the tragic facts at length, asserted that disbarment "serves only to punish an apparently talented lawyer whose misconduct resulted from the most desperate, life-threatening circumstances." (49 C.3d 249.) "An alternative is available which would, in my view, far better serve the public, the profession and the courts. To the extent necessary, we may impose conditions of probation which will ensure that the attorney is rehabilitated and the public is protected." (49 C.3d 255.)

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6. Restitution.

1 *Witkin Cal. Proc. Attys* § 549

[§ 549] Restitution.

Prompt restitution is a strong mitigating factor. (See *Demain v. State Bar* (1970) 3 C.3d 381, 388, 90 C.R. 420, 475 P.2d 652 [efforts to repay]; *Himmel v. State Bar* (1971) 4 C.3d 786, 799, 94 C.R. 825, 484 P.2d 993 [full restitution]; *Benson v. State Bar* (1971) 5 C.3d 382, 96 C.R. 30, 486 P.2d 1230 [attempt at partial restitution]; *Athearn v. State Bar* (1977) 20 C.3d 232, 142 C.R. 171, 571 P.2d 628 [full restitution]; *Waysman v. State Bar* (1986) 41 C.3d 452, 458, 459, 224 C.R. 101, 714 P.2d 1239 [prompt commencement of restitution, with petitioner continuing to make monthly payments]; 95 A.L.R.3d 724 [restitution as mitigating circumstance in disciplinary action against attorney].)

However, belated restitution, under pressure or threat of disciplinary proceedings, is not helpful. (See *Maggart v. State Bar* (1936) 7 C.2d 495, 502, 61 P.2d 451; *Pearlin v. State Bar* (1941) 18 C.2d 682, 684, 117 P.2d 341; *Narlian v. State Bar* (1943) 21 C.2d 876, 887, 136 P.2d 553; *Black v. State Bar* (1972) 7 C.3d 676, 694, 103 C.R. 288, 499 P.2d 968, 2 Cal. Evidence (4th), Witnesses, §372; *In re Wright* (1973) 10 C.3d 374, 377, 378, 110 C.R. 348, 515 P.2d 292; *In re Cohen* (1974) 11 C.3d 935, 943, 114 C.R. 611, 523 P.2d 651; *Magee v. State Bar* (1975) 13 C.3d 700, 708, 119 C.R. 485, 532 P.2d 133; *In re Lyons* (1975) 15 C.3d 322, 326, 124 C.R. 171, 540 P.2d 11; *Fitzpatrick v. State Bar* (1977) 20 C.3d 73, 141 C.R. 169, 569 P.2d 763.)

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7. Other Subsequent Conduct.

1 *Witkin Cal. Proc. Attys* § 550

[§ 550] Other Subsequent Conduct.

(1) *Good Conduct*. Other acts of repentance have been considered. (See *Smith v. State Bar* (1930) 211 C. 249, 258, 294 P. 1057 [test case against form of ambulance chasing; petitioner, on learning of its disfavor, voluntarily abandoned it before proceedings were commenced]; *Signer v. State Bar* (1939) 13 C.2d 151, 153, 88 P.2d 127 [abstained from practice for 15 months]; *In re Urias* (1966) 65 C.2d 258, 262, 53 C.R. 881, 418 P.2d 849, *infra*, §622; *In re Higbie* (1972) 6 C.3d 562, 574, 99 C.R. 865, 493 P.2d 97 [petitioner cooperated with authorities on arrest, indicating recognition of his wrongful conduct and willingness to rehabilitate himself]; *Bradpiece v. State Bar* (1974) 10 C.3d 742, 748, 111 C.R. 905, 518 P.2d 337 [corrective measures to avoid problem in future; candor, cooperation and remorse demonstrated]; *In re Cohen* (1974) 11 C.3d 935, 943, 114 C.R. 611, 523 P.2d 651 [concerted efforts for rehabilitation; remorse displayed; favorable change in attitude].)

(2) *Behavior in Disciplinary Hearings*. The court may be influenced by petitioner's good or bad behavior in the disciplinary hearings. (See *Honoroff v. State Bar* (1958) 50 C.2d 202, 210, 323 P.2d 1003 [petitioner's "vacillating conduct, his evasive testimony, and his lack of candor before the local committee"]; *Demain v. State Bar* (1970) 3 C.3d 381, 388, 90 C.R. 420, 475 P.2d 652 [petitioner's "candor, cooperation and remorse throughout the disciplinary proceedings, and the efforts he has made and is making to overcome his personal difficulties and to repay his debts"]; *Sevin v. State Bar* (1973) 8 C.3d 641, 646, 105 C.R. 513, 504 P.2d 449 [lack of candor]; *In re Bogart* (1973) 9 C.3d 743, 749, 108 C.R. 815, 511 P.2d 1167 [same]; *Selznick v. State Bar* (1976) 16 C.3d 704, 709, 129 C.R. 108, 547 P.2d 1388 [same]; *Cain v. State Bar* (1979) 25 C.3d 956, 961, 160 C.R. 362, 603 P.2d 464; *Franklin v. State Bar* (1986) 41 C.3d 700, 710, 224 C.R. 738, 715 P.2d 699 [attorney's intentionally misleading testimony before State Bar]; *In the Matter of Dahlz* (2001) 4 Cal. State Bar Ct. Rptr. 269, 282 [lack of candor with investigators and false testimony].)

(3) *Behavior During or After Discipline Imposed*. Continued practice during suspension has been viewed as additional support for a recommendation of disbarment. (See *In re Bogart*, *supra*, 9 C.3d 749; *Jackson v. State Bar* (1979) 25 C.3d 398, 404, 158 C.R. 869, 600 P.2d 1326 [continued misconduct despite pending disciplinary action].)

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8. Extrinsic Circumstances.

1 *Witkin Cal. Proc. Attys* § 551

[§ 551] Extrinsic Circumstances.

Extrinsic factors favorable to the petitioner are occasionally invoked with success.

(1) *Bad Motives or Character of Complainant.* In theory, the spite or other wrongful motives of a complainant are immaterial, and some of the cases have said so plainly. "Whatever may have been the instigating factor, or whatever may have been the personal motive, in the initiation of the State Bar proceeding, are not matters of controlling concern in a case where the facts disclosed independently lead to the conclusion that the attorney is subject to some disciplinary action." (*Rohe v. State Bar* (1941) 17 C.2d 445, 450, 110 P.2d 389; see *Bryant v. State Bar* (1942) 21 C.2d 285, 298, 131 P.2d 523; *Pickering v. State Bar* (1944) 24 C.2d 141, 145, 148 P.2d 1; *Fall v. State Bar* (1944) 25 C.2d 149, 159, 153 P.2d 1.)

Nevertheless, a showing of bad motive or character of the person instigating the proceedings has two unmistakable effects:

(a) The credibility of the complainant as a witness is weakened; "evidence which bears the earmarks of private spite should be scrutinized most carefully and accepted with extreme caution." (*Herrscher v. State Bar* (1935) 4 C.2d 399, 413, 49 P.2d 832 [quoting from an earlier case; evidence reviewed and charges dismissed]; *Hildebrand v. State Bar* (1941) 18 C.2d 816, 834, 117 P.2d 860 [criticizing evidence "colored by self-interest and animosity"; charges dismissed].)

(b) The difficulties confronting an attorney in dealing with such a client are sometimes considered in mitigation of the punishment. (See *McGrath v. State Bar* (1943) 21 C.2d 737, 741, 135 P.2d 1.)

(2) *Lack of Injury or Damage to Client or Third Person.* An act of misconduct is of course not excused merely because neither the client nor a third person ultimately suffered loss. (*Pickering v. State Bar*, *supra*; *Allen v. State Bar* (1951) 36 C.2d 683, 685, 226 P.2d 569; *Foote v. State Bar* (1951) 37 C.2d 127, 230 P.2d 617; *Reznik v. State Bar* (1969) 1 C.3d 198, 203, 81 C.R. 769, 460 P.2d 969; *In re Bloom* (1977) 19 C.3d 175, 179, 137 C.R. 168, 561 P.2d 258 [solicitation of bribe; lack of individual harm carries little weight because crime impugned integrity of county government]; *Allen v. State Bar* (1977) 20 C.3d 172, 141 C.R. 808, 570 P.2d 1226 [intentional deception of bank; not

defense or mitigating factor]; *Athearn v. State Bar* (1977) 20 C.3d 232, 236, 142 C.R. 171, 571 P.2d 628 [restitution after misappropriation of funds].)

However, lack of injury or damage has been mentioned occasionally as a reason for a reduction of the penalty. (*In re Graves* (1929) 208 C. 57, 62, 280 P. 115 [condonation by victim considered]; *Paine v. State Bar* (1939) 14 C.2d 150, 154, 93 P.2d 103; *In re Higbie* (1972) 6 C.3d 562, 573, 99 C.R. 865, 493 P.2d 97 [mitigating factor]; *In re Kristovich* (1976) 18 C.3d 468, 134 C.R. 409, 556 P.2d 771 [mitigating factor].)

(3) *Beneficial Services Performed*. The fact that the accused attorney performed valuable and beneficial services for the complainant is a mitigating factor. (*Mills v. State Bar* (1931) 211 C. 579, 582, 297 P. 19; *Lantz v. State Bar* (1931) 212 C. 213, 220, 298 P. 497.)

(4) *Discriminatory Proceedings*. In early cases the court hinted that when more than one attorney is involved in a particular wrongful act or transaction, common fairness calls for prosecution of all or none. If only one is charged, a likely order is remand to the State Bar for reopening of the proceedings and joinder of all participants. (See *Gray v. State Bar* (1934) 1 C.2d 226, 33 P.2d 1016 [remand]; *Gray v. State Bar* (1936) 7 C.2d 177, 181, 59 P.2d 1033 [dismissed]; *Herrscher v. State Bar*, *supra*, 4 C.2d 417 [this, among other factors, considered, and proceeding ultimately dismissed].) (For practice where more than one attorney may be involved in transaction for which discipline is sought, see *infra*, §590.)

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A. Discipline by the Courts.

1. Disbarment or Suspension by Supreme Court.

a. Inherent Power.

1 Witkin Cal. Proc. Attys § 552

[§ 552] Inherent Power.

Prior to the State Bar Act, discipline was administered by the courts under their inherent judicial power. The State Bar Act did not attempt to curtail or limit the previously existing, judicial power. (*B. & P.C. 6075, 6087, 6100.*) Accordingly, the Business and Professions Code retains the detailed procedure for proceedings to disbar or suspend, initiated by the court on its own motion or by verified accusation, followed by order to appear and answer, service of citation, answer by accused attorney, trial by the court and judgment. (*B. & P.C. 6107 et seq.*) (See *Theard v. United States* (1957) 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 [disbarment by state court does not automatically require disbarment by federal courts]; *In re Ruffalo* (1968) 390 U.S. 544, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117, 122 [in determining whether disbarment by federal court will follow disbarment by state, court will consider whether state proceeding afforded attorney due process]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §29 et seq.)

However, the elaborate scheme of disciplinary procedure set up in the State Bar Act has rendered court proceedings unnecessary, and in recognition of this condition *In re Walker* (1948) 32 C.2d 488, 196 P.2d 882, declared a policy rule requiring exhaustion of the State Bar remedy. Thus, the court will not exercise its powers unless and until the accuser has first invoked the disciplinary procedure of the State Bar. More particularly, the court will dismiss an accusation filed in the court unless it appears from the filing (a) that the same specific charges have been previously presented in writing to the State Bar; and (b) that a hearing has been arbitrarily refused, or that after a hearing the State Bar has arbitrarily failed to take appropriate action. (32 C.2d 490.) (See *B. & P.C. 6087* [Supreme Court may authorize State Bar to take any action otherwise reserved to the Supreme Court in any matter arising under State Bar Act or initiated by Supreme Court, provided action is reviewable by Supreme Court]; C.R.C., Rule 9.13(e) [petition to Supreme Court must show that review within State Bar Court has been exhausted].) (On review and determination by Supreme Court, see *infra*, §613 et seq.)

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b. Nonstatutory Grounds.

1 Witkin Cal. Proc. Attys § 553

[§ 553] Nonstatutory Grounds.

The inherent power of the court was reaffirmed and exercised in *Stratmore v. State Bar* (1975) 14 C.3d 887, 123 C.R. 101, 538 P.2d 229. Petitioner was charged with fraudulently obtaining money from New York law firms in 1971, prior to his admission to practice in California in 1972. The court issued an order to show cause why petitioner's order of admission should not be revoked. Hearings before the local committee and board resulted in the board's recommendation of suspension for 2 years, with probation and actual suspension for 9 months. *Held*, the Court had the power to impose the discipline, and the recommendation was adopted.

(a) Early cases holding that courts lack authority to disbar or suspend on grounds other than those set forth in the statute received some support in *Sullivan v. State Bar* (1946) 28 C.2d 488, 495, 170 P.2d 888, but the statements were contrary to later decisions recognizing the inherent power (e.g., *Emslie v. State Bar* (1974) 11 C.3d 210, 225, 230, 113 C.R. 175, 520 P.2d 991), and on this point *Sullivan* is disapproved. (14 C.3d 890.)

(b) Neither the standards for admission nor the grounds for discipline are exclusively statutory; the court retains inherent power to require additional standards, and may impose discipline for conduct, either within or outside of an attorney's professional activities, that shows the attorney to be unfit to practice. Hence, it is irrelevant that petitioner's conduct preceded his admission to practice. (14 C.3d 890, citing *In re Bogart* (1973) 9 C.3d 743, 108 C.R. 815, 511 P.2d 1167, *supra*, §§467, 507.)

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c. No Superior Court Jurisdiction.

1 Witkin Cal. Proc. Attys § 554

[§ 554] No Superior Court Jurisdiction.

In *Jacobs v. State Bar* (1977) 20 C.3d 191, 141 C.R. 812, 570 P.2d 1230, an attorney applied to a superior court to restrain a State Bar investigation of his professional activities and to annul a local committee's subpoena requiring a physician to appear before it and produce billings of the attorney. The court determined that it had jurisdiction but denied relief, and the attorney appealed. *Held*, order reversed and trial court directed to dismiss.

(a) The California Supreme Court has sole original jurisdiction to disbar or suspend an attorney. The State Bar conducts disciplinary proceedings as the Supreme Court's administrative arm. "To allow attorneys to initiate superior court proceedings to circumvent or 'shortcut' this function, especially at the investigatory stage, would tend to jeopardize the integrity of the process." (20 C.3d 196.)

(b) *B. & P.C. 6051*, which authorizes State Bar committees to apply to the superior court for enforcement of their subpoenas, gives that court jurisdiction only in proceedings that the committee chooses to initiate. The attorney under investigation is entitled to file with the committee itself a motion to quash a subpoena. This and other procedural safeguards in State Bar proceedings, coupled with the opportunity for Supreme Court review, sufficiently protect the attorney's rights. (20 C.3d 197, 198.) (See *B. & P.C. 6051.1* [motion to quash subpoena issued pursuant to *B. & P.C. 6049* must be brought in State Bar Court].)

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2. Criminal Prosecution.

1 Witkin Cal. Proc. Attys § 555

[§ 555] Criminal Prosecution.

Certain kinds of misconduct are crimes. Prosecution for these offenses may take place independently of State Bar proceedings, or may be cumulative; i.e., on conviction of the more serious offenses the attorney will be disbarred or suspended. (See *supra*, §466.) The following are illustrative:

P.C. 158, 159 (common barratry: "the practice of exciting groundless judicial proceedings"); see 2 *Cal. Crim. Law* (3d), *Crimes Against Governmental Authority*, §3.

B. & P.C. 6128 (deception of court or party, delay of client's action for own gain, receiving money not entitled to take); see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §331.

P.C. 506 (embezzlement: misappropriation of client's property); see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §29.

B. & P.C. 6126 (practicing while disbarred or suspended); see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §331.

B. & P.C. 6131 (assisting defendant in criminal case after aiding in its prosecution or where law partner previously prosecuted case); see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §331.

B. & P.C. 6129 states that "[e]very attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor." *B. & P.C. 6129* is a limited statement of the common law prohibition against champerty and maintenance, and, as a criminal statute, it should not be loosely construed. Thus, in *Martin v. Freeman* (1963) 216 C.A.2d 639, 31 C.R. 217, S, an attorney, owed money to D, another attorney. S had a claim against defendant, and he assigned it to D in liquidation of the indebtedness. In this suit by D's assignee, the trial judge invoked the statute to deny recovery. *Held*, reversed; D did not buy the claim in the market. "The outright purchasing by attorneys of claims which perhaps otherwise would never be sued upon obviously would tend to stir up a good deal of litigation if it were permitted; but the transfer by one who owes money to an attorney of a claim which the transferor possesses against a third person may have but insignificant

effect in the volume of litigation, and it partakes much less of the officious intermeddling nature of out-and-out purchase and sale." (216 C.A.2d 643.)

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1 Witkin Cal. Proc. Attys § 556

[§ 556] Other Measures.

The courts may impose other kinds of sanctions on attorneys:

(1) Contempt proceedings for misconduct amounting to a contempt of court. (See *B. & P.C. 6127*; *C.C.P. 1209* et seq.; *7 Cal. Proc. (5th), Trial*, §189 et seq.)

(2) Summary order for the return of money wrongfully withheld. (See *Estate of De Barry (1941) 43 C.A.2d 715, 731, 111 P.2d 728*; *In re Marriage of Wagoner (1986) 176 C.A.3d 936, 940, 222 C.R. 479* [order to pay money disbursed in violation of stipulation].)

(3) Dismissal of a case as collusive or sham. (See *3 Cal. Proc. (5th), Actions*, §24; *5 Cal. Proc. (5th), Pleading*, §1005.)

(4) Dismissal of, or imposition of penalties for, a frivolous appeal. (See *9 Cal. Proc. (5th), Appeal*, §§983, 984.)

(5) Admonition or reprimand in open court for misconduct during a trial. (See *7 Cal. Proc. (5th), Trial*, §212.)

(6) Striking a pleading or other paper as sham (see *5 Cal. Proc. (5th), Pleading*, §1013) or as a penalty for refusing to make discovery (see *2 Cal. Evidence (4th), Discovery*, §257).

(7) Award of attorneys' fees against a party or attorney for tactics or actions not based on good faith. (*C.C.P. 128.6*; see *7 Cal. Proc. (5th), Trial*, §227 et seq.)

(8) Report to the State Bar. (See *In re Marriage of Wagoner, supra*, *176 C.A.3d 943* ["The clerk is directed to forward a copy of our opinion to the State Bar for its own evaluation of the professional conduct involved"]; on court's duty to make reports to State Bar, see *B. & P.C. 6086.7, infra*, §575.)

A trial court, as well as an appellate court, has inherent and plenary power to strike from the record a scandalous, abusive, or defamatory paper filed by counsel. In *Warner v. Warner (1955) 135 C.A.2d 302, 303, 287 P.2d 174*, defendant attorney, in pro. per., filed an affidavit attacking the character and professional standing of counsel for

plaintiff. *Held*, the trial court properly exercised its discretion in ordering the affidavit stricken from the record, removed from the file, and sealed until further order of the court.

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(New) Revocation of pro hac vice status: In *Sheller v. Superior Court* (2008) 158 C.A.4th 1697, 71 C.R.3d 207, attorney S, appearing pro hac vice for plaintiffs in a class action, sent a communication to prospective class members that contained a misrepresentation that stated class representatives would be paid for their time. After concluding that S's behavior would justify revocation of his pro hac vice status, the court declined to do so, and instead ordered S to reimburse defendant for attorneys' fees and issued a formal reprimand. *Held*, the trial court lacked authority to impose attorneys' fees as a sanction, but could have revoked S's pro hac vice status.

(a) Although California has not yet addressed the issue, numerous other jurisdictions have determined that their trial courts have the authority to revoke an attorney's pro hac vice status. The legal basis for that authority has varied. For example, some jurisdictions expressly authorize revocation in their statutes or rules; others have found the authority in a trial court's inherent power to regulate practice and protect the integrity of its proceedings. (158 C.A.4th 1714.)

(b) California has no express provision granting trial courts the right to revoke an attorney's pro hac vice status, and unlike federal courts California trial courts do not have the power to control admission to the bar and discipline attorneys (text, §554). However, California trial courts do have the inherent power "to regulate practice before them and protect the integrity of their proceedings." Moreover, C.R.C., Rule 9.40(f) (text, §389) provides that an attorney appearing pro hac vice is subject to the jurisdiction of the court with respect to the laws governing conduct to the same extent as a California attorney. (158 C.A.4th 1716.)

(c) Thus, because "a California trial court's inherent power includes the authority to disqualify a California attorney, and that revocation of an out-of-state-attorney's *pro hac vice* status is, in effect, a disqualification of the out-of-state attorney ... a California trial court's inherent powers include the authority to revoke an attorney's *pro hac vice* status when that attorney has engaged in conduct ... sufficient to disqualify a California attorney." (158 C.A.4th 1716.)



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1 Witkin Cal. Proc. Attys § 557

[§ 557] Criticism in Judicial Opinion.

A severe sanction for unethical or other improper conduct is criticism in a judicial opinion published in the permanent official reports. Examples are numerous:

Fusari v. Steinberg (1975) 419 U.S. 379, footnote 12, 95 S.Ct. 533, 42 L.Ed.2d 521 [briefs and oral argument failed to inform court of "significant" revision of challenged statutory scheme; majority found it "difficult to understand the failure of counsel fully to inform the Court"; concurring justice declared it "disconcerting"].

Farrar v. Steenbergh (1916) 173 C. 94, 98, 159 P. 707 [attorney, to obtain default, misled opposing counsel, who had "no cause to suspect treachery or deceit"].

Cobe v. Crane (1916) 173 C. 116, 120, 159 P. 587 [contentions of appellants "based either upon gross ignorance of or a willful attempt to misrepresent the law"].

Wilson v. Bittick (1965) 63 C.2d 30, 40, footnote 8, 45 C.R. 31, 403 P.2d 159 [tone of injured dignity in plaintiff's brief "ill becomes one who by his dilatory tactics has given everyone concerned ample cause to lose patience with him"].

Sabella v. Southern Pac. Co. (1969) 70 C.2d 311, 321, 74 C.R. 534, 449 P.2d 750 ["Intemperate and unprofessional conduct by counsel as is here involved runs a grave and unjustifiable risk of sacrificing an otherwise sound case for recovery, and as such is a disservice to a litigant"].

In re Ciraolo (1969) 70 C.2d 389, 399, 74 C.R. 865, 450 P.2d 241 [false affidavit to disqualify judge; "unless the seriousness of his conduct is impressed upon petitioner by this contempt conviction and sentence, petitioner will feel it appropriate to again employ the same contemptuous tactics"].

Ferreira v. Ferreira (1973) 9 C.3d 824, 843, footnote 27, 109 C.R. 80, 512 P.2d 304 [criticism of counsel for personal attacks in brief].

In re Benoit (1973) 10 C.3d 72, 88, 109 C.R. 785, 514 P.2d 97 [counsel's failure either to file a criminal defendant's

notice of appeal or to instruct him how to do so is a "breach of professional duty" for which in the future the court "may well refer the matter to the State Bar"].

Houser v. Superior Court (1932) 121 C.A. 31, 36, 8 P.2d 483 ["with full knowledge ... of the existence of the temporary restraining order, but in reliance upon what as to him amounted at most to a bare technicality, he deliberately chose to violate the order"].

Corum v. Hartford Acc. & Indem. Co. (1945) 67 C.A.2d 891, 896, 155 P.2d 710 ["To take up the time of the courts with an action known by the attorney to be false and fictitious is clearly an abuse of judicial process"].

Simon v. San Francisco (1947) 79 C.A.2d 590, 600, 180 P.2d 393 ["The trial of a law suit is not a game where the spoils of victory go to the clever and technical regardless of the merits"].

Estate of Kromrey (1950) 98 C.A.2d 639, 646, 220 P.2d 805 ["appellant not only violated the confidential relationship between attorney and client but also violated the ethics of the legal profession"].

Estate of Vokal (1953) 121 C.A.2d 252, 254, 263 P.2d 64 [denial of attorneys' fees; trust attorney was castigated for exorbitant and illegal charges, obtaining advantage from estate, and disloyalty].

Smith v. Los Angeles Bookbinders Union No. 63 (1955) 133 C.A.2d 486, 500, 284 P.2d 194 ["The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended"].

People v. Massey (1955) 137 C.A.2d 623, 625, 290 P.2d 906 [criticism of defendant's attorney for failing to appear to argue appeal].

Gordon v. Gordon (1956) 145 C.A.2d 231, 234, 302 P.2d 355 [criticism of attorney for concealing from court material facts concerning inadequate notice of trial].

Bernath v. Wilson (1957) 149 C.A.2d 831, 835, 309 P.2d 87, *supra*, §540 [criticism of attorney for violating oral agreement with opposing counsel to extend time to plead].

People v. Speaks (1957) 156 C.A.2d 25, 39, 41, 319 P.2d 709 [criticism of deputy district attorney's conduct in obtaining confession].

Daley v. Butte (1964) 227 C.A.2d 380, 389, 38 C.R. 693 [criticism of plaintiff's attorney for "inexplicable immobility" resulting in dismissal for lack of prosecution].

People v. Francisco (1964) 228 C.A.2d 355, 360, footnote 2, 39 C.R. 503 [criticism of district attorney for failure to remedy obvious defect in proof].

Kenworthy v. California (1965) 236 C.A.2d 378, 396, 46 C.R. 396 [denunciation of counsel's "gross and deliberate" misconduct, unnecessary to decision, but "impelled" because "the message still seems not to get through to some trial attorneys"].

Mayberry v. Coca Cola Bottling Co. of Sacramento (1966) 244 C.A.2d 350, 354, footnote 3, 53 C.R. 317 [criticism of counsel's failure to raise issue at pretrial conference].

Schulz v. Wulfing (1967) 251 C.A.2d 776, 778, 60 C.R. 53 [denunciation of counsel's failure to cite record support in appellate brief after warning him in prior decision against this disregard of established court rules].

People v. Busick (1968) 259 C.A.2d 744, 751, 66 C.R. 532, *supra*, §503 [walking out of courtroom and refusing to further participate in proceedings].

Halpin v. Superior Court (1971) 14 C.A.3d 530, 535, 92 C.R. 329 [criticism of improper conduct set forth in detail].

In re Ridenour (1973) 33 C.A.3d 792, 801, 109 C.R. 370 [conduct of three counsel and petitioner "show an acute desire and calculated plan to delay a final disposition of the judgment of conviction against petitioner and a studied plan to create error in the process"].

Day v. Rosenthal (1985) 170 C.A.3d 1125, 1147, 1180, 217 C.R. 89 [action for malpractice, breach of fiduciary duty, fraud, and abuse of process; majority opinion described violations of attorney responsibility as "numerous, blatant and egregious," constituting "irresponsible 'representation' " that "trampled on basic attorney obligations"; concurring justice referred to "a course of conduct pursued by a votary of greed, who was insatiate in his avaricious appetite, lamentable in his judgment, and who engaged in a constant and deliberate usurpation of his noble office"].

In re Marriage of Wagoner (1986) 176 C.A.3d 936, 943, 222 C.R. 479 [attorney's conduct reflected "very poorly on him in particular and the legal profession in general. He has violated a trust, overreached an adversary, and done a disservice to an overburdened judicial system"].

McDonald v. John P. Scripps Newspaper (1989) 210 C.A.3d 100, 102, 257 C.R. 473 ["Question--When should an attorney say 'no' to a client? Answer--When asked to file a lawsuit like this one"].

Olson Partnership v. Gaylord Plating Lab (1990) 226 C.A.3d 235, 242, 276 C.R. 493, 7 Cal. Proc. (5th), Trial, §235 [attorney had moved for summary judgment on basis of erroneous and incomplete response to interrogatory, which opposing counsel said would be corrected; in upholding sanctions, court remarked: "There is such a thing as professional courtesy, and it is sad that counsel must learn this in an appellate opinion"].

Mammoth Mountain Ski Area v. Graham (2006) 135 C.A.4th 1367, 1374, 38 C.R.3d 422 [appellate counsel misrepresenting record at oral argument].

In *Simonian v. Patterson* (1994) 27 C.A.4th 773, 32 C.R.2d 722, attorney S, represented by attorney Z, brought an action against his ex-fiancee's father in an attempt to retrieve personal property from the ex-fiancee. The court concluded that the claims were "totally and completely devoid of merit." (27 C.A.4th 784.) "We deem the filing of this meritless suit and the prosecution of this frivolous appeal to be a serious dereliction of duty by appellants, both lawyers. A license to practice law is not a cudgel to wield against laymen, who ordinarily are at a severe disadvantage against lawyers. ... In his zeal to exact some kind of punishment or revenge, appellant [S] has apparently lost sight of his professional responsibility, especially when measured against record albums and Christmas decorations." (27 C.A.4th 786.) "Appellant [Z] is not to be treated more leniently because his client happens to be a lawyer. The fact remains that [Z] is 'not a hired gun required to carry out every direction given by the client.' " (27 C.A.4th 786.)

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 B. Nature of State Bar Proceedings.
 1. In General.

1 Witkin Cal. Proc. Attys § 558

[§ 558] In General.

(1) *State Bar Act.* The disciplinary procedure under the State Bar Act, although described as "alternative and cumulative" (*B. & P.C. 6075*), is, as a practical matter, the exclusive method of trying accusations against attorneys. (See *supra*, §552.) The grounds for disciplinary action are in the statutes (mainly Business and Professions Code provisions) and the Rules of Professional Conduct of the State Bar of California. *B. & P.C. 6076* authorizes the Board of Governors to adopt these rules with the approval of the Supreme Court, and *B. & P.C. 6077* makes them binding on all members of the State Bar. (See *Barton v. State Bar* (1930) 209 C. 677, 680, 289 P. 818.)

(2) *Attorney's Duty To Cooperate.* An attorney must cooperate and participate in a disciplinary investigation or other regulatory proceeding pending against the attorney. (*B. & P.C. 6068(i)*.) However, this duty must "not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges." Nor may the duty be construed to require an attorney to cooperate with a request that requires the attorney to waive a constitutional or statutory privilege, or to comply with matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Moreover, an attorney's exercise of a constitutional or statutory privilege may not be used against the attorney in a regulatory or disciplinary proceeding. (*B. & P.C. 6068(i)*; see *B. & P.C. 6079.4* [attorney's exercise of Fifth Amendment or other constitutional or statutory privilege is not failure to cooperate under *B. & P.C. 6068(i)*].) (See *supra*, §498 and *infra*, §560.)

(3) *Rules of Professional Conduct.* The original Rules of Professional Conduct were adopted in 1928; the current Rules became effective in 1989. (See *supra*, §409 et seq.) The Board of Governors may discipline a member's wilful breach of the rules as provided by law. (*Rules of Professional Conduct, Rule 1-100(A)*.)

(4) *Rules of Procedure and Practice.* *B. & P.C. 6086* gives the Board of Governors rule-making power in disciplinary proceedings. The original Rules of Procedure of the State Bar were adopted in 1927. Transitional Rules of Procedure were adopted in 1989. A major revision, involving both substantive changes and a restructuring, resulted in new rules directly pertaining to State Bar Court proceedings, which became effective January 1, 1996.

The Rules of Procedure are augmented by the Rules of Practice of the State Bar Court, adopted by the Executive

Committee of the State Bar Court (*infra*, §562) pursuant to *B. & P.C. 6086.5* and *6086.65(b)*. The current rules became effective January 1, 1995, and are applicable to all proceedings before the State Bar Court. (See Rules of Practice of the State Bar Court, Rule 1100 *et seq.*; *Rules of Procedure of the State Bar, Rule 1010(a)(1).*) (On State Bar Court procedures in disciplinary matters, see *infra*, §561 *et seq.*)

(5) *California Constitution*. Cal Const., Art VI, §18(e), provides in part: "The State Bar may institute appropriate attorney disciplinary proceedings against any judge who retires or resigns from office with judicial disciplinary charges pending."

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1 *Witkin Cal. Proc. Attys* § 559

[§ 559] Not Criminal Proceeding.

Disciplinary proceedings are not designed to punish the attorney. The basic purpose is to protect the public and the profession from the objectionable activities of persons unfit to practice law, and a disciplinary proceeding is not a criminal action. (See *Marsh v. State Bar* (1934) 2 C.2d 75, 78, 39 P.2d 403; *Dudney v. State Bar* (1937) 8 C.2d 555, 563, 66 P.2d 1199; *In re Rothrock* (1940) 16 C.2d 449, 454, 106 P.2d 907; *Segretti v. State Bar* (1976) 15 C.3d 878, 886, 126 C.R. 793, 544 P.2d 929; *Giovanazzi v. State Bar* (1980) 28 C.3d 465, 472, 169 C.R. 581, 619 P.2d 1005; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §101.) Hence, the following principles apply:

(1) *Presumption of Innocence*. The statutory presumption of innocence is not available in disciplinary proceedings. (*Ring v. State Bar* (1933) 218 C. 747, 750, 24 P.2d 821.)

(2) *Rules of Evidence*. The technical rules of evidence in criminal cases are not applicable. (See *Fischer v. State Bar* (1936) 6 C.2d 671, 672, 58 P.2d 1277 [disbarment for perjury, though proof was made without two witnesses or corroboration required by statute]; *Werner v. State Bar* (1944) 24 C.2d 611, 615, 150 P.2d 892 [admission of testimony at former trial, though not in strict compliance with statute]; 1 *Cal. Evidence* (4th), *Introduction*, §55.)

(3) *Multiple Prosecutions*. Disciplinary proceedings are not subject to the rule against multiple prosecutions. (See 3 *Cal. Crim. Law* (3d), *Punishment*, §§136, 140; *Urbano v. State Bar* (1977) 19 C.3d 16, 20, 136 C.R. 572, 560 P.2d 1; *Goldman v. State Bar* (1977) 20 C.3d 130, 139, 141 C.R. 447, 570 P.2d 463 [overlapping charges are not prohibited by P.C. 654 (forbidding multiple punishment) because proceedings are not criminal and charges are not punishment]; *In re Brown* (1995) 12 C.4th 205, 215, 217, 48 C.R.2d 29, 906 P.2d 1184 [defense of double jeopardy is not available in disciplinary proceedings; hence, prior criminal conviction is not bar to imposition of discipline].)

(4) *Entrapment Defense*. The entrapment defense is not available. In *Wong v. State Bar* (1975) 15 C.3d 528, 125 C.R. 482, 542 P.2d 642, petitioner was indicted for bribery and conspiracy, on evidence that he had solicited money from businessmen for use in bribing police officers to allow illegal gambling to take place. He was acquitted on the ground that the police department had initiated the action by having two officers pose as corrupt policemen in its investigation of suspected gambling. In the State Bar proceeding petitioner contended that the entrapment was either a complete defense or a mitigating circumstance precluding severe discipline. *Held*, petitioner was disbarred. *Patty v.*

Board of Med. Examiners (1973) 9 C.3d 356, 107 C.R. 473, 508 P.2d 1121, 1 Cal. Crim. Law (3d), Defenses, §92, is distinguishable: There the entrapment was committed by the investigators of the administrative agency. Here the State Bar played no part in petitioner's entrapment. (15 C.3d 531.)

(5) *Proceeding Unreasonably Delayed*. The rule giving a defendant the right to a dismissal of a criminal proceeding unreasonably delayed (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §324 et seq.) does not apply to disciplinary proceedings. (See *Lewis v. State Bar* (1973) 9 C.3d 704, 713, 108 C.R. 821, 511 P.2d 1173 [no prejudice shown]; *Taylor v. State Bar* (1974) 11 C.3d 424, 434, 113 C.R. 478, 521 P.2d 470 [no prejudice shown; delay was largely result of petitioner's military duty]; *Yokozeki v. State Bar* (1974) 11 C.3d 436, 449, 113 C.R. 602, 521 P.2d 858 [no limitation period; mere delay, without prejudice, is no defense, but may be factor in mitigation]; *Caldwell v. State Bar* (1975) 13 C.3d 488, 495, 496, 498, 119 C.R. 217, 531 P.2d 785 [delay during disposition of civil action filed against petitioner by clients; no prejudice shown]; *Allen v. State Bar* (1977) 20 C.3d 172, 179, 141 C.R. 808, 570 P.2d 1226 [no prejudice shown]; *Athearn v. State Bar* (1977) 20 C.3d 232, 142 C.R. 171, 571 P.2d 628 [4-month delay in notifying attorney of local committee's conclusions; no prejudice shown]; *Wells v. State Bar* (1978) 20 C.3d 708, 714, 144 C.R. 133, 575 P.2d 285 [22-month delay in notification by State Bar of charges made; "we cannot condone the long delay," but no prejudice shown].) (See 93 A.L.R.3d 1057.)

In *Yokozeki*, *supra*, the court said: "It is not unreasonable for a disgruntled client to attempt to resolve his differences with an attorney through a civil action before filing a complaint with the State Bar." Thus, a 7-year delay in filing the complaint was not unreasonable when the complaint was filed "when it became apparent that petitioner was not going to pay the default judgment." (11 C.3d 449.)

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 3. Quasi-Criminal Proceeding.

1 Witkin Cal. Proc. Attys § 560

[§ 560] Quasi-Criminal Proceeding.

The declaration that disciplinary proceedings are not criminal proceedings (see *supra*, §559) is considerably undermined by the repeated concession that they are "quasi-criminal" proceedings. (*Golden v. State Bar* (1931) 213 C. 237, 247, 2 P.2d 325; *Herrscher v. State Bar* (1935) 4 C.2d 399, 403, 421, 49 P.2d 832; *Furman v. State Bar* (1938) 12 C.2d 212, 229, 83 P.2d 12; see 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §101.) And this seems to be the more realistic and reasonable position. The attorney whose professional license is challenged has as much at stake as the defendant in many a criminal prosecution, and should be similarly protected in the *trial of serious charges*. This is accomplished in the following ways:

(1) *Degree of Proof*. Although the statutory protection of proof beyond a reasonable doubt does not apply to these proceedings, the court has created its substantial equivalent by requiring "clear and convincing evidence." (*Golden v. State Bar*, *supra*, 213 C. 247 ["while it is not essential that the proof of guilt be established beyond a reasonable doubt, yet the charges must be sustained by convincing proof to a reasonable certainty and any reasonable doubts should be resolved in favor of the accused"]; *Furman v. State Bar*, *supra* [same]; *Hildebrand v. State Bar* (1941) 18 C.2d 816, 834, 117 P.2d 860 [same]; *Rules of Procedure of the State Bar*, Rule 213 [State Bar has burden to prove culpability by clear and convincing evidence]; see 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §111.)

(2) *Evidence*. Although these proceedings are not governed by the "technical" rules of evidence in criminal cases (*supra*, §559), only legally sufficient evidence will be considered, and inadmissible hearsay will be given no weight. This was decided by *In re Richardson* (1930) 209 C. 492, 288 P. 669, early in the history of the State Bar. Although the court sustained the recommendation of disbarment, it criticized the local committee's reception of background evidence contributing to the "atmosphere of public clamor, political intrigue and general corruption and dishonesty." (209 C. 497.) "Legal evidence alone should be required to deprive a duly admitted attorney of the vitally important and valuable right to practice his profession, and to impose upon him the stigma of disbarment. The court can be asked in such review only to consider the sufficiency of legal evidence. We are of the view, therefore, that only legal evidence, as that term is understood among lawyers, should receive the consideration of the Board of Governors and committees of the State Bar in the exercise of the disciplinary features of the Bar Act." (209 C. 499.)

The extent to which the hearsay rule applies in disciplinary proceedings "is uncertain." (*Younger v. State Bar*

(1974) 12 C.3d 274, 285, 113 C.R. 829, 522 P.2d 5 [question left open; statements involved were nonhearsay offered as circumstantial evidence]; see *Goldman v. State Bar* (1977) 20 C.3d 130, 137, 141 C.R. 447, 570 P.2d 463 [evidence not hearsay and therefore admissible]; cf. *Rules of Procedure of the State Bar, Rule 214*, infra, §592 [Evidence Code, as applied in civil cases, is applicable in State Bar Court proceedings]; 1 *Cal. Evidence* (4th), *Introduction*, §55.) (On permissible use of hearsay evidence in affidavits, see *Conway v. State Bar* (1989) 47 C.3d 1107, 255 C.R. 390, 767 P.2d 657, supra, §353.)

(3) *Self-incrimination*. The attorney may claim the privilege against self-incrimination, and imposition of the penalty of disbarment for exercise of the privilege is unconstitutional. (*Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 627, 17 L.Ed.2d 574, 577, 2 *Cal. Evidence* (4th), *Witnesses*, §363.) (See 37 A.L.R.4th 646 [failure to cooperate with or obey disciplinary authorities as independent ground for discipline].) (On duty to cooperate in disciplinary proceedings, see supra, §558.)

However, testifying without objection waives the privilege. (*Black v. State Bar* (1972) 7 C.3d 676, 688, 103 C.R. 288, 499 P.2d 968, 2 *Cal. Evidence* (4th), *Witnesses*, §372.) In addition, testimony given in a prior proceeding under a grant of immunity may nevertheless be used in a disciplinary proceeding; i.e., the immunity protects against later criminal prosecution, and a disciplinary proceeding is not criminal for purposes of the privilege. (*Segretti v. State Bar* (1976) 15 C.3d 878, 886, 126 C.R. 793, 544 P.2d 929, 2 *Cal. Evidence* (4th), *Witnesses*, §477, following *Black v. State Bar*.)

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1 Witkin Cal. Proc. Attys § 561

[§ 561] In General.

(1) *Function and Organization.* The State Bar Court acts in place of the Board of Governors in disciplinary, reinstatement, and inactive status proceedings and may exercise the authority of the board and its committees, except as limited by the rules of the board. (*B. & P.C. 6086.5; Rules of Procedure of the State Bar, Rule 1000.*) In addition, C.R.C., Rule 9.10 permits the State Bar Court to do the following:

- (a) To exercise the statutory powers under *B. & P.C. 6101* and *6102*, regarding discipline of attorneys convicted of crimes (*supra*, §466 et seq.). (C.R.C., Rule 9.10(a).)
- (b) To extend the time for an attorney to take the Professional Responsibility Examination. (C.R.C., Rule 9.10(b).)
- (c) For good cause, to approve stipulations, modifications, and corrections of probation. (C.R.C., Rule 9.10(c).)
- (d) For good cause, to extend the time to comply with C.R.C., Rule 9.20 (duties of disbarred, resigned, or suspended attorneys; *supra*, §82). (C.R.C., Rule 9.10(d).)
- (e) For good cause, to grant temporary stays of orders of suspension. (C.R.C., Rule 9.10(e).)
- (f) To hear, in the first instance, applications for readmission and reinstatement (*infra*, §645 et seq.). (C.R.C., Rule 9.10(f).)

(2) *Rules of Procedure and Practice.* Proceedings in the State Bar Court are governed by Rules of Procedure of the State Bar (*Rules of Procedure of the State Bar, Rule 10*), and the Rules of Practice of the State Bar Court (Rules of Practice of the State Bar Court, Rule 1101). These rules may be accessed on the State Bar website: www.calbar.ca.gov.

The State Bar Court's Executive Committee (see *infra*, §562) may adopt rules of practice for "all proceedings within its jurisdiction." (*B. & P.C. 6086.5; Rules of Procedure of the State Bar, Rule 1010(a)(1).*) Pursuant to this authority, the Executive Committee adopted Rules of Practice in April 1980, and revised Rules January 1, 1995, which are applicable to all proceedings before the State Bar Court. (See Rules of Practice of the State Bar Court, Rule 1100 et

seq.)

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4. State Bar Court.

b. Departments and Officers.

1 Witkin Cal. Proc. Attys § 562

[§ 562] Departments and Officers.

(1) *Hearing Department.* The Hearing Department is the trial department of the State Bar Court and consists of five hearing judges. (*B. & P.C. 6079.1*; Rules of Procedure of the State Bar, Rule 2.60.)

From among members of the State Bar or retired judges, the Supreme Court or the board may appoint pro tempore judges to decide matters when a State Bar Court judge is unavailable to serve without undue delay to the proceedings. The qualifications, terms, conditions of service, and compensation of pro tempore judges are set by the board, subject to modification by the Supreme Court. (*B. & P.C. 6079.1(e)*.)

(2) *Review Department.* The Review Department is the appellate department of the State Bar Court and consists of the presiding judge of the State Bar Court and two Review Department judges appointed by the Supreme Court. (*B. & P.C. 6086.65(a)*; Rules of Procedure of the State Bar, Rule 3.02.) (On interlocutory review by Review Department, see *Rules of Procedure of the State Bar, Rule 300*, *infra*, §594.)

The decisions of the Review Department are published in the California State Bar Court Reporter (Cal. State Bar Ct. Rptr.), which includes both the full opinions and a complete digest. Subscriptions may be ordered from the State Bar Court Reporter of the State Bar Court in San Francisco. (On State Bar Court Review Department Decisions, see *infra*, §605 *et seq.*)

(3) *Judges.* The Supreme Court appoints the presiding judge of the Hearing Department. The five hearing judges are appointed as follows: (a) two by the Supreme Court, (b) one by the Governor, (c) one by the Senate Committee on Rules, and (d) one by the Speaker of the Assembly. All judges are appointed for 6-year terms, and those appointed may not practice law during their terms. The judges (a) must have been members of the bar for at least 5 years, (b) must not have been disciplined as an attorney in any jurisdiction, and (c) must meet the requirements of *Govt.C. 12011.5(d)* (Governor's appointees or nominees for judicial office; see 2 *Cal. Proc. (5th), Courts*, §5). All judges appointed are subject to admonition, censure, removal, or retirement by the Supreme Court on the same grounds as judges of courts of record. (*B. & P.C. 6079.1*; *B. & P.C. 6086.65*; see *Obrien v. Jones (2000) 23 C.4th 40, 47, 96 C.R.2d 205, 999 P.2d 95* [1999 amendments to *B. & P.C. 6079.1* and *6086.65* do not violate separation of powers doctrine].) (On Applicant

Evaluation and Nomination Committee, see C.R.C., Rule 9.11.)

(4) *Executive Committee.* The presiding judge of the State Bar Court appoints a committee consisting of at least seven persons, one of whom must be a nonlawyer. (*B. & P.C. 6086.65(b).*) The Committee may adopt rules of practice for the operation of the State Bar Court and is generally responsible for the administrative processing of all proceedings. (*B. & P.C. 6086.5, 6086.65(b); Rules of Procedure of the State Bar, Rule 1010.*)

(5) *Chief Trial Counsel.* The Board of Governors appoints, subject to Senate confirmation, a chief trial counsel for a term of 4 years. The chief trial counsel serves under the Board's Regulation, Admissions, and Discipline Oversight Committee, and not under the direction of the chief executive officer. (*B. & P.C. 6079.5(a).*) The chief trial counsel has exclusive jurisdiction to review inquiries and complaints, conduct investigations, and determine whether disciplinary charges should be filed in the State Bar Court. (*Rules of Procedure of the State Bar, Rule 2101.*) Further, the chief trial counsel may appoint special deputy trial counsel as required or specified under the Rules of Procedure of the State Bar. (See *Rules of Procedure of the State Bar, Rule 2201*; on qualifications of chief trial counsel, see *B. & P.C. 6079.5(b).*) (See *In the Matter of Parker* (1997) 3 Cal. State Bar Ct. Rptr. 747, 751 [Office of Chief Trial Counsel is responsible for monitoring, investigating, and initiating proceedings alleging probation violations; order recommending that as condition of probation attorney report compliance directly to hearing judge who has approved substance abuse program was inconsistent].)

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5. Agreement in Lieu of Disciplinary Proceedings.

1 Witkin Cal. Proc. Attys § 563

[§ 563] Agreement in Lieu of Disciplinary Proceedings.

The State Bar disciplinary agency may make agreements with attorneys "in lieu of disciplinary prosecution with the agency charged with attorney discipline." Attorneys are under a statutory duty to honor these agreements (*B. & P.C. 6068(l)*), which may be used in a subsequent disciplinary proceeding involving the attorney (*B. & P.C. 6092.5(i)*). (On termination of proceedings based on agreement in lieu of discipline, see *infra*, §595.)

As a condition of an agreement in lieu of disciplinary proceedings, the State Bar may require an attorney to be fingerprinted, in order to determine whether the attorney has a record of criminal conviction. The use of fingerprint information is limited to discovering prior and subsequent criminal arrests, and fingerprint records are retained for the limited purpose of criminal arrest notification. (*B. & P.C. 6054.*)

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B. Nature of State Bar Proceedings.

6. Pleadings, Papers, and Motions.

1 Witkin Cal. Proc. Attys § 564

[§ 564] Pleadings, Papers, and Motions.

(1) *Format of Papers.* All papers, except exhibits, must be letter size. (Rules of Practice of the State Bar Court, Rule 1110(a).) The first page must be in a prescribed form. (Rules of Practice of the State Bar Court, Rule 1110(b).)

(2) *Filing and Service.* Pleadings are filed with the clerk in the venue in which the proceeding is located. However, in an emergency or when ordered by the court, pleadings may be filed outside the proper venue. Further, pleadings filed in proceedings before the Review Department may be filed in either location of the State Bar Court (Los Angeles or San Francisco). (Rules of Procedure of the State Bar Court, Rule 55.)

Filings in the Hearing Department must be in duplicate; the number in the Review Department depends on the number specified in the applicable Rule of Procedure or Rule of Practice. (Rules of Practice of the State Bar Court, Rule 1110(e).) (On amended and supplemental pleadings, see *Rules of Procedure of the State Bar, Rule 104.*)

Service of the initial pleading must be made by the initiating party on all other parties, except in matters in which service of the initial pleading is made by the clerk. (*Rules of Procedure of the State Bar, Rule 60(a).*) Service on a member must be by certified mail, return receipt requested, addressed to the latest address shown on State Bar membership records. (*Rules of Procedure of the State Bar, Rule 60(b);* see *B. & P.C. 6002.1(c)* [service is complete at time of mailing].) (On sufficiency of notice by certified mail, see *Bowles v. State Bar* (1989) 48 C.3d 100, 106, 255 C.R. 846, 768 P.2d 65.) Subsequent papers are served pursuant to *Rules of Procedure of the State Bar, Rule 61.*

Proof of service by a party is made according to *C.C.P. 1013(a)* (*Rules of Procedure of the State Bar, Rule 62(a)*), and must be filed within 10 days of service on opposing parties (Rules of Practice of the State Bar Court, Rule 1111(a)).

(3) *Extension of Time.* On motion and for good cause shown, the court may grant an extension of time to file a pleading or may permit a late filing. (*Rules of Procedure of the State Bar, Rule 64(b).*)

(4) *Motions.* Unless the court orders otherwise, motions must be in writing (*Rules of Procedure of the State Bar, Rule 105(a)*), and are submitted without hearing (*Rules of Procedure of the State Bar, Rule 105(d)*).

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7. Transcripts.

1 *Witkin Cal. Proc. Attys* § 565

[§ 565] Transcripts.

(1) *Proceedings Recorded or Reported.* All hearings, trials, and Review Department oral arguments in State Bar Court proceedings must be electronically recorded or reported by some other approved method. Copies of the recordings in public proceedings must be made available for purchase from the clerk. (*Rules of Procedure of the State Bar, Rule 30.*)

(2) *Preparation of Transcripts.* An official transcript is prepared under the direction of the State Bar Court. An original and one copy of the transcript are available from the clerk on request and advance payment, unless payment is excused. A party ordering an official transcript of a pending proceeding must serve a copy of the transcript on all opposing parties. (*Rules of Procedure of the State Bar, Rule 31.*)

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8. Prohibited Representation.

1 Witkin Cal. Proc. Attys § 566

[§ 566] Prohibited Representation.

State Bar officers and employees are generally prohibited from representing a party before the State Bar Court during their term of office and until at least 6 months have elapsed after the expiration of their term. The prohibition on representation is absolute with respect to any matter in which the officer or employee previously participated. However, the Board of Governors may waive compliance with the rule for good cause. (*Rules of Procedure of the State Bar, Rule 3101.*)

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 9. Disqualification of Judges.

1 Witkin Cal. Proc. Attys § 567

[§ 567] Disqualification of Judges.

Rules of Procedure of the State Bar, Rule 106 specifies the grounds and procedure for the disqualification of State Bar Court judges as follows:

(1) A judge will be disqualified if the judge is subject to disqualification under any of the grounds specified in *C.C.P. 170.1* (2 *Cal. Proc.* (5th), *Courts*, §103 et seq.). (*Rules of Procedure of the State Bar, Rule 106(a).*)

(2) A judge pro tempore (supra, §562) may be disqualified if the judge, or the judge's office of affiliation, is or represents (a) a party to pending litigation involving any party or counsel in the proceeding, or (b) a party represented by any party or counsel in the proceeding. (*Rules of Procedure of the State Bar, Rule 106(b).*)

(3) The consideration or rejection of a stipulation by an assigned judge is *not* a basis for disqualification. Further, submission of a stipulation to that judge for approval constitutes a waiver of any contention that the judge is disqualified due to the judge's action on the stipulation. Nor is it a basis for disqualification that the judge in a proceeding for relief from default also heard evidence or filed a decision prior to the motion for relief from default. (*Rules of Procedure of the State Bar, Rule 106(d).*)

(4) A judge may recuse himself or herself on the court's motion, or at the request of a party made orally on the record. (*Rules of Procedure of the State Bar, Rule 106(f).*)

(5) The party moving to disqualify must do so at the earliest of the following dates: (a) within 10 days of first learning of the ground for disqualification; (b) prior to commencement of trial; (c) as to a judge of the Review Department, 20 days before oral argument before the Review Department. If the moving party does not know the identity of the assigned judge or the ground for disqualification sufficiently in advance to permit a written motion, the party must file the motion promptly and make an oral motion at the start of the next proceeding. (*Rules of Procedure of the State Bar, Rule 106(e).*) (See *Tarver v. State Bar* (1984) 37 C.3d 122, 207 C.R. 302, 688 P.2d 911 [untimely challenge under former Rule 230].)

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1 Witkin Cal. Proc. Attys § 568

[§ 568] Hearings and Records.

(1) *Public Nature.* Except as otherwise provided by law, all State Bar Court proceedings must be public. (*B. & P.C. 6086.1(a)(1); Rules of Procedure of the State Bar, Rule 20.*) (On photographing, recording, and broadcasting State Bar Court proceedings, see *Rules of Procedure of the State Bar, Rule 32.*) Under *B. & P.C. 6086.1(a)(2)*, the following hearings and records are public:

- (a) Filings for involuntary inactive enrollment or restriction under *B. & P.C. 6007(a), 6007(c), 6007(d), or 6007(e)*.
- (b) Petitions for reinstatement under *B. & P.C. 6078*.
- (c) Suspension or disbarment proceedings under *B. & P.C. 6101 or 6102*.
- (d) Payment information from the Client Security Fund under *B. & P.C. 6140.5*.
- (e) Actions to cease or assume a law practice under *B. & P.C. 6180 or 6190*.

(2) *Confidential Proceedings.* The following proceedings are confidential:

- (a) Proceedings involving inactive enrollment under *B. & P.C. 6007(b)* (*supra*, §350 and *infra*, §632 et seq.). (*Rules of Procedure of the State Bar, Rule 21.*)
- (b) Investigations. (See *infra*, §576.)
- (c) Deliberations of State Bar Court judges. (*Rules of Procedure of the State Bar, Rule 24.*)
- (d) Settlement conferences. (*Rules of Procedure of the State Bar, Rule 20.*)

(3) *Order Sealing Portions of Record.* A party may move for an order sealing a portion of the record. (*Rules of Procedure of the State Bar, Rule 23(b).*) To prevail, the party must establish that "a statutory privilege or constitutionally protected interest of a party, non-party or witness outweighs the compelling public interest in the public

nature of the proceeding." (*Rules of Procedure of the State Bar, Rule 23(c).*) If the motion is being made before the Review Department, the party must show good cause why the motion was not made in the Hearing Department. (*Rules of Procedure of the State Bar, Rule 23(b).*) Once sealed, that portion of the record becomes nonpublic, "protected material." "Protected material" may include any hearing, portion of a hearing, testimony, exhibit, pleading or other document. (*Rules of Procedure of the State Bar, Rule 23(a).*) Protected material may only be disclosed to (a) the parties and counsel, (b) the Supreme Court, State Bar, and independent audiotape transcribers, and (c) probation office personnel when necessary for their official duties. (*Rules of Procedure of the State Bar, Rule 23(f).*)

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2. Communications Are Privileged.

1 Witkin Cal. Proc. Attys § 569

[§ 569] Communications Are Privileged.

Communications relating to attorney misconduct, disability, or competence, communications related to an investigation or proceeding, and testimony given in the proceeding are privileged and may not be the basis of a lawsuit. The liability of the State Bar, as well as its officers and employees, is governed by California's Government Claims Act (*Govt.C. 810 et seq.*, 5 *Summary* (10th), *Torts*, §216 et seq.). (*B. & P.C. 6094(a).*) The statute does not limit or alter privileges or immunities existing prior to its enactment, "but is cumulative with the existing law." (*B. & P.C. 6094(a).*)

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1 Witkin Cal. Proc. Attys § 570

[§ 570] Statistics and Reporting.

(1) *Maintaining and Expunging Records.* The State Bar must keep "permanent records of discipline and other matters within its jurisdiction." (*B. & P.C. 6092.5(d).*) In addition, it must compile statistics, including a log of complaints received, investigative files, statistical summaries of cases, transcripts of proceedings, and other records that the State Bar or the court require to be maintained. (*B. & P.C. 6092.5(d).*)

The State Bar must expunge records as directed by the Supreme Court. (*B. & P.C. 6092.5(e).*)

(2) *Response to Inquiries.* *B. & P.C. 6094.5(b)* requires that the State Bar, subject to its record retention policy, respond within a reasonable time to inquiries about the following:

(a) Pending cases in which a notice to show cause has been filed.

(b) Public discipline imposed on an attorney in California or, to the extent known, elsewhere.

(c) Criminal cases, to the extent known, in which an attorney has been charged or convicted of a felony, or convicted of (1) a misdemeanor involving the practice of law or a client as the victim, or (2) a felony or misdemeanor, a necessary element of which involves improper conduct of the attorney.

The information may not be used by an attorney to solicit business. (*B. & P.C. 6094.5(b).*)

(3) *Annual Report.* The State Bar must make an annual report to the Assembly and Senate Judiciary Committees concerning the disposition of all criminal or disciplinary proceedings involving the alleged commission of felonies by attorneys. (*B. & P.C. 6095(b).*) (On required reports concerning progress in disposing of complaints, see *infra*, §573.)

(4) *Report of Misconduct to Law Enforcement and Disciplinary Agencies.* The State Bar must disclose to appropriate law enforcement and disciplinary agencies information not otherwise public under the State Bar Act when an investigation or proceeding concerns alleged misconduct that might subject an attorney to disciplinary charges in another jurisdiction or to criminal prosecution for (a) a felony, or (b) a lesser crime committed during the course of practice or in a manner that the attorney's client was a victim. (*B. & P.C. 6044.5(a).*)

(5) *Reports to Government Agencies and Judicial Nominees Evaluation Commission.* The Chief Trial Counsel or designee may disclose information not otherwise public to (a) government agencies responsible for enforcement of civil and criminal laws or professional licensing, and (b) members of the Judicial Nominees Evaluation Commission or its review committee. (*B. & P.C. 6044.5(b).*)

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1 Witkin Cal. Proc. Attys § 571

[§ 571] In General.

(1) *Who May Complain.* A complainant may be the following:

- (a) A current or former client. (*Rules of Procedure of the State Bar, Rule 2403(a).*)
- (b) A party complaining on behalf of a current or former client. (*Rules of Procedure of the State Bar, Rule 2403(b).*)
- (c) A person to whom the attorney owed a fiduciary duty, the alleged breach of which should be investigated. (*Rules of Procedure of the State Bar, Rule 2403(c).*)
- (d) A judge or attorney. (*Rules of Procedure of the State Bar, Rule 2403(d).*)
- (e) A person having significant new information about an attorney's alleged ethical violation. (*Rules of Procedure of the State Bar, Rule 2403(e).*)

Communications concerning an attorney's conduct may be made to the Office of the Chief Trial Counsel at the Los Angeles office of the State Bar. Complainants may be required to present appropriate information on official forms. (*Rules of Procedure of the State Bar, Rule 2404.*)

(2) *Duty of Complainant.* It is a misdemeanor to make a knowingly false and malicious report or complaint of professional misconduct to the State Bar. (*B. & P.C. 6043.5.*) Further, the Chief Trial Counsel may close an investigation or complaint if the complainant fails to comply with the State Bar's reasonable requests for assistance, information, or documentation. (*Rules of Procedure of the State Bar, Rule 2407.*)

(3) *Absolute Privilege.* A complaint is absolutely privileged under C.C. 47(b), as a publication made in an official proceeding, and cannot be the foundation for a libel action. (See *Chen v. Fleming* (1983) 147 C.A.3d 36, 40, 194 C.R. 913; *Lebbos v. State Bar* (1985) 165 C.A.3d 656, 663, 666, 670, 211 C.R. 847 [forwarding of clients' complaints by county bar association to State Bar, and State Bar's investigation of those complaints, were protected by C.C. 47, and

were not actionable under federal Civil Rights Act (see 8 *Summary* (10th), *Constitutional Law*, §814 et seq.)); 5 *Summary* (10th), *Torts*, §579; on communications relating to discipline as privileged, see *supra*, §569.)

(4) *Attorney's Response*. Before filing a Notice of Disciplinary Charges, the Office of the Chief Trial Counsel must notify the affected attorney in writing and allow the attorney at least 2 weeks to submit a written explanation. Two additional weeks must be allowed on request, but further extensions will be granted only on a showing of necessity due to the specific constraints of the attorney's practice. The attorney's response may raise constitutional or statutory privileges, but the applicability of those privileges does not excuse the attorney from submitting the response "to the extent necessary to identify and exercise the claimed privilege." (*Rules of Procedure of the State Bar, Rule 2409*.)

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D. Complaints and Investigation.

1. Complaint to State Bar.

b. Verification.

1 Witkin Cal. Proc. Attys § 572

[§ 572] Verification.

(1) *Informal Unverified Complaint.* Procedural due process requires notice to the attorney and an opportunity for a hearing, and these, together with the right to counsel and to subpoena witnesses, are guaranteed by statute. (*B. & P.C. 6085.*) It was contended in early cases that this constitutional principle, applied to the quasi-criminal disciplinary proceeding, demanded a written, verified accusation as a jurisdictional requisite. However, a split court in *Herron v. State Bar* (1931) 212 C. 196, 298 P. 474, held that the procedure of informal complaint and preliminary investigation was valid. "This procedure completely and adequately occupied the same field held by the verified accusations under the system provided for in the code sections. It is an effort to take an advanced step over and to improve upon the system provided for in the code. In fact, the preliminary investigation is an inquiry by officers of this court selected for the purpose of ascertaining the probable truth of the charge made. Such an investigation doubtless does and it should allow an opportunity for the accused to be heard before a proceeding is begun. With competent officers, acting conscientiously and impartially, who can say that this system is inferior to or less just than that provided in the code? What innocent man would not prefer this method of handling a complaint to a public proceeding against him resting alone upon the affidavit of a partisan, if not a prejudiced client?" (212 C. 200.) (See *McGrath v. State Bar* (1943) 21 C.2d 737, 740, 135 P.2d 1 [investigation preliminary to hearing by Board of Governors occupies same field held by written and verified accusations under Code].)

The nature and purpose of the informal complaint system were further explained in *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 7 C.R. 109, 354 P.2d 637: "The procedure evolved by the State Bar is well adapted to provide reasonable protection for both the public and the members of the bar. The State Bar will accept a complaint from any member of the public who feels, whether rightly or wrongly, that he has been aggrieved by the action of the attorney, or feels interested in complaining about an attorney, no matter how informally made the complaint may be. ... These complaints are confidential unless they result in disciplinary action taken against the attorney. Many such complaints found to be unfounded are never brought to the attention of the attorney involved. This procedure acts as a safety valve for the public. It thereby is made to feel that the law profession is not a closed body which protects its members no matter how unfaithful to their trusts any might be, and which would punish a member of the public who makes an unfounded charge by disclosure of his name and his charge. Although the vast majority of the charges made

against attorneys are by disgruntled clients and completely without foundation, and are so found by the State Bar, such complainants are somewhat satisfied by the fact that they have had their day before the tribunal." (54 C.2d 567.) (See *Stanwyck v. Horne* (1983) 146 C.A.3d 450, 457, 459, 194 C.R. 228 [under former rules, which required State Bar to conduct independent preliminary investigation on receipt of complaint, disciplinary proceedings were initiated by State Bar, rather than person making complaint; hence, no action lay against complaining party for malicious prosecution, even if State Bar proceedings were terminated in attorney's favor].)

(2) *Discretion To Require Verified Complaint.* The State Bar may demand a substantial showing from the complainant, and may require (a) a verified accusation stating specific charges and specific facts, or (b) specific evidence or facts in support of the complaint, before proceeding with an investigation or hearing. (*B. & P.C. 6043.*)

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1. Complaint to State Bar.

c. Duty To Investigate and Respond.

1 Witkin Cal. Proc. Attys § 573

[§ 573] Duty To Investigate and Respond.

The State Bar is obligated to investigate complaints and to keep complainants informed concerning the status of the complaint, as follows:

- (1) Acknowledge receipt of a written complaint within 2 weeks. (*B. & P.C. 6093.5.*)
- (2) On request, notify the complainant of the status of the complaint and provide the complainant with a written summary of the attorney's response if the response is the basis for dismissal. (*B. & P.C. 6093.5.*)
- (3) Notify the complainant in writing of the disposition of the complaint and the reasons for the disposition. (*B. & P.C. 6093.5.*)
- (4) Investigate all client complaints that a trust fund is being mishandled, and require an audit if warranted. (*B. & P.C. 6091.*)
- (5) Promptly notify the complainant of the disposition of the matter. (*B. & P.C. 6092.5(a).*)
- (6) Provide information to prospective complainants as to the nature and procedures of the disciplinary system, the criteria for the prosecution of complaints, the client security fund, and fee arbitration procedures (*supra*, §220 et seq.). (*B. & P.C. 6092.5(g).*)
- (7) Inform the public, local bar associations and other organizations, and other interested persons about the agency's work and the right of all persons to make complaints. (*B. & P.C. 6092.5(h).*)

The Office of the Chief Trial Counsel has the discretion to close an inquiry, complaint, or investigation. The matter may also be closed by a warning or directional letter or in any other appropriate manner not constituting discipline. (*Rules of Procedure of the State Bar, Rule 2601; see infra*, §578.) (On requirement that State Bar strive to process and resolve complaints within 6 months, see *B. & P.C. 6140.2.*)

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1 Witkin Cal. Proc. Attys § 574

[§ 574] Discipline Mediation Program.

(1) *Authority.* The State Bar is authorized to adopt rules, regulations, standards, and guidelines necessary to establish and implement an alternative dispute resolution discipline mediation program "to resolve complaints against attorneys that do not warrant the institution of formal investigation or prosecution." (*B. & P.C. 6086.14(a)* and (b).) Accordingly, the State Bar has adopted rules for the administration of the State Bar Alternative Dispute Resolution Client-Attorney Mediation Program (ADRCAMP). (See *Rules of Procedure of the State Bar, Rule 4401* et seq.) The statute authorizing the program does not limit or alter the power of the Supreme Court or the State Bar to disbar or discipline attorneys. (*B. & P.C. 6086.14(c).*)

(2) *Standards for Referral.* The Office of the Chief Trial Counsel may require an attorney to participate in the ADRCAMP after considering the following factors:

(a) The attorney's prior discipline record, including a record of public discipline or informal action. The informal action may include agreements in lieu of discipline, admonitions, warning letters, directional letters, and reportable actions. (*Rules of Procedure of the State Bar, Rule 4403(a)(1).*)

(b) Existing open inquiries or investigations involving the same conduct. (*Rules of Procedure of the State Bar, Rule 4403(a)(2).*)

(c) Pending disciplinary proceedings. (*Rules of Procedure of the State Bar, Rule 4403(a)(3).*)

(d) Client willingness to participate in the program. (*Rules of Procedure of the State Bar, Rule 4403(a)(4).*)

(e) Availability of ADRCAMP in the county where the attorney practices or performed significant legal services. (*Rules of Procedure of the State Bar, Rule 4403(a)(5).*)

(f) Prior efforts to resolve the dispute. (*Rules of Procedure of the State Bar, Rule 4403(a)(6).*)

(3) *Attorney's Refusal To Participate.* Refusal to participate in the program or failure to comply with an agreement

reached in the program may subject the attorney to discipline. (*B. & P.C. 6086.14(a); Rules of Procedure of the State Bar, Rule 4406(b)(3).*) Records relating to the program may be made available in a subsequent disciplinary action. (*B. & P.C. 6086.14(c).*)

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D. Complaints and Investigation.

2. Court Report to State Bar.

1 Witkin Cal. Proc. Attys § 575

[§ 575] Court Report to State Bar.

(1) *Incompetent Representation.* Whenever reversal or modification of a judgment "is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney," the court must report the matter to the State Bar for investigation concerning possible disciplinary action. The court must also notify the attorney of the reference to the State Bar. (*B. & P.C. 6086.7.*)

(2) *Malpractice Judgments.* A court must make a written report to the State Bar, within 20 days after judgment, of a judgment holding a State Bar member liable for damages "in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity." (*B. & P.C. 6086.8(a).*) (See *Estate of Gilkison* (1998) 65 C.A.4th 1443, 1447, footnote 4, 77 C.R.2d 463, citing the text [commending trial court for reporting attorney's possible breach of fiduciary obligation (removing amount of disputed fee from client trust account) to State Bar].)

(3) *Imposition of Sanctions.* A court must notify the State Bar of the imposition of judicial sanctions against an attorney, except (a) sanctions for failure to make discovery, or (b) monetary sanctions under § 1,000. (*B. & P.C. 6086.7(c).*) The court must notify the attorney of the reference, and the State Bar must investigate "the appropriateness of initiating disciplinary action." (*B. & P.C. 6086.7.*) (See *Simonian v. Patterson* (1994) 27 C.A.4th 773, 786, 32 C.R.2d 722 [one attorney, represented by another attorney, brought action solely to harass defendant; sanctions of \$ 50,000 assessed jointly and severally, and State Bar notified].)

(4) *Contempt Warranting Discipline.* If a contempt holding imposed against an attorney involves grounds warranting discipline, the court entering the contempt order must transmit a copy of the relevant order, minutes, and transcript to the State Bar. (*B. & P.C. 6086.7(a).*) (See *In re Grayson* (1997) 15 C.4th 792, 794, 64 C.R.2d 102, 937 P.2d 645 [attorney representing defendant on automatic appeal from death penalty failed to file opening brief, despite repeated extensions of time and order of Supreme Court to file brief by specific date; attorney was held in contempt of court and fined \$ 1,000, and copy of judgment was forwarded to State Bar under *B. & P.C. 6086.7*].)

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1 Witkin Cal. Proc. Attys § 576

[§ 576] Nature and Scope.

(1) *In General.* The purpose of an investigation is to determine whether there is reasonable cause to believe that an attorney has violated the State Bar Act or the Rules of Professional Conduct. (*Rules of Procedure of the State Bar, Rule 2401.*) (See *Rules of Procedure of the State Bar, Rule 2402* [State Bar may open inquiry or investigation on its own accord or on receipt of complaint]; *Geibel v. State Bar (1939) 14 C.2d 144, 149, 93 P.2d 97* [local committee on its own motion may undertake investigation of attorney's conduct]; *7 Am.Jur.2d (2007 ed.), Attorneys at Law §102.*) Under *B. & P.C. 6044*, the board, or any of its appointed committees, may initiate an investigation of any matter affecting or relating to the following:

(a) The State Bar.

(b) The practice of law.

(c) The discipline of attorneys.

(d) The unlawful practice of law (*B. & P.C. 6125 et seq., supra, §379 et seq.*) or the unlawful solicitation of legal services (*B. & P.C. 6150 et seq., supra, §527 et seq.*).

Additionally, the Office of the Chief Trial Counsel, pursuant to directions from the Supreme Court, must "undertake whatever investigations are assigned to it." (*B. & P.C. 6092.5(f).*)

(2) *Confidentiality.* All disciplinary investigations are confidential until the time formal charges are filed. Further, all investigations of matters under *B. & P.C. 6086.1(a)(2)* (matters subject to public access; *supra, §568*) are confidential until the formal proceeding is commenced. (*B. & P.C. 6086.1(b).*) However, confidentiality may be waived (a) by the attorney being investigated, or (b) by the Chief Trial Counsel or State Bar President or either's designee, after private notice to the attorney being investigated, when warranted for protection of the public, or under *B. & P.C. 6044.5* (disclosure of information regarding alleged criminal misconduct; *supra, §570*). (*B. & P.C. 6086.1(b).*)

(3) *Notice of Disciplinary Charges.* The Office of the Chief Trial Counsel may issue a notice of disciplinary

charges if it finds that (a) there is reasonable cause to believe that an attorney has violated the State Bar Act or the Rules of Professional Conduct, and (b) the attorney has received a fair, adequate, and reasonable opportunity to deny or explain the charges. (*Rules of Procedure of the State Bar, Rule 2604.*)

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3. Investigation.

b. Examination of Books and Records.

1 Witkin Cal. Proc. Attys § 577

[§ 577] Examination of Books and Records.

(1) *Attorney's Books.* When a client files a complaint alleging that the client's trust fund is being mishandled, the State Bar must investigate and may require an audit. (*B. & P.C. 6091*; see *Rules of Professional Conduct, Rule 4-100*, supra, §453 [preserving funds and property].)

(2) *Nonpublic Court Records.* For purposes of investigation and enforcement in a disciplinary proceeding, the State Bar is entitled, ex parte, to access nonpublic court records "relevant to the competence or performance" of members of the State Bar, provided that the records remain confidential. With specified exceptions, access is not limited by a court order sealing the records. The nature and content of the records may be publicly disclosed after notice to the parties in the underlying action. A party adversely affected by disclosure may notify the State Bar within 10 days of his intention to seek a court hearing on disclosure. (*B. & P.C. 6090.6*.)

(3) *State Bar Records.* State Bar records regarding admission, membership, and trust fund administration are available to the Office of the Chief Trial Counsel in prosecuting complaints, except to the extent that disclosure is prohibited by law. (*B. & P.C. 6086.2*.)

(4) *Criminal History Information.* State and local law enforcement agencies, licensing bodies and their employees, and court personnel are required to assist the State Bar in investigations related to attorney discipline and to furnish state and local summary criminal history information. The cost of providing the information must be paid by the State Bar. (*B. & P.C. 6054*.)

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 3. Investigation.
 c. Determination.

1 Witkin Cal. Proc. Attys § 578

[§ 578] Determination.

(1) *Closure.* The Office of the Chief Trial Counsel may, in its discretion, close an inquiry, complaint, or investigation. The closure may be pursuant to a warning or directional letter, or "by any other appropriate manner not constituting discipline." (*Rules of Procedure of the State Bar, Rule 2601.*) (See *Lebbos v. State Bar* (1985) 165 C.A.3d 656, 670, 671, 211 C.R. 847 [because informal investigation cannot result in imposition of sanctions against attorney, it does not constitute "prosecution"; hence, even though State Bar proceedings are terminated favorably to attorney in investigatory stage, there is no basis for attorney's malicious prosecution action].)

(2) *Admonition.* The Office of the Chief Trial Counsel may dispose of a matter by admonishing the attorney and so advising the complainant. (*Rules of Procedure of the State Bar, Rules 2602(a) and (b).*) The attorney may have the admonition set aside and the investigation resumed by so requesting by written letter within 15 days of service of the admonition letter. (*Rules of Procedure of the State Bar, Rule 2602(c).*) The admonishment remains nonpublic and does not constitute discipline. However, if within 2 years of the admonition letter a State Bar Court proceeding commences against the attorney based on other alleged misconduct, the matter terminated by admonition may be reopened. (*Rules of Procedure of the State Bar, Rule 2602(b).*)

(3) *Reopening Investigation.* The Office of the Chief Trial Counsel may, within the appropriate period of limitations, reopen an inquiry, investigation, or complaint if (a) there is new material evidence, or (b) the Chief Trial Counsel determines that there is good cause. (*Rules of Procedure of the State Bar, Rule 2603.*) (On period of limitations, see *Rules of Procedure of the State Bar, Rule 51.*)

(4) *Disciplinary Charges.* The Office of the Chief Trial Counsel may file a notice of disciplinary charges if it finds that (a) there is reasonable cause to believe that the attorney has violated the State Bar Act or the Rules of Professional Conduct, and (b) the attorney has received a fair, adequate, and reasonable opportunity to deny or explain the charges. (*Rules of Procedure of the State Bar, Rule 2604.*)

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E. Proceedings in Hearing Department.
1. Venue.

1 Witkin Cal. Proc. Attys § 579

[§ 579] Venue.

(1) *In General.* The State Bar Court has offices in Los Angeles and San Francisco. Proceedings must be initiated either in Los Angeles or in San Francisco, depending on (a) where the attorney maintains a principal office, or (b) where the attorney resides, or (c) where the alleged conduct occurred. (*Rules of Procedure of the State Bar, Rule 52.*)

(2) *Proceedings in Alternative Counties.* The State Bar Court may conduct proceedings outside of Los Angeles or San Francisco for the convenience of parties and witnesses, and on timely motion of a party. If requested by a party, that party may be ordered to pay all or part of resulting court costs or costs to the opposing party. (*Rules of Procedure of the State Bar, Rule 53.*)

(3) *Transfer.* Proceedings may be transferred on the ground that (a) the proceeding was initiated in an improper venue, or (b) transfer to a different venue would be more convenient for witnesses and promote "the ends of justice." (*Rules of Procedure of the State Bar, Rule 54.*) Either party may move for a transfer. The motion must be filed in the court where the proceeding is pending no later than the last day of the discovery period. (*Rules of Procedure of the State Bar, Rule 54(a).*)

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 2. Notice of Charges.

1 Witkin Cal. Proc. Attys § 580

[§ 580] Notice of Charges.

(1) *Filing of Pleading.* Unless provided otherwise for a particular disciplinary proceeding, formal proceedings in the hearing department of the State Bar court are commenced by filing a pleading. (*Rules of Procedure of the State Bar, Rule 50.*) Generally, a *notice of disciplinary charges* is the initial pleading in a disciplinary proceeding. (*Rules of Procedure of the State Bar, Rule 101(a).*) (On special proceedings requiring different methods of commencement, see *infra*, §630 et seq.; on format of papers, service, and filing, see *supra*, §564; on amendments to pleadings, see *infra*, §582.)

(2) *Contents of Notice.* *Rules of Procedure of the State Bar, Rule 101(b)* requires that the notice of disciplinary charges contain the following information:

- (a) Citation to the statutes, rules, or court orders alleged to have been violated, or to warrant the proposed action.
- (b) A sufficiently detailed statement of the facts constituting the alleged violations to permit the respondent to prepare a defense.
- (c) Relation of the individual facts set forth to specific statutes, rules, or court orders alleged to have been violated or to warrant the proposed action.
- (d) A notice in prominent type advising the respondent that failure to respond within 20 days of service will result in default, inactive enrollment, and further discipline including a period of actual suspension. (On details of notice, see *Rules of Procedure of the State Bar, Rule 101(b)(4).*)
- (e) A notice that respondent may be ordered to pay costs pursuant to *B. & P.C. 6086.10* (*infra*, §602).

If the State Bar intends to seek the involuntary inactive enrollment of the respondent under *B. & P.C. 6007(c)* (substantial threat of harm to client or public; *infra*, §636), the warning must so state. (*Rules of Procedure of the State Bar, Rule 101(c).*)

(3) *Prefiling Early Neutral Evaluation Conference.* A State Bar Court judge, at the request of either party, must

conduct an Early Neutral Evaluation Conference (ENEC) if the Chief Trial Counsel and the attorney are unable to resolve or dispose of the matter prior to the filing of charges. The ENEC must be held within 15 days of the request. At the conference, the judge must provide the parties with an oral neutral evaluation of the merits of the case, and if the matter can be resolved as a result of the ENEC, the Deputy Chief Trial Counsel must document the resolution and the ENEC judge may approve or reject the proposed agreement. (*Rules of Procedure of the State Bar, Rule 75.*)

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1 Witkin Cal. Proc. Attys § 581

[§ 581] Response to Notice.

(1) *Time To Respond.* The respondent must file a written response within 20 days of service of the notice of disciplinary charges. The time may be extended by the court, or extended *once* by written stipulation of the parties for a maximum of 15 days. (*Rules of Procedure of the State Bar, Rules 103(a) and (b).*)

If the respondent moves to dismiss for defective service or a defective pleading (*Rules of Procedure of the State Bar, Rules 262(b) and (c)*), the time to respond is extended to 10 days following either (a) service of the court's order denying the motion or postponing its disposition until the trial on the merits; (b) proper service of the initial pleading; or (c) service of a permitted amended initial pleading. (*Rules of Procedure of the State Bar, Rules 102, 262.*)

(2) *Permissible Pleas and Contents.* Only three kinds of pleas in response to a notice of disciplinary charges are permitted: (a) admission of culpability; (b) denial of culpability; (c) nolo contendere, subject to approval of the State Bar Court. A plea of nolo contendere has the same legal effect as an admission of culpability, except that it may not be used against the member as an admission in a civil action, and the court must so advise the member. (*B. & P.C. 6085.5.*) Demurrers and motions for further particulars are not allowed. (*Rules of Procedure of the State Bar, Rule 103(a).*)

The attorney's response must contain an address for service. If the plea is nolo contendere, it must be signed by the attorney and contain an acknowledgement that the attorney completely understands that the plea will be considered an admission of the truth of the facts alleged and of "culpability for the purposes of the disciplinary proceeding." (*Rules of Procedure of the State Bar, Rule 103(c)*; see *B. & P.C. 6085.5(c)* [effect of nolo contendere plea].)

(3) *Failure To Respond.* If the respondent fails to file a timely response, and no motion to extend the time is pending, the deputy trial counsel may move for default under *Rules of Procedure of the State Bar, Rule 200* (default procedure for untimely response). (*Rules of Procedure of the State Bar, Rule 103(d).*) On entry of default, the court must order the involuntary inactive enrollment of the attorney (see *supra*, §349 et seq.). (*B. & P.C. 6007(e)*; *Rules of Procedure of the State Bar, Rule 500.*)

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4. Amended and Supplemental Pleadings.

1 Witkin Cal. Proc. Attys § 582

[§ 582] Amended and Supplemental Pleadings.

(1) *Amendment to Initial Pleading Prior to Response or Default.* A notice of disciplinary charges or other initial pleading may be amended once as a matter of course, without leave of the court. (*Rules of Procedure of the State Bar, Rule 104(a).*) The amended pleading must be served as required by *Rules of Procedure of the State Bar, Rule 60* (supra, §564). The time to respond to the amended initial pleading is calculated from the date of service of the amended pleading. (*Rules of Procedure of the State Bar, Rule 104(a).*)

(2) *Amendment to Initial Pleading Prior to Commencement of Trial.* Other amendments to the initial pleading, prior to the commencement of trial, may be made on court order for good cause shown. Unless the amendment is to correct insubstantial errors, the amending party must serve it under *Rules of Procedure of the State Bar, Rule 60*, and the opposing party is entitled to a reasonable time to respond and prepare a defense. Further, if an opposing party's default has been entered, the entry must be vacated. (*Rules of Procedure of the State Bar, Rule 104(b).*)

(3) *Amendment to Initial Pleading During or After Trial.*

(a) *Contested Trials.* The court may permit the initial pleading to be amended during or after a contested trial. The opposing party must be given a reasonable time to respond and prepare a defense unless the amendment is to (1) conform to proof of issues raised by the pleadings, or (2) include matters proven by evidence introduced without objection. (*Rules of Procedure of the State Bar, Rule 104(c)(1).*)

(b) *Default Trials.* In default cases, the initial pleading may only be amended if (1) the default is vacated, and (2) the amended initial pleading is served on the opposing party under *Rules of Procedure of the State Bar, Rule 60*. (*Rules of Procedure of the State Bar, Rule 104(c)(2).*)

(4) *Amendment to Other Pleadings.* Pleadings, other than initial pleadings, may be amended once as a matter of course at any time before a response is due to be served or is served, whichever occurs first. If the pleading is one to which no response is permitted, and no trial date has been set, the pleading may be amended within 20 days after the pleading is served. Otherwise, amendment is by court order on good cause shown, or by stipulation of the parties. (*Rules of Procedure of the State Bar, Rule 104(d).*)

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1 Witkin Cal. Proc. Attys § 583

[§ 583] Obtaining Counsel.

In *Ainsworth v. State Bar* (1988) 46 C.3d 1218, 252 C.R. 267, 762 P.2d 431, a notice to show cause was filed in February 1985, but attempts to serve petitioner by mail were unsuccessful because he had not notified the State Bar of his current address. He eventually acknowledged personal service of the notice, which included an application for appointment of counsel on a showing of indigency. In November 1985, he filed a request for appointed counsel, with a financial statement showing income of \$ 42,000 per year. The request was granted. In January 1986, a notice to show cause was served in a second matter. In June 1986, petitioner filed an application for appointment of counsel, relying on the same financial data. Concluding that petitioner was attempting to delay the proceedings, the State Bar examiner filed a motion for hearing on the appointed counsel issue. Then, after receiving no opposition from petitioner, the examiner filed a motion to vacate the 1985 order appointing counsel and opposing appointment of counsel in the 1986 matter. The motion was granted. *Held*, no error.

(a) State Bar procedures for obtaining counsel and determining indigency are informal. An attorney is entitled to a reasonable opportunity to be represented by counsel under *B. & P.C. 6085* (supra, §572), but it is the attorney's responsibility to obtain representation. (46 C.3d 1229, 1230.)

(b) Petitioner had ample time to prepare for the hearing. Based on his financial statement and income, it was reasonable to conclude that he was not indigent, and he hired an attorney to represent him during hearing motions. Finally, the hearing was held 11 months after the second notice to show cause. Because of petitioner's delay in locating counsel and his failure to show indigency, the State Bar Court properly vacated the 1985 appointment and denied the 1986 application for counsel. (46 C.3d 1231.) (See 86 A.L.R.4th 1071 [appointment of counsel for attorney facing disciplinary charges].)

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 a. In General.

1 Witkin Cal. Proc. Attys § 584

[§ 584] In General.

In *Brotsky v. State Bar* (1962) 57 C.2d 287, 301, 19 C.R. 153, 368 P.2d 697, the discovery statutes were held applicable to disciplinary proceedings. (See 2 *Cal. Evidence* (4th), *Discovery*, §6; 83 A.L.R.3d 777 [discovery or inspection of state bar records of complaints against or investigations of attorneys].)

(1) *State Bar Court Proceedings*. Except where specified otherwise, the Civil Discovery Act (C.C.P. 2016.010 et seq.; 2 *Cal. Evidence* (4th), *Discovery*, §5 et seq.) applies to discovery in State Bar Court proceedings as limited or modified by the Rules of Procedure of the State Bar. (*Rules of Procedure of the State Bar*, Rule 180.) The Civil Discovery Act does not govern physical and mental examinations in disciplinary proceedings. (See *infra*, §585.) (On mandatory discovery conference and report, see *infra*, §587.)

(2) *Exculpatory Evidence*. After initiation of disciplinary proceedings, an attorney must be given a fair, adequate, and reasonable opportunity to receive all exculpatory evidence from the State Bar whenever it is discovered and available. (*B. & P.C.* 6085(b).)

(3) *Joint Discovery in Related Proceedings*. When two or more State Bar Court proceedings involve common questions of fact, but are not consolidated, the court may permit joint discovery by any party. Permission must be sought by motion, and joint discovery may only be conducted when so ordered in each of the proceedings involved. (*Rules of Procedure of the State Bar*, Rule 188.)

(4) *Subpena*. In all formal proceedings, each party may compel, by subpena, the attendance of witnesses and the production of relevant books, papers, and documents. (*B. & P.C.* 6049(c).)

(5) *Depositions*. Any party may compel another party to be deposed, with or without production of documents. (*Rules of Procedure of the State Bar*, Rule 151(a).) The party initiating the deposition must (a) serve the subpena on the applicable persons or entities, (b) obtain proof of service, and (c) pay applicable witness fees or expenses. (*Rules of Procedure of the State Bar*, Rule 151(d).) (See *Rules of Procedure of the State Bar*, Rules 151(e) and (f) [deposition subpena duces tecum]; *Nizinski v. State Bar* (1975) 14 C.3d 587, 590, 121 C.R. 824, 536 P.2d 72 [deposition of

unavailable witness was properly admitted].)

(6) *Work Product*. The State Bar may discover the work product of an attorney against whom disciplinary charges are pending when relevant to issues of the attorney's breach of duty. When appropriate, the discovery may be subject to a protective order to ensure confidentiality. (*C.C.P.* 2018.070; see 2 *Cal. Evidence* (4th), Witnesses, §§140, 141.) (On exception to protection of work product when attorney is suspected of participating in crime or fraud, see *C.C.P.* 2018.050; 2 *Cal. Evidence* (4th), Witnesses, §140.)

(7) *Time*. Formal discovery may be commenced 20 days after the date the responsive pleading is originally due (*Rules of Procedure of the State Bar*, Rule 182(b)), and must be completed within 120 days after service of the initial pleading (*Rules of Procedure of the State Bar*, Rule 181(a)). (See Rules of Practice of the State Bar Court, Rule 1130(b)(2) [time pendency guidelines].)

(8) *Sanctions*. Under *Rules of Procedure of the State Bar*, Rule 186, the following sanctions are available for discovery abuse in disciplinary proceedings:

(a) Contempt. (See *Rules of Procedure of the State Bar*, Rule 187; *C.C.P.* 2023.030(e).)

(b) Dismissal with prejudice. (*Rules of Procedure of the State Bar*, Rule 262(g); *C.C.P.* 2023.030(d)(3).)

(c) Issue sanction. Designated facts will be taken as established. (See *C.C.P.* 2023.030(b).)

Monetary sanctions are not available. (*Rules of Procedure of the State Bar*, Rule 186.)

(9) *Review*. The Hearing Department considers petitions for review of discovery rulings by a hearing judge. (*Rules of Procedure of the State Bar*, Rule 300.) A party seeking review must file a petition for review with the clerk within 10 days after service of notice of the discovery ruling. (*Rules of Procedure of the State Bar*, Rule 189.)

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 b. Physical and Mental Examinations.

1 Witkin Cal. Proc. Attys § 585

[§ 585] Physical and Mental Examinations.

(1) *Authority.* *C.C.P. 2032.010* et seq., governing physical and mental examinations, are not applicable to disciplinary proceedings. (*Rules of Procedure of the State Bar, Rule 184(a).*) However, if the physical or mental condition of an attorney is at issue, the State Bar may seek an order requiring a physical or mental examination under *B. & P.C. 6053* or the court, on its own motion, may issue an order to show cause why a mental or physical examination should not be ordered under *B. & P.C. 6053*. Both the motion and order to show cause must specify the manner, conditions, scope, and nature of the examination, and must provide for the selection of the physician or psychiatrist to perform the examination. (*Rules of Procedure of the State Bar, Rules 184(b)(1)* and *(b)(2).*) A party has 10 days from the date of service of an order to show cause to file a response. (*Rules of Procedure of the State Bar, Rule 184(b)(2).*) (See *In the Matter of Respondent B.* (1991) 1 Cal. State Bar Ct. Rptr. 424, 432 [*B. & P.C. 6053* does not violate right to privacy].)

(2) *Stipulation.* The parties may stipulate to an order for a physical or mental examination. The stipulation must specify the manner, conditions, scope, and nature of the examination, and who will bear the cost. Further, the stipulation may specify the physician or psychiatrist, or other qualified expert to be appointed to conduct the examination. Alternatively, the parties may ask the court to select a physician or psychiatrist. (*Rules of Procedure of the State Bar, Rule 184(f).*)

(3) *Appointed Counsel.* If a motion is filed or an order to show cause is issued under Rule 184, the court may appoint counsel to represent the member in connection with the motion or order. (*Rules of Procedure of the State Bar, Rule 184(h).*)

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 c. Attorney's Trust Fund Records.

1 Witkin Cal. Proc. Attys § 586

[§ 586] Attorney's Trust Fund Records.

The State Bar may subpoena trust or financial records from financial institutions. (*B. & P.C. 6069; Rules of Procedure of the State Bar, Rules 153 and 154* [procedure, conditions, and safeguards to assure that clients' interests are not unduly infringed].) (On audit of client's trust fund when complaint alleges mishandling, see *supra*, §577.)

A motion to quash may be filed with and heard by the State Bar Court. (*Rules of Procedure of the State Bar, Rule 153(c)*; see *Jacobs v. State Bar* (1977) 20 C.3d 191, 141 C.R. 812, 570 P.2d 1230, *supra*, §554 [superior court has jurisdiction only if State Bar seeks judicial enforcement of subpoena].) However, the sole ground permitted for a motion to quash under Rule 153 is that the records sought by the subpoena do not pertain to trust accounts that the attorney must maintain in accordance with the Rules of Professional Conduct (see *supra*, §453). (*Rules of Procedure of the State Bar, Rule 153(d)*.)

In *Doyle v. State Bar* (1982) 32 C.3d 12, 184 C.R. 720, 648 P.2d 942, the complaint charged that petitioner had misappropriated his client's share of a personal injury settlement by depositing the draft in his trust account and using the funds for personal purposes during a 10-month period. The trust account records were obtained by subpoena, and petitioner's belated motion to quash was denied. In the Supreme Court petitioner contended that his constitutional right to privacy (Cal. Const., Art. I, §1; see 7 *Summary* (10th), *Constitutional Law*, §575 et seq.) protected the records from disclosure. The court pointed out that privacy interests must be balanced against the need for disclosure, and held that the State Bar had made a sufficient showing of need. (32 C.3d 20.) The opinion adds:

"For the future guidance of the State Bar and its membership, we commend the adoption of a practice, consistent with the principles expressed by us in *Valley Bank of Nevada v. Superior Court* ... , whereby the State Bar notifies complaining clients that their records are sought in connection with a pending investigation, thus affording the clients an opportunity to object to disclosure or to assert any privacy interests in, or unusual circumstances surrounding, such material. If possible, the State Bar should obtain the clients' consent to disclosure. Nonetheless, if such consent is withheld, disclosure may be ordered upon a showing of good cause, based upon a balancing of the competing interests, in the manner hereinabove described." (32 C.3d 21, citing *Valley Bank of Nevada v. Superior Court* (1975) 15 C.3d 652, 125 C.R. 553, 542 P.2d 977.) (See *In the Matter of Member W* (1996) 3 Cal. State Bar Ct. Rptr. 535, 538, 539 [statutes

and rules governing investigative subpoenas for trust account records comply with requirements stated in *Doyle v. State Bar*].)

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6. Discovery.
d. Conference and Report.

1 *Witkin Cal. Proc. Attys* § 587

[§ 587] Conference and Report.

(1) *Purpose and Scope.* In a proceeding where discovery is permitted without court order, the parties must engage in a discovery conference within 20 days after service of the responsive pleading (*Rules of Procedure of the State Bar, Rule 182(a)*), and complete the conference no later than 30 days after service of the responsive pleading (*Rules of Procedure of the State Bar, Rule 182(c)*). During the conference, the parties must in good faith attempt to agree on an informal exchange of documents, witness names and addresses, and other information, to occur within 10 days of the conference. (*Rules of Procedure of the State Bar, Rule 182(a)(1)*.) The parties must also attempt to agree on a plan and timetable for the completion of formal discovery no later than the discovery cut-off date. (*Rules of Procedure of the State Bar, Rule 182(a)(2)*.)

(2) *Report to Court.* At the first status conference following the discovery conference, the parties must report to the court any agreements reached, and any anticipated discovery disputes or reasons why a party might be unable to complete formal discovery by the cut-off date. (*Rules of Procedure of the State Bar, Rule 182(d)*.)

(3) *Sanctions.* Failure to participate in good faith, or to make a good faith effort to comply with agreements reached at the conference, may constitute cause for an order compelling or precluding discovery, or other appropriate discovery sanctions. (*Rules of Procedure of the State Bar, Rule 182(f)*.)

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 7. Consolidation and Transfer.

1 Witkin Cal. Proc. Attys § 588

[§ 588] Consolidation and Transfer.

(1) *Consolidation Is Permitted.* Proceedings may be consolidated if no substantial rights of any party will be prejudiced. Thus, proceedings involving different members but with common questions of fact may be consolidated for all purposes or for a joint hearing or trial. Further, the court may make other orders concerning consolidated proceedings to avoid unnecessary cost or delay. (*Rules of Procedure of the State Bar, Rule 108(a).*) (See *Mrakich v. State Bar* (1973) 8 C.3d 896, 906, 106 C.R. 497, 506 P.2d 633 [consolidation of two charges under former rule was proper and not prejudicial]; *Smith v. State Bar* (1985) 38 C.3d 525, 536, 537, 213 C.R. 236, 698 P.2d 139 [where one proceeding had reached Supreme Court and other had not yet reached disciplinary hearing stage, it was in public interest to avoid delay from consolidation and to resolve matter before Supreme Court].)

(2) *Procedure.* Consolidation may be (a) on motion of any party, (b) by stipulation, or (c) on motion of the court with proper notice to the parties. Motions to consolidate must be filed as soon as practicable. (*Rules of Procedure of the State Bar, Rule 108(a).*)

(3) *Remand.* Normally, proceedings in the Hearing Department may not be consolidated with proceedings in the Review Department. However, the Presiding Judge may order a proceeding in the Review Department to be remanded to the Hearing Department for a ruling on whether consolidation is appropriate. (*Rules of Procedure of the State Bar, Rule 108(b).*)

(4) *Transfer.* If proceedings sought to be consolidated are pending in different venues, a motion to transfer venue must be granted before a motion to consolidate may be filed. (*Rules of Procedure of the State Bar, Rule 108(c).*)

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 8. Conferences and Pretrial Statements.

1 Witkin Cal. Proc. Attys § 589

[§ 589] Conferences and Pretrial Statements.

(1) *Mandatory Status Conference.* A status conference is mandatory in all proceedings and must be ordered by the assigned judge within 45 days after the initial pleading was filed. The conference may be held in court or by telephone. (Rules of Practice of the State Bar, Rule 1210(a).) The order for the conference specifies subjects to be covered. Additionally, participating parties must address the following items (Rules of Practice of the State Bar, Rule 1210(b)):

- (a) Jurisdiction and venue.
- (b) The substance of all claims, defenses, and genuinely controverted issues.
- (c) Anticipated motions.
- (d) Further proceedings, including setting dates for discovery cut-off, further status conferences, and settlement conferences.
- (e) Modifications of the standard pretrial procedures due to the nature of the proceeding.
- (f) Prospects for settlement.
- (g) Other matters conducive to the just, efficient, and economical determination of the proceeding.

(2) *Pretrial Statements.* The parties must prepare and file a joint, pretrial statement unless otherwise ordered. If this is not feasible after a good faith attempt, the parties must serve and file separate statements. (Rules of Procedure of the State Bar, Rule 211(a).) Statements must be filed and served at least 20 days before the pretrial conference, or as ordered by the court. (Rules of Procedure of the State Bar, Rule 211(b).) Failure to file a statement may result in sanctions, including the exclusion of evidence or witnesses. (Rules of Procedure of the State Bar, Rule 211(f).) (On preparation and content of the pretrial statement, see Rules of Practice of the State Bar, Rules 1221, 1223.)

(3) *Pretrial Conferences.* The parties may participate in one or more pretrial conferences at those times ordered by the judge. (Rules of Practice of the State Bar Court, Rule 1220.) Conferences may not be held more than 45 days before

the scheduled start of trial. (*Rules of Procedure of the State Bar, Rule 211(d).*)

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 9. Stays.

1 Witkin Cal. Proc. Attys § 590

[§ 590] Stays.

The court, either on a party's motion or on its own motion, may stay any proceeding in whole or in part, for the period and on the terms the court deems proper. (*Rules of Procedure of the State Bar, Rule 116(a)*.) The stay tolls all time limitations in the proceeding, but for good cause shown the court may order the perpetuation of evidence (see *infra*, §631). (*Rules of Procedure of the State Bar, Rule 116(a)*.) The court may require any party to furnish information or to appear at conferences concerning the stayed proceeding. (Rules of Practice of the State Bar Court, Rule 1132(b).) (See *Rules of Procedure of the State Bar, Rule 116(b)* [factors in determining grant of stay]; on motion for stay pending interlocutory review, see *infra*, §594.)

Stays are required when the member is mentally incapacitated or is in military service. (*Rules of Procedure of the State Bar, Rules 117(a), 118*.)

The fact that another member may have committed acts of misconduct in the same transaction does not stay a proceeding. (*Rules of Procedure of the State Bar, Rule 218*.) After the decision is filed, the court may refer the matter with respect to the other member to the office designated by the Chief Trial Counsel. (*Rules of Procedure of the State Bar, Rule 218*.)

Any party may move to terminate a stay, and the court on its own motion may terminate the stay after prior notice to the parties. (Rules of Practice of the State Bar Court, Rule 1132(c)(1).)

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 10. Trial.

a. Notice and Failure To Appear.

1 *Witkin Cal. Proc. Attys* § 591

[§ 591] Notice and Failure To Appear.

(1) *Notice of Trial*. Notice of the trial date must be served on the parties by the clerk at least 30 days before the trial date. (*Rules of Procedure of the State Bar, Rule 212(a)*.) If the trial date is rescheduled, at least 20 days' notice of the new date must be given to the parties, orally or by mail. (*Rules of Procedure of the State Bar, Rule 212(b)*.) In either instance, the parties may agree to shorter notice. (*Rules of Procedure of the State Bar, Rule 212*.)

(2) *Failure To Appear*. The respondent must appear at trial unless default has been entered. (*Rules of Procedure of the State Bar, Rule 210*.) The trial proceeds on the merits despite the respondent's failure to appear, in person or by counsel, unless a continuance is granted for good cause. (*Rules of Procedure of the State Bar, Rule 201(a)*.) (On continuance, see *Rules of Practice of the State Bar, Rule 1131*.)

Failure to appear may be construed as an admission of the allegations in the disciplinary charges. Hence, discipline may be recommended or imposed based on the admitted facts, and the respondent may be barred from further participation in the proceedings until the default is set aside on a timely motion. (*B. & P.C. 6088; Rules of Procedure of the State Bar, Rule 201(c)*); on setting aside a default, see *Rules of Procedure of the State Bar, Rule 201 et seq.*) (See *Yokozeki v. State Bar (1974) 11 C.3d 436, 447, 113 C.R. 602, 521 P.2d 858* [14 months was ample time to prepare defense and obtain counsel; member has obligation to appear at disciplinary hearing and hearing can properly proceed in member's absence]; *Palomo v. State Bar (1984) 36 C.3d 785, 792, 793, 205 C.R. 834, 685 P.2d 1185* [continuance was properly denied where showing was insufficient]; *Bambic v. State Bar (1985) 40 C.3d 314, 319, 320, 219 C.R. 489, 707 P.2d 862* [continuance was properly denied where petitioner repeatedly failed to appear at hearings and to present evidence, failed to show good cause for continuance, and failed to submit written motion for continuance when given opportunity to do so]; *Baca v. State Bar (1990) 52 C.3d 294, 303, 276 C.R. 169, 801 P.2d 412* [where petitioner ignored notice of default and all subsequent notices and never sought relief from default under applicable rule, request to present new evidence before Supreme Court was denied]; *Colangelo v. State Bar (1991) 53 C.3d 1255, 1263, 1265, 283 C.R. 181, 812 P.2d 200* [request for remand to State Bar Court was denied where attorney's claim that he did not respond to charges because of temporal lobe epilepsy was implausible]; *Potack v. State Bar (1991) 54 C.3d 132, 137, 284 C.R. 335, 813 P.2d 1365* [hearing panel's denial of motion to set aside default was not abuse of discretion where petitioner ignored several notices, and claim that he was "misled" about need to appear was without merit].)

(3) *Recommendation Concerning Actual Suspension.* Where the State Bar Court recommends that an attorney who has defaulted be placed on actual suspension, that recommendation must contain the following: (a) a specific period of actual suspension, and (b) a statement that the attorney's actual suspension must continue unless the State Bar Court grants a motion to terminate the actual suspension at the conclusion of the specified actual suspension period or by a later date on order of the court. (*Rules of Procedure of the State Bar, Rule 205(a).*) (See *In the Matter of Stansbury* (2000) 4 Cal. State Bar Ct. Rptr. 103, 107 [error for hearing judge's discipline recommendation not to provide for specific, definite, or measurable period of actual suspension; thus, review department modified recommendation to include actual suspension of 90 days and until attorney complied with specified conditions]; *In the Matter of Bailey* (2001) 4 Cal. State Bar Ct. Rptr. 220, 227 [it was error for hearing judge to fail to recommend specific period of stayed suspension and conditions of probation pursuant to Rule 205; neither attorney's default nor requirement of motion under Rule 205 to terminate suspension is valid reason to dispense with required recommendations].)

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 b. Evidence.
 1. In General.

1 Witkin Cal. Proc. Attys § 592

[§ 592] In General.

(1) *Civil Rules Apply.* The rules of evidence in civil cases in courts of record are generally applicable to disciplinary proceedings. However, errors in the admission or exclusion of evidence do not invalidate a finding, decision, or determination unless they result in the denial of a fair hearing. (*Rules of Procedure of the State Bar, Rule 214*; see *supra*, §559; *Stuart v. State Bar* (1985) 40 C.3d 838, 845, 221 C.R. 557, 710 P.2d 357 [client's testimony concerning injuries was admissible to show substantiality of tort claim and seriousness of petitioner's lack of diligence; but even if irrelevant, testimony was not prejudicial]; 79 A.L.R.4th 576 [admissibility of lie detector test results or offer or refusal to take test].)

(2) *Order of Proof.* The parties must present evidence of culpability before presenting evidence of aggravating or mitigating circumstances, unless the court decides otherwise. (Rules of Practice of the State Bar Court, Rule 1250.)

(3) *Simplifying Proof.* All parties are under a duty, if practicable, to confer and arrive at stipulations, which are binding unless rejected by the court for good cause. Stipulations, except those as to facts only and procedural stipulations, require court approval. (*Rules of Procedure of the State Bar, Rules 130, 131, 135.*) (On stipulations as to facts, conclusions of law, and dispositions, see *Rules of Procedure of the State Bar, Rules 132, 133.*)

(4) *Exhibits and Objections.* At least 10 days before the pretrial conference (*supra*, §589), the parties must exchange copies of all exhibits to be offered and all schedules, summaries, diagrams and charts to be used at trial, other than for impeachment or rebuttal. (Rules of Practice of the State Bar Court, Rule 1224(b).) Rule 1224 sets forth detailed premarking and identification procedures, and noncompliance with Rule 1224 could result in the exclusion of exhibits from evidence. (Rules of Practice of the State Bar Court, Rule 1224(g).)

A party proposing to object to an exhibit must advise the opposing party of the objection prior to trial. The parties must then confer before the pretrial conference, or before trial, and attempt to resolve the objections. Failing resolution, the parties must advise the judge of the objections and attempt to present the matter to the judge for a ruling at the pretrial conference, or as ordered by the judge. (Rules of Practice of the State Bar Court, Rule 1225.)

(5) *Testimonials to Character*. The good character of the petitioner is relevant on the issue of guilt and in mitigation of punishment. (See *supra*, §544.) The usual method of proof is reputation evidence, but it has been held proper to depart from technical restrictions and to allow the introduction of letters from attorneys, judges, and other persons testifying to the good character and conduct of the petitioner. (See *Gray v. State Bar* (1936) 7 C.2d 177, 179, 59 P.2d 1033; *Ev.C. 1102, 1 Cal. Evidence (4th), Circumstantial Evidence*, §55 [opinion evidence of character is admissible].) However, it is improper to present this evidentiary matter initially to the Supreme Court in a petition for review, without prior introduction in the State Bar Court proceedings. (*Johnson v. State Bar* (1935) 4 C.2d 744, 753, 52 P.2d 928; *Allen v. State Bar* (1933) 218 C. 19, 26, 21 P.2d 107 [criticizing lawyers who wrote to court on petitioner's behalf].)

(6) *Client Security Fund Decisions*. Except in specified instances, the decision on an application for reimbursement from the Client Security Fund is not admissible in a disciplinary proceeding. (*Rules of Procedure of the State Bar, Rule 215.*)

(7) *Grant of Immunity*. The superior court, on application by the disciplinary agency and notice to the prosecuting authority, may grant immunity from criminal prosecution to a witness in a disciplinary proceeding. (*B. & P.C. 6094(b).*)

(8) *Collateral Estoppel*. Principles of collateral estoppel may be used in the State Bar Court provided that (a) the issue in the civil finding is substantially identical to the issue in the State Bar Court, (b) the civil finding was made under the same burden of proof applicable to the issue in the State Bar Court, (c) the accused attorney was a party to the civil proceeding, (d) there was a final judgment on the merits in the civil proceeding, (e) precluding relitigation of the issue does not result in unfairness to the attorney, and (f) the civil finding must have been necessary to the judgment. However, application of collateral estoppel does not alter the fundamental requirement that the Office of Chief Trial Counsel must prove each element of the charged violation by clear and convincing evidence. (*In the Matter of Torres* (2000) 4 Cal. State Bar Ct. Rptr. 138, 146 [collateral estoppel was properly applied regarding attorney's harassment and intentional infliction of emotional distress on former client]; *In the Matter of Kittrell* (2000) 4 Cal. State Bar Ct. Rptr. 195, 205 [preclusive use of record from civil action involving business investment transactions between party and attorney to establish moral turpitude].)

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b. Evidence.

2. Evidence From Other Disciplinary Proceedings.

1 *Witkin Cal. Proc. Attys* § 593

[§ 593] Evidence From Other Disciplinary Proceedings.

(1) *Record of Prior Proceedings.* Although permitted under the former rules (see, e.g., *Lewis v. State Bar* (1973) 9 C.3d 704, 715, 108 C.R. 821, 511 P.2d 1173), a record of prior discipline is *inadmissible* until a finding of culpability is made, unless it tends to prove a fact in issue in determining culpability. (*Rules of Procedure of the State Bar, Rule 216(b)*; *Rules of Practice of the State Bar Court, Rule 1260.*) If a record of prior discipline is admitted but the recommended discipline has not yet been imposed, the court must specify the recommended disposition if that discipline is adopted, dismissed, or modified. (*Rules of Procedure of the State Bar, Rule 216(c).*) (On what constitutes a prior record of discipline, see *Rules of Procedure of the State Bar, Rule 216(a).*)

(2) *Records of Complaints.* Records of complaints of unproven charges against the attorney are inadmissible on behalf of the State Bar. However, if the attorney introduces evidence to show that no complaints or charges have been made, the records are admissible in rebuttal. (*Rules of Procedure of the State Bar, Rule 217.*) Further, facts underlying a record of complaint or unproven charge, if otherwise admissible, are admissible if they tend to prove a fact in issue. (*Rules of Procedure of the State Bar, Rule 217.*)

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 c. Interlocutory Review of Orders.

1 Witkin Cal. Proc. Attys § 594

[§ 594] Interlocutory Review of Orders.

(1) *Availability.* Interlocutory review is available under *Rules of Procedure of the State Bar, Rule 300*, and as provided elsewhere in the Rules of Procedure, "with respect to significant issues that require intervention of the Review Department prior to completion of proceedings in the Hearing Department and that are not readily remedial after trial." (*Rules of Procedure of the State Bar, Rule 300(a).*)

(2) *Petition.* A party seeking review of an order must petition the Review Department within 15 days of service of a written order by a judge of the Hearing Department, or of an oral order on the record, whichever is later. If a different time for seeking review is specified elsewhere in the Rules of Procedure, that time controls. In addition, the timely filing of a motion for reconsideration of a hearing judge's order extends the time for seeking review until 15 days after service of the ruling on the motion. (*Rules of Procedure of the State Bar, Rule 300(b).*) (On form and contents of petition, and filing requirements, see *Rules of Procedure of the State Bar, Rules 300(c)* and *(d).*) Unless otherwise ordered, no response to the petition for interlocutory review is required. (*Rules of Procedure of the State Bar, Rule 300(e).*)

(3) *Motion for Stay.* A party seeking review and wishing to stay proceedings in the Hearing Department pending disposition of the petition must move for the stay before the hearing judge at the time of filing the petition for review. The motion may be oral on the record or in writing on shortened notice under *Rules of Procedure of the State Bar, Rule 64.* (*Rules of Procedure of the State Bar, Rule 300(h)(1).*) If the motion is denied, the petitioning party may move for the Review Department to stay further Hearing Department proceedings pending a ruling on the petition. (*Rules of Procedure of the State Bar, Rule 300(h)(2).*)

(4) *No Oral Argument and Summary Denial.* The Review Department will decide the issues presented without oral argument, unless it deems otherwise. (*Rules of Procedure of the State Bar, Rule 300(j).*) The petition may be summarily denied if the petition (a) fails to meet the criteria required by *Rules of Procedure of the State Bar, Rule 300(a)*, or (b) does not demonstrate clearly that the hearing judge's order was erroneous under the applicable standard of review. (*Rules of Procedure of the State Bar, Rule 300(i).*) (See *Rules of Procedure of the State Bar, Rule 300(k)* [unless otherwise specified, standard of review is abuse of discretion or error of law].)

(5) *Decision*. The Review Department may deny the relief sought, or may grant it, in whole or in part, and impose appropriate conditions on the petitioning party. (*Rules of Procedure of the State Bar, Rule 300(l).*)

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11. Termination.

a. Termination by Dismissal.

1 Witkin Cal. Proc. Attys § 595

[§ 595] Termination by Dismissal.

(1) *Voluntary Dismissal.* The party initiating the proceeding may move for voluntary dismissal of all or part of the proceeding based on the unavailability or insufficiency of the evidence (*Rules of Procedure of the State Bar, Rule 262(a)*), or "in the furtherance of justice" (*Rules of Procedure of the State Bar, Rule 262(e)*). In either case, the dismissal is *without prejudice*, unless the court directs otherwise. (*Rules of Procedure of the State Bar, Rules 262(a) and (e)*.) (On nature and effect of dismissal with or without prejudice, see *Rules of Procedure of the State Bar, Rule 261*.)

(2) *Dismissal on Motion of Court.* The court, on its own motion, after notice to the parties, may dismiss an entire proceeding, but not part of a proceeding, with or without prejudice in the furtherance of justice. The reasons must be set forth in a written order. (*Rules of Procedure of the State Bar, Rule 262(e)(2)*.) (See *In the Matter of Respondent AA* (2004) 4 Cal. State Bar Ct. Rptr. 721, 728 [hearing judge did not abuse discretion in dismissing proceedings on her own motion in furtherance of justice where attorney, due to typographical error in change of address to State Bar, did not receive notice that he could participate in evaluative proceedings prior to notice of disciplinary charges].)

(3) *Defective Service.* A proceeding may be dismissed, without prejudice, due to a defect in the manner of service of the initial pleading. (*Rules of Procedure of the State Bar, Rule 262(b)*.)

(4) *Defective Initial Pleading.* A proceeding may be dismissed for failure of the initial pleading (a) to state a legally sufficient basis for the action proposed, or (b) to state a disciplinable offense or give sufficient notice of the charges. The motion to dismiss may be made at any time before a finding of culpability. The dismissal is without prejudice and at least one opportunity must be given to file an amended initial pleading. (*Rules of Procedure of the State Bar, Rule 262(c)*.)

(5) *Proceeding Barred by Statute or Rule.* A proceeding may be dismissed if it is barred by statute or rule. (*Rules of Procedure of the State Bar, Rule 262(d)*.)

(6) *Agreement in Lieu of Discipline.* A proceeding may be dismissed, without prejudice, if the State Bar and the respondent have entered into an agreement in lieu of discipline under *B. & P.C. 6092.5(i)* (*supra*, §563). (*Rules of*

Procedure of the State Bar, Rule 262(f).)

(7) *Discovery Sanction.* Dismissal with prejudice may be ordered as a discovery sanction (see supra, §584). (*Rules of Procedure of the State Bar, Rule 262(g).*)

(8) *Future Consolidation.* A proceeding may be dismissed in order to permit it to be refiled later and consolidated with an anticipated proceeding involving the same member, but only if (a) the parties jointly move for dismissal for good cause, or (b) a party moves for dismissal and clearly and convincingly demonstrates good cause. (*Rules of Procedure of the State Bar, Rule 262(h).*)

(9) *Resignation or Disbarment.* If the attorney who is the subject of the proceeding resigns or is disbarred during the proceeding, the court must take judicial notice and dismiss the proceeding. The dismissal is without prejudice in the event of a petition for reinstatement (infra, §645 et seq.). (*Rules of Procedure of the State Bar, Rule 262(i).*)

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b. Termination by Admonition.

1 Witkin Cal. Proc. Attys § 596

[§ 596] Termination by Admonition.

Except for Client Security Fund matters (*supra*, §§17, 18) or serious offenses, the court may resolve the matter by an admonition if the violation was unintentional or occurred under mitigating circumstances, and no significant harm resulted. (*Rules of Procedure of the State Bar, Rule 264(a).*) The complainant is informed of the admonition, but it is not otherwise made public, and does not constitute the imposition of discipline. (*Rules of Procedure of the State Bar, Rules 264(c) and (d).*) (On what constitutes "serious offenses," see *Rules of Procedure of the State Bar, Rule 264(b).*) The parties may jointly or separately request the admonition. (*Rules of Procedure of the State Bar, Rule 264(e).*)

The charges may be reopened if within 2 years the member is charged in formal proceedings for other alleged misconduct. To reopen the charges, the Chief Trial Counsel must file a motion within 30 days after the second proceeding is initiated. All applicable time limitations are tolled between the admonition and the filing of the order granting the motion to reopen. (*Rules of Procedure of the State Bar, Rule 264(f).*)

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c. Termination by Stipulation.

1. Procedure.

1 *Witkin Cal. Proc. Attys* § 597

[§ 597] Procedure.

(1) *When Parties May Stipulate.* The parties may stipulate to a disposition after facts establishing culpability and conclusions of law have been adjudicated or stipulated to by the parties. (*Rules of Procedure of the State Bar, Rules 133(a), 134(a).*) (On required contents of stipulation, see *Rules of Procedure of the State Bar, Rule 134(c).*)

(2) *Review by Hearing Judge.* The hearing judge must examine the stipulation and its admitted facts, conclusions, and proposed disposition for (a) fairness to the parties, and (b) the extent to which the public will be adequately protected. The judge may either reject the stipulation, approve it as submitted, or approve it with modifications accepted by the parties. (*Rules of Procedure of the State Bar, Rule 135(a).*)

(3) *Effect of Rejection.* If the court rejects the stipulation, the parties are relieved of all of its effects, and the proceeding resumes. Although the rejection does not bar approval of a later stipulation in the same case, the parties must first disclose to the court that a previous stipulation was rejected, and the court may investigate the reasons for the rejection. (*Rules of Procedure of the State Bar, Rule 135(c).*)

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2. Binding Effect.

1 *Witkin Cal. Proc. Attys* § 598

[§ 598] Binding Effect.

Former inconsistencies on the binding effect of stipulations were resolved in *Inniss v. State Bar* (1978) 20 C.3d 552, 143 C.R. 408, 573 P.2d 852. Petitioner entered into a stipulation and concurred in the recommended punishment. However, when informed by the court that it was considering an increased punishment, he petitioned for review. The court took note of the prior case law on binding stipulations, and "concluded that, as a general rule, the attorney should become bound by the factual recitals in a stipulation once the board has entered its findings, conclusions and recommendations. Thereupon, if this court has announced it is considering imposition of more severe sanctions than those recommended, we may relieve the attorney from the binding effect of the stipulation. Ordinarily, however, the stipulated facts may not be contradicted; otherwise, the stipulation procedure would serve little or no purpose, requiring a remand for further evidentiary hearings whenever the attorney deems it advisable to challenge the factual recitals. On the other hand, fundamental fairness seems to require us to relieve an attorney from the legal conclusions to which he may have agreed solely because the recommended punishment seemed to him fair and reasonable." (20 C.3d 555.) (See *Giovanazzi v. State Bar* (1980) 28 C.3d 465, 169 C.R. 581, 619 P.2d 1005 [*Innis* is authority for imposition of harsher discipline than that recommended on stipulation without remanding cause for evidentiary hearing on issue of mitigation]; *Wells v. State Bar* (1984) 36 C.3d 199, 207, 203 C.R. 134, 680 P.2d 1093 [petitioner's supplemental statement that elaborated on but did not contradict stipulation was allowed even though not approved by referee]; *Smith v. State Bar* (1985) 38 C.3d 525, 535, 213 C.R. 236, 698 P.2d 139 [Supreme Court may relieve attorney of stipulations as to legal conclusions when considering greater discipline].)

Under *Rules of Procedure of the State Bar, Rule 135*, the stipulation, once approved, binds the parties unless withdrawn or modified with the court's approval. A motion to withdraw or modify must be filed within 15 days of service of the order approving the stipulation. The stipulation may also be modified or withdrawn on the court's motion after notice to the parties. (*Rules of Procedure of the State Bar, Rule 135(b).*) (On effect of court's rejection of stipulation, see *Rules of Procedure of the State Bar, Rule 135(c)*, *supra*, §597.)

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d. Termination by Death.

1 Witkin Cal. Proc. Attys § 599

[§ 599] Termination by Death.

The death of an attorney who is the subject of a pending proceeding will terminate the proceeding. Any party or counsel must promptly file a motion for termination together with a certified copy of the death certificate or other sufficient proof of death. The court must order the proceeding terminated once it receives the motion, or on its own motion after receipt of sufficient proof of death and after notice to the deputy trial counsel and the deceased party's counsel. (*Rules of Procedure of the State Bar, Rule 263.*)

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 12. Decision.

1 Witkin Cal. Proc. Attys § 600

[§ 600] Decision.

(1) *Responsibility of Judge.* On submission of the matter, the assigned judge prepares a written decision for the clerk to file and serve. The judge may not assign the preparation of any portion of the decision to any party or counsel. (*Rules of Procedure of the State Bar, Rule 220(a)*; Rules of Practice of the State Bar Court, Rule 1270.) The decision is deemed final unless a timely request for review (*infra*, §603 et seq.) or other post-trial motion (*infra*, this section) is filed, or the decision is modified on the court's own motion. Corrections of typographical errors or insubstantial changes not affecting the merits do not constitute a modified decision. (*Rules of Procedure of the State Bar, Rule 220(a)*.)

The judge must file the decision within 30 days, and not later than 90 days, from the submission. (Rules of Practice of the State Bar Court, Rule 1130(b)(4).) Unless the Rules specify otherwise, the final decision of the court should be effectuated by the clerk within 45 days of filing. (Rules of Practice of the State Bar Court, Rule 1130(d).)

(2) *Order for Inactive Enrollment.* If the court recommends disbarment, it must include an order that the respondent be enrolled as an inactive member under *B. & P.C. 6007(c)(4)* (*supra*, §351). Unless otherwise ordered, the order is effective on personal service or 3 days after service by mail, whichever is earlier. (*Rules of Procedure of the State Bar, Rule 220(c)*.)

(3) *Post-trial Motions in Hearing Department.* Within 15 days after service of the decision, any party may file a motion in the Hearing Department for reconsideration (*Rules of Procedure of the State Bar, Rule 224(a)*), or, by separate document, move for a new trial (*Rules of Procedure of the State Bar, Rule 223(a)*). Further, at any time prior to the expiration of the time for requesting review by the Review Department (*infra*, §603 et seq.) any party may move to reopen the record to present additional evidence. (*Rules of Procedure of the State Bar, Rule 222(a)*.)

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 13. Discipline.

1 Witkin Cal. Proc. Attys § 601

[§ 601] Discipline.

(1) *Reproval.* The court may order either public or private reproval. Reprovals are set forth in the court's decision or order approving stipulation and are effective when the decision or order is final. The decision or order must specify whether the reproval is public or private. (*Rules of Procedure of the State Bar, Rule 270(a)*; see *B. & P.C. 6078* [statutory disciplinary power of board following hearing].)

Public reprovals are available as part of the attorney's official State Bar membership records and may be disclosed to public inquiries. The record of the proceeding imposing the reproval is public. (*Rules of Procedure of the State Bar, Rule 270(b)*.)

Private reprovals are also part of the attorney's State Bar membership records and will be disclosed in response to public inquiries unless the reproval was imposed because of a court-approved stipulation prior to the initiation of court proceedings. However, the record of the proceeding imposing the private reproval is generally not available to the public. (*Rules of Procedure of the State Bar, Rules 270(c) and (d)*.) Complainants are advised of the imposition of a private reproval. (*Rules of Procedure of the State Bar, Rule 270(c)*.) (See *Mack v. State Bar (2001) 92 C.A.4th 957, 961, 112 C.R.2d 341* [posting plaintiff's disciplinary history on State Bar website did not violate parties' stipulation to private reproval; once disciplinary proceedings were initiated, records of proceedings became public, and private reproval became part of attorney's State Bar records subject to disclosure].)

Conditions may be attached to reprovals in the manner authorized by C.R.C., Rule 9.19. (*Rules of Procedure of the State Bar, Rule 271*.) Motions to modify the conditions are governed by the rules applicable to probation modification and early termination proceedings (*Rules of Procedure of the State Bar, Rule 550 et seq.*; *infra*, §642). (*Rules of Procedure of the State Bar, Rule 271*.)

(2) *Suspension or Disbarment.* The court may recommend to the Supreme Court that the attorney be suspended or disbarred. (*B. & P.C. 6078*.) If so, the recommendation and accompanying record must be transmitted to the Supreme Court. (*Rules of Procedure of the State Bar, Rule 250*.) (On review and determination by Supreme Court, see *infra*, §613 *et seq.*)

(3) *Mandatory Remedial Education.* Except as provided by order of the Supreme Court, all dispositions or decisions imposing discipline must require that the attorney satisfactorily complete the State Bar Ethics School unless the attorney has completed the course within the prior 2 years. (*Rules of Procedure of the State Bar, Rule 290(a).*) A disciplined attorney residing in another jurisdiction may seek authorization to attend a comparable course by a certified provider in the other jurisdiction. (*Rules of Procedure of the State Bar, Rule 290(b).*) Rule 290 does not apply to cases involving reprovals. (*In the Matter of Respondent Z* (1999) 4 Cal. State Bar Ct. Rptr. 85, 88 [private reproof].)

(4) *Standards for Attorney Sanctions.* The Board of Governors has issued Standards for Attorney Sanctions for Professional Misconduct, which are contained in Title IV of the Rules of Procedure of the State Bar. The express goals of the standards are "(a) to better discharge the purposes of attorney discipline as announced by the Supreme Court; (b) to achieve greater consistency in disciplinary sanction for similar offenses; and (c) to identify for the legal profession, the courts and the public the factors which may appropriately be considered for imposing discipline on an attorney and to set forth an appropriate means by which those factors may lead to the selection of a sanction in a particular case." (Introduction to Standards for Attorney Sanctions for Professional Misconduct.)

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 14. Costs and Sanctions.

1 Witkin Cal. Proc. Attys § 602

[§ 602] Costs and Sanctions.

(1) *Order Imposing Discipline.* An order imposing public reproof or other discipline, or accepting a resignation with disciplinary charges pending, must direct that the attorney pay costs. (*B. & P.C. 6086.10(a)*.) The costs include the reporter's fees and expenses incurred for the reporter's transcript, all expenses that would qualify as taxable costs in a civil proceeding, and charges that the State Bar determines to be the reasonable costs of investigation, hearing, and review, excluding fees for attorneys and experts. (*B. & P.C. 6086.10(b)*.) Costs imposed under *B. & P.C. 6086.10* are penalties, payable to the State Bar "to promote rehabilitation and to protect the public." (*B. & P.C. 6086.10(e)*.)

Assessed costs must be paid with the next year's membership fee or as a condition of reinstatement of membership. (*B. & P.C. 6140.7*.) Orders imposed under *B. & P.C. 6086.10(a)* are enforceable as money judgments. (*B. & P.C. 6086.10(a)*; C.R.C., Rule 9.23.)

At the State Bar's discretion, the attorney may be granted total or partial relief from the payment of costs, or an extension of time to pay them, "upon grounds of hardship, special circumstances, or other good cause." (*B. & P.C. 6086.10(c)*.) (See *In the Matter of Respondent J.* (1993) 2 Cal. State Bar Ct. Rptr. 273, 278 [partial relief from costs was proper because of attorney's extraordinary efforts to cooperate, and delay caused by State Bar counsel].)

(2) *Monetary Sanction.* The Supreme Court, in ordering suspension or disbarment or accepting a resignation with disciplinary charges pending, may order payment of a monetary sanction up to \$ 5,000 for each violation, up to a total of \$ 50,000. (*B. & P.C. 6086.13(a)*.) This authority is in addition to that granted by *B. & P.C. 6086.10*, and any other authority to impose costs or monetary sanctions. (*B. & P.C. 6086.13(d)*.)

(3) *Reimbursement When Attorney Is Exonerated.* An attorney who is exonerated of all charges after a formal hearing is entitled to reimbursement from the State Bar of reasonable expenses of preparation for the hearing, excluding fees for attorneys and experts; the State Bar determines the amount. (*B. & P.C. 6086.10(d)*.)

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 1. In General.

1 Witkin Cal. Proc. Attys § 603

[§ 603] In General.

(1) *Request for Review.* The Review Department may only review a decision or order on the timely request of a party, not on its own motion. (*B. & P.C. 6086.65(c)*.) Either party may request review within 30 days of the hearing judge's decision, ruling, or order, if no post-trial motion is filed (*supra*, §600), or within 30 days of service of the hearing judge's ruling on a post-trial motion. (*Rules of Procedure of the State Bar, Rule 301(a)(1)*.) Unless otherwise ordered by the presiding judge, the requesting party must certify that a trial transcript has been ordered and appropriate arrangements made for payment of the required transcript deposit. (*Rules of Procedure of the State Bar, Rule 301(a)(2)*.) (On rules governing filings with the Review Department generally, see *Rules of Practice of the State Bar, Rule 1300 et seq.*; on summary review, see *infra*, §604.)

An opposing party may request review within 10 days after service of the other party's initial request for review, or within the time permitted by *Rules of Procedure of the State Bar, Rule 301(a)(1)*, whichever is later. (*Rules of Procedure of the State Bar, Rule 301(b)*.) If more than one party requests review, each party must file an appellant's brief and a respondent's brief. Each may file a rebuttal brief. (*Rules of Procedure of the State Bar, Rule 301(c)(2)*.) (See *In the Matter of Tiernan* (1996) 3 Cal. State Bar Ct. Rptr. 523, 526, footnote 3 [respondent who wishes to raise issues different from those raised by appellant should file own request for review]; on time requirements, see *Rules of Procedure of the State Bar, Rules 302, 303*.)

(2) *Hearing.* Generally, the Review Department must give the parties an opportunity for oral argument. Written notice of the time and place for the hearing must be served on the parties at least 30 days before the hearing, unless the parties agree to a shorter notice period. (*Rules of Procedure of the State Bar, Rule 304*.) (On summary review without oral argument, see *infra*, §604.)

The Review Department hears and decides matters en banc, but two judges of the Review Department constitute a quorum. (*Rules of Procedure of the State Bar, Rule 305(c)*.) A majority vote of Review Department judges present and voting is sufficient to take an action or arrive at a decision. (*Rules of Procedure of the State Bar, Rule 305(c)*.) (On evidence and record before Review Department, see *Rules of Procedure of the State Bar, Rule 306*.)

(3) *Scope of Review.* The department independently reviews the record, and may adopt findings, conclusions, and a

decision or recommendation different from those of the hearing judge, except that the hearing judge's findings of fact resolving issues of credibility "shall be given great weight." (*Rules of Procedure of the State Bar, Rule 305(a)*; C.R.C., Rule 9.12.) Further, the department may take action on an issue whether or not the issue was raised in the request for review or the parties' briefs. (*Rules of Procedure of the State Bar, Rule 305(b)*.) (See *In re Fahey* (1973) 8 C.3d 842, 851, 106 C.R. 313, 505 P.2d 1369, supra, §472 [restoring finding of committee and rejecting board's finding where committee, not board, saw petitioner and heard his testimony; decided under former rules].)

(4) *Determination*. The Review Department may remand a proceeding to the Hearing Department for a new trial on specified issues, for a trial de novo, or for other proceedings. (*Rules of Procedure of the State Bar, Rule 305(a)*.) The department's decision is required to be filed within 3 months of submission of the cause. (*Rules of Practice of the State Bar Court, Rule 1130(c)(2)*.) (On evidence Review Department may consider, see *Rules of Procedure of the State Bar, Rule 306*.)

(5) *Reconsideration of Review Department Actions*. Decisions and rulings of the department are subject to reconsideration only when ordered on the department's own motion or on request for reconsideration filed and served by a party within 15 days of service of the decision. (*Rules of Procedure of the State Bar, Rule 309(a)*.)

(6) *Order for Inactive Enrollment*. If the Review Department recommends disbarment, its opinion must include an order that the respondent be enrolled as an inactive member under *B. & P.C. 6007(c)(4)* (supra, §351). Unless otherwise ordered, the order is effective on personal service or 3 days after service by mail, whichever is earlier. (*Rules of Procedure of the State Bar, Rule 305(f)*.)

(7) *Publication of Review Department Decisions*. Review Department decisions are published in the California State Bar Court Reporter. (*Rules of Procedure of the State Bar, Rule 310(a)*; see infra, §605 et seq.)

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 2. Summary Review.

1 Witkin Cal. Proc. Attys § 604

[§ 604] Summary Review.

(1) *Authorization.* The Review Department may summarily review matters raising limited issues that can be decided without a transcript of the entire record of the hearing or without the normal briefs. (*Rules of Procedure of the State Bar, Rule 308(a).*) However, Rule 308 does not restrict the Review Department's authority to review the full record or to require a full or partial transcript and briefs. (*Rules of Procedure of the State Bar, Rule 308(h)(1).*) The decision of the hearing judge is considered the final State Bar Court decision on all matters of fact and on all issues that have been waived. (*Rules of Procedure of the State Bar, Rule 308(c).*)

(2) *Eligible Matters.* Matters eligible for summary review include matters on which the hearing judge's material findings of fact are unchallenged, and the issues on review include the following:

(a) Contentions that the facts support conclusions of law different than those reached by the hearing judge. (*Rules of Procedure of the State Bar, Rule 308(a)(1).*)

(b) Disagreement as to the appropriate disposition or degree of discipline. (*Rules of Procedure of the State Bar, Rule 308(a)(2).*)

(c) Other questions of law. (*Rules of Procedure of the State Bar, Rule 308(a)(3).*)

(3) *Waiver.* Issues or contentions not raised by the parties in the briefs are considered waived. (*Rules of Procedure of the State Bar, Rule 308(b).*)

(4) *Procedure.* A party may request summary review by filing a request that the Review Department designate the matter for summary review. The request must be filed within 30 days of service of the hearing judge's decision. (*Rules of Procedure of the State Bar, Rule 308(e)(1).*) When review has been sought under *Rules of Procedure of the State Bar, Rule 301* (supra, §603), the Review Department may notify the parties on its own motion that it considers the matter eligible for summary review, and may invite the party seeking review to so elect. If the party declines, the matter proceeds under *Rules of Procedure of the State Bar, Rule 301* et seq. (*Rules of Procedure of the State Bar, Rule 308(e)(2).*)

If the Review Department determines that summary review is inappropriate, the parties have 10 days from service of notice of this determination to file a request for review under *Rules of Procedure of the State Bar, Rule 301*. (*Rules of Procedure of the State Bar, Rule 308(i)*.)

(5) *Memoranda*. The party seeking summary review must file, in lieu of briefs, an opening memorandum within 20 days after service of the order designating the proceeding for summary review. (*Rules of Procedure of the State Bar, Rule 308(f)(1)*.) Within 15 days of service of the opening memorandum, each opposing party must file a responsive memorandum. (*Rules of Procedure of the State Bar, Rule 308(f)(2)*.) Within 10 days of service of the responsive memorandum, the party seeking summary review may file a reply memorandum addressing any new issues raised in the response. (*Rules of Procedure of the State Bar, Rule 308(f)(3)*.) Supplemental briefs may be ordered by the Review Department. (*Rules of Procedure of the State Bar, Rule 308(f)*.) (On content requirements for opening and responsive memoranda, see *Rules of Procedure of the State Bar, Rules 308(f)(1), 308(f)(2)*.)

(6) *Oral Argument*. Oral argument is not available in summary review proceedings unless specifically requested by a party or ordered by the Review Department. If requested or ordered, oral argument is by telephone conference (in designated courtrooms) on 15 days' notice, unless the parties agree otherwise. A party may present its oral argument either by telephone or in person at one of the designated courtrooms. (*Rules of Procedure of the State Bar, Rule 308(g)*.)

(7) *Motion for Reconsideration*. A party seeking review by the Supreme Court of a summary review decision must first file a motion for reconsideration by the Review Department. The motion must be filed within 15 days of service of the Review Department's decision, and must be accompanied by certification that a trial transcript has been ordered and appropriate arrangements made for payment. (*Rules of Procedure of the State Bar, Rule 308(j)*.) A motion for reconsideration is treated like a request for review under *Rules of Procedure of the State Bar, Rule 301*, except that the time to file opening, responsive, and rebuttal briefs is shortened. (*Rules of Procedure of the State Bar, Rule 308(j)(2)*.)

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a. In General.

1 Witkin Cal. Proc. Attys § 605

[§ 605] In General.

(1) *Publication of Opinions.* The decisions of the Review Department are published in the California State Bar Court Reporter (Cal. State Bar Ct. Rptr.) (*Rules of Procedure of the State Bar, Rule 310(a)*), which includes both the full opinions and a complete digest. Subscriptions may be ordered from the State Bar Court Reporter of the State Bar in San Francisco.

(2) *Opinions as Precedent.* In the absence of contrary Supreme Court precedent, a published opinion that is effective without Supreme Court order is binding on the Hearing Department and citable as precedent in the State Bar Court. (*Rules of Procedure of the State Bar, Rule 310(b)*.) However, when a petition for writ of review has been filed with the Supreme Court, any published Review Department opinion in that proceeding is not citable as precedent unless and until the Supreme Court denies the petition, dismisses the writ without opinion, or orders the Review Department opinion to remain citable. (*Rules of Procedure of the State Bar, Rule 310(c)*.) A Review Department opinion ordered depublished by the Supreme Court is not citable as precedent. (*Rules of Procedure of the State Bar, Rule 310(d)*.)

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b. Recommendation Followed.
1. Charges Dismissed.

1 Witkin Cal. Proc. Attys § 606

[§ 606] Charges Dismissed.

The Review Department may follow the recommendation of the Hearing Department and dismiss the charges because of procedural improprieties or insufficient evidence of culpability. (See *In the Matter of Mapps* (1990) 1 Cal. State Bar Ct. Rptr. 19, 24 [attorney could not be disciplined for uncharged Penal Code violation; motion for reconsideration denied]; *In the Matter of Glasser* (1990) 1 Cal. State Bar Ct. Rptr. 163, 173 [notice to show cause did not adequately inform attorney of specific misconduct alleged; dismissal affirmed]; *In the Matter of Carr* (1991) 1 Cal. State Bar Ct. Rptr. 756, 764 [conviction for driving under influence of legal medication did not warrant discipline]; *In the Matter of Respondent H.* (1992) 2 Cal. State Bar Ct. Rptr. 234, 237 [trust account violations charged; dismissal upheld]; *In the Matter of Respondent I.* (1993) 2 Cal. State Bar Ct. Rptr. 260, 272 [out-of-state drunk driving conviction; no discipline imposed].)

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2. Disbarment.

1 Witkin Cal. Proc. Attys § 607

[§ 607] Disbarment.

In appropriate cases, the Review Department will accept the recommendation of the hearing judge and order disbarment. The following cases are illustrative:

In the Matter of Kizer (1990) 1 Cal. State Bar Ct. Rptr. 87, 94 [misappropriation of personal injury settlement proceeds].

In the Matter of Taylor (1991) 1 Cal. State Bar Ct. Rptr. 563, 582 [practicing law while suspended, filing unauthorized lawsuit, failing to communicate with clients, failing to return client files, papers, and unearned fees].

In the Matter of Shinn (1992) 2 Cal. State Bar Ct. Rptr. 96, 107 [misappropriation of client funds, failure to perform services competently, filing suit without client's authorization].

In the Matter of Babero (1993) 2 Cal. State Bar Ct. Rptr. 322, 334 [failure to comply with order in prior disciplinary proceeding to notify clients of discipline].

In the Matter of Acuna (1996) 3 Cal. State Bar Ct. Rptr. 495, 499, 510 [misappropriation of funds, practicing law while suspended, representation of conflicting interests; disbarment].

In the Matter of Berg (1997) 3 Cal. State Bar Ct. Rptr. 725, 729, 738 [collection of unconscionable fee by repeated fraudulent billing in one matter, withdrawal of and refusal to pay disputed trust funds in another matter].

In the Matter of Priamos (1998) 3 Cal. State Bar Ct. Rptr. 824, 830 [7 years' self-dealing with client's investment funds where attorney knew of client's fragile mental health].

In the Matter of Wyshak (1999) 4 Cal. State Bar Ct. Rptr. 70, 82 [defrauding real estate sellers through acts of dishonesty and concealment while acting as escrow agent and trustee, advancing unfounded sexual harassment charges to delay or defeat unlawful detainer action, and disobeying federal court discovery order].

In the Matter of Phillips (2001) 4 Cal. State Bar Ct. Rptr. 315, 321 [misconduct in five client matters and two nonclient matters including collecting illegal fee, failure to return clients' property, prohibited fee sharing, law partnership with nonlawyer, repeated failure to perform services competently, failure to refund unearned fee, failure to respond promptly to status inquiries, and extensive evidence in aggravation].

In the Matter of Gadda (2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [misconduct in 16 charged counts involving trust account and 9 client matters including failure to perform services competently, failure to promptly return unearned fees and files, failure to respond to status inquiries, demonstrative indifference toward rectification or atonement; similar previous misconduct].

In the Matter of Tenner (2004) 4 Cal. State Bar Ct. Rptr. 688, 696 [habitual and severe misconduct following reinstatement after previous disbarment].

SUPPLEMENT: [This section is current through the latest supplement]

Illustrative cases ordering disbarment:

In the Matter of Conner (2008) 5 Cal. State Bar Ct. Rptr. 93, 107 [misconduct in single client matter that involved obtaining interests adverse to client, trust account violations, intentionally misappropriating funds, failing to competently perform services, failing to account, failing to return client files, collecting unconscionable fee, and three separate counts involving moral turpitude].

In the Matter of Fahy (2009) 5 Cal. State Bar Ct. Rptr. 141, 148 [violation of duty through serious misconduct as civil trial juror by voting contrary to evidence in order to avoid deadlock and return to practice, and moral turpitude by misrepresenting to trial judge reason for vote; previous 2-year actual suspension].



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3. Other Discipline.

1 Witkin Cal. Proc. Attys § 608

[§ 608] Other Discipline.

Recommended discipline less severe than disbarment was accepted by the Review Department in the following cases:

In the Matter of Respondent K. (1993) 2 Cal. State Bar Ct. Rptr. 335, 354 [failure to set aside portion of legal fee pending resolution of dispute; private reproval].

In the Matter of Ike (1996) 3 Cal. State Bar Ct. Rptr. 483, 487, 494 [fraudulent concealment from Committee of Bar Examiners of arrest and pending trial on felony charges, with conviction on two charges and report of guilty plea to State Bar after admission to Bar; vacation of order of admission with alternative recommendation of disbarment].

In the Matter of Bragg (1997) 3 Cal. State Bar Ct. Rptr. 615, 619, 629 [failure to provide competent legal services, failure to meet requirements of agreement in lieu of discipline, sharing fees with and aiding nonlawyer in practice of law; 2 years' probation, 1 year actual suspension].

In the Matter of Lantz (2000) 4 Cal. State Bar Ct. Rptr. 126, 136 [misappropriation of funds through gross neglect, withholding illegal fee, recklessly incompetent performance of services, failure to promptly return unearned fees and render accounting; 2 years' probation, 1 year actual suspension with conditions].

In the Matter of Scott (2002) 4 Cal. State Bar Ct. Rptr. 446, 454 [filing and pursuing frivolous actions in bad faith and for corrupt motive; 2 years' stayed suspension, 2 years' probation, 60 days' actual suspension].

In the Matter of Pasyanos (2005) 4 Cal. State Bar Ct. Rptr. 746, 754 [no intent to conceal or mislead by failure to update Application for Determination of Moral Character to disclose prior misdemeanor; public reproval].

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c. Different Findings on Guilt.

1 *Witkin Cal. Proc. Attys* § 609

[§ 609] Different Findings on Guilt.

(1) *Dismissal*. The Review Department may conclude that the attorney was not culpable of the violations charged and dismiss the proceedings. (See *In the Matter of Respondent A.* (1990) 1 Cal. State Bar Ct. Rptr. 255, 265 [rejecting former volunteer review department's finding of improper post-trial communication]; *In the Matter of Respondent D.* (1991) 1 Cal. State Bar Ct. Rptr. 517, 523 [record did not support finding that attorney pursued appeal in bad faith].)

(2) *Remand*. The Review Department may make a different determination on the attorney's guilt and remand the proceedings to the Hearing Department. (See *In the Matter of Navarro* (1990) 1 Cal. State Bar Ct. Rptr. 192, 200 [denial of attorney's motion for relief from default was abuse of discretion]; *In the Matter of Morone* (1990) 1 Cal. State Bar Ct. Rptr. 207, 216 [same]; *In the Matter of Heiner* (1990) 1 Cal. State Bar Ct. Rptr. 301, 309 [referee appeared to have reached decision before attorney testified]; *In the Matter of Hazelkorn* (1991) 1 Cal. State Bar Ct. Rptr. 602, 607 [dismissal reversed; attorney culpable of practicing while suspended]; *In the Matter of Respondent N.* (1993) 2 Cal. State Bar Ct. Rptr. 502, 508 [dismissal reversed; attorney culpable of failure to pay taxes]; *In the Matter of Anderson* (1997) 3 Cal. State Bar Ct. Rptr. 775, 785 [State Bar failed to prove falsity of statements made by attorney regarding honesty of judges]; *In the Matter of Kittrell* (2000) 4 Cal. State Bar Ct. Rptr. 195, 211 [remanded for new trial on issues of violation of moral turpitude statute, violation of Rules of Professional Conduct governing business transactions with clients, aggravating and mitigating circumstances, and appropriate discipline].)

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d. Different Punishment Imposed.

1. Reduction in Punishment.

1 Witkin Cal. Proc. Attys § 610

[§ 610] Reduction in Punishment.

The Review Department has frequently reduced the recommended discipline while accepting all, or substantially all, of the Hearing Department's findings on culpability. The following are illustrative:

In the Matter of Rose (1994) 3 Cal. State Bar Ct. Rptr. 192, 208 [conviction of carrying loaded firearm in vehicle, failure to comply with probation in prior discipline, and failure to comply with order to notify clients of disciplinary action; recommended disbarment reduced to 2 years' actual suspension].

In the Matter of Respondent V (1995) 3 Cal. State Bar Ct. Rptr. 442, 445, 453 [single instance of misleading solicitation letter; recommendation of public reproof reduced to admonition].

In the Matter of Sawyer (1997) 3 Cal. State Bar Ct. Rptr. 765, 773 [misdemeanor conviction of being accessory in submitting false information to bank to induce loan; recommendation of 5 years' stayed suspension and 5 years' probation with 3 years' actual suspension reduced to 3 years' stayed suspension, 3 years' probation with 18 months' actual suspension].

In the Matter of McCarthy (2002) 4 Cal. State Bar Ct. Rptr. 364, 372 [breach of fiduciary duty as general partner, wilful misappropriation of funds, and attempt to have complaining witness withdraw complaint; recommendation of disbarment reduced to 4 years' stayed suspension with 3 years' probation and 2 years' actual suspension].

In the Matter of Malek-Yonan (2003) 4 Cal. State Bar Ct. Rptr. 627, 640 [multiple acts of misconduct including "gross inattention" to safeguarding client trust account, thus enabling nonattorney staff to steal \$ 1.7 million; recommendation of disbarment reduced to 5 years' stayed suspension with 5 years' probation and 18 months' actual suspension].

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d. Different Punishment Imposed.

2. Increase in Punishment.

1 *Witkin Cal. Proc. Attys* § 611

[§ 611] Increase in Punishment.

The Review Department has increased the recommended discipline in many cases while accepting most or all of the Hearing Department's findings on culpability. The following are illustrative:

In the Matter of Grueneich (1993) 2 Cal. State Bar Ct. Rptr. 439, 444 [violation of probation and failure to comply in prior disciplinary proceeding with order to notify clients of disciplinary action; recommendation of 30 months' actual suspension increased to disbarment].

In the Matter of Varakin (1994) 3 Cal. State Bar Ct. Rptr. 179, 189 [abuse of judicial system, lack of repentance, persistent misconduct; recommendation of 2 years' actual suspension increased to disbarment].

In the Matter of Katz (1995) 3 Cal. State Bar Ct. Rptr. 430, 433, 441 [repeated use of dishonest means on behalf of client involving moral turpitude, wilful violation of court orders, prior disciplinary record; recommendation of 90 days' actual suspension increased to 2 years' actual suspension and restitution].

In the Matter of Kaplan (1996) 3 Cal. State Bar Ct. Rptr. 547, 551, 570 [habitual and reckless disregard of clients' interests over 7-year period amounting to pattern of misconduct involving moral turpitude, with substantial aggravating factors; recommendation of 3 years' actual suspension increased to disbarment].

In the Matter of Steele (1997) 3 Cal. State Bar Ct. Rptr. 708, 711, 724 [partnership and fee splitting with nonlawyer, reckless failure to control law practice, deliberate concealment, misappropriation and misrepresentation, and violation of many ethical rules; recommendation of 4 years' probation with 2 years' actual suspension increased to disbarment].

In the Matter of Lais (1998) 3 Cal. State Bar Ct. Rptr. 907, 925 [multiple acts of wrongdoing, failure to make full restitution to one client, and commission of uncharged violation of *B. & P.C. 6068(i)* (*supra*, §558); recommendation of actual suspension for at least 90 days and until full restitution is made; increased to add condition that if actual suspension is 2 years or more, suspension to continue until rehabilitation and fitness to practice is proven].

In the Matter of Duxbury (1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [misdemeanor conviction for violation of *Ins.C.* 750(a) (offering compensation for referral of clients) and modification of hearing judge's mitigation findings; 120 days' actual suspension increased to 6 months' actual suspension].

In the Matter of Lais (2000) 4 Cal. State Bar Ct. Rptr. 112, 124 [frivolous appeal in marital settlement dispute, lying to law enforcement officers, and misleading court in child custody dispute; recommendation of 3 years' stayed suspension and 1 year's actual suspension increased to 2 years' actual suspension with additional conditions during probation].

In the Matter of Valinoti (2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [intentional and reckless failure to competently perform legal services, multiple client abandonments, multiple acts of moral turpitude, repeated aiding and abetting of nonattorney immigration services providers, recklessly practicing law; recommendation of 3 years' stayed suspension and 3 years' probation with 2 years' actual suspension increased to 5 years' stayed suspension and 5 years' probation with 3 years' actual suspension].

In the Matter of Davis (2003) 4 Cal. State Bar Ct. Rptr. 576, 595 [intentional misappropriation of corporate client's funds, various acts of concealment and duplicity, ignoring restitution; recommended amount of restitution increased and additional probation requirements added].

In the Matter of Tenner (2004) 4 Cal. State Bar Ct. Rptr. 688, 693 [previous disbarment and counts of present misconduct involving four clients; 2 years' actual suspension increased to disbarment].

In the Matter of Brockway (2006) 4 Cal. State Bar Ct. Rptr. 944, 958 [findings of additional uncharged misconduct constituting moral turpitude and no mitigation; 1 year's actual suspension increased to 5 years' stayed suspension with 5 years' probation, and 2 years' actual suspension].

In the Matter of Thomson (2006) 4 Cal. State Bar Ct. Rptr. 966, 979 [attorney's fifth disciplinary proceeding, repeated violation of court orders, failing to report court sanctions, and unauthorized practice of law; 4 years' actual suspension increased to disbarment].

In the Matter of Riordan (2007) 5 Cal. State Bar Ct. Rptr. 41, 51 [failure to (a) perform legal services competently, (b) comply with Supreme Court orders, and (c) timely report judicial sanctions; recommended 60 days' actual suspension increased to 6 months' stayed suspension and 1 year's probation with conditions].

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Illustrative cases increasing recommended discipline:

In the Matter of Esau (2007) 5 Cal. State Bar Ct. Rptr. 131, 140 [attorney's repeated noncompliance with probation and wilful disobedience of court orders resulting in violation of C.R.C., Rule 9.20 (duties of disciplined attorneys; text, §82); stayed 4-year suspension, probation, and actual suspension of 2 years increased to disbarment].



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1 Witkin Cal. Proc. Attys § 612

[§ 612] Probation.

The Review Department may revoke probation when an attorney fails to comply with the required conditions. (See *In the Matter of Marsh* (1990) 1 Cal. State Bar Ct. Rptr. 291, 300 [attorney's failure to respond to disciplinary charges, resulting in entry of default order, was not prima facie evidence that attorney was not amenable to probation]; *In the Matter of Carr* (1992) 2 Cal. State Bar Ct. Rptr. 244, 252, 253 [attorney refused to state in probation reports that he had abstained from intoxicants]; *In the Matter of Howard* (1993) 2 Cal. State Bar Ct. Rptr. 445, 452 [failure to return client files and comply with other probation conditions]; *In the Matter of Tiernan* (1996) 3 Cal. State Bar Ct. Rptr. 523, 527, 533 [failure to cooperate with probation monitor and to submit quarterly probation reports; probation revoked, 11 months' suspension imposed, and attorney involuntarily inactively enrolled under B. & P.C. 6007(d) (supra, §352)]; *In the Matter of Weiner* (1997) 3 Cal. State Bar Ct. Rptr. 759, 763 [discipline recommendation modified to require attorney to submit quarterly, written probation compliance reports during 18-month probation period].)

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1. Nature of Review. a. In General.

1 Witkin Cal. Proc. Attys § 613

[§ 613] In General.

(1) *Review by Supreme Court or Court of Appeal.* An attorney complained against and an attorney whose reinstatement the board refuses to recommend may have the matter reviewed by the California Supreme Court or the California Court of Appeal in accordance with the procedure prescribed by the California Supreme Court. (*B. & P.C. 6082.*) For purposes of *B. & P.C. 6082*, "board" includes the State Bar Court. (*B. & P.C. 6086.5.*)

Because C.R.C., Rule 9.10 grants broad authority to the State Bar Court (see *supra*, §561), review in the Supreme Court is granted only on a showing that specific grounds for review exist (C.R.C., Rule 9.16; see *infra*, §615), and that review within the State Bar Court has been exhausted (C.R.C., Rule 9.13(e); see *supra*, §603 et seq.).

(2) *Standard of Review.* Pursuant to the theory that the discipline of attorneys is within the judicial power, and that the State Bar Court is only a "recommendatory" body, an accused attorney has a right to have the State Bar Court's decision to suspend or disbar reviewed by the Supreme Court, and no penalty is actually imposed unless and until the Supreme Court orders it. (*B. & P.C. 6082, 6084, 6086.5; In re Shattuck* (1929) 208 C. 6, 11, 279 P. 998.)

This unique proceeding in review differs from an ordinary appeal and from review by writ of certiorari. The court does not affirm, reverse, or annul the judgment or order of a lower tribunal, and the findings of fact of the State Bar Court are not binding. The court examines the entire record, weighs the evidence, and makes an independent determination and order imposing discipline or dismissing the proceeding. (*In re Shattuck*, *supra*; *In re Petersen* (1929) 208 C. 42, 46, 53, 280 P. 124; *Herrscher v. State Bar* (1935) 4 C.2d 399, 401, 49 P.2d 832; *Gray v. State Bar* (1936) 7 C.2d 177, 180, 59 P.2d 1033; *Furman v. State Bar* (1938) 12 C.2d 212, 214, 83 P.2d 12; *Werner v. State Bar* (1939) 13 C.2d 666, 673, 91 P.2d 881; *Hildebrand v. State Bar* (1941) 18 C.2d 816, 834, 117 P.2d 860; *Schullman v. State Bar* (1963) 59 C.2d 590, 599, 30 C.R. 834, 381 P.2d 658; *Zitny v. State Bar* (1966) 64 C.2d 787, 789, 51 C.R. 825, 415 P.2d 521; see *Kapelus v. State Bar* (1987) 44 C.3d 179, 242 C.R. 196, 745 P.2d 917 [dissenting justice characterized traditional standard of review in State Bar disciplinary cases as "untenable as a matter of law and obsolete as a matter of social policy"; urged abandoning requirement that court resolve all reasonable doubts in favor of attorney because it "invites rather than inhibits de novo judicial consideration of evidence"].)

Nothing in C.R.C., Rule 9.5 et seq., relating to attorney admission and disciplinary proceedings and review of State Bar Court proceedings, affects the power of the Supreme Court to exercise its inherent jurisdiction over the lawyer discipline and admissions system. (C.R.C., Rule 9.10(g).)

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G. Supreme Court Review.

1. Nature of Review.

b. Findings and Recommendation of State Bar Court.

1 *Witkin Cal. Proc. Attys* § 614

[§ 614] Findings and Recommendation of State Bar Court.

(1) *Burden on Petitioner.* The findings and recommendation of the State Bar Court are clothed with something like the usual presumption in favor of a trial court's judgment. On review, the burden is on the petitioner to show that the decision is erroneous or unlawful, and many cases so hold. (*B. & P.C. 6083(c)*; see *Aydelotte v. State Bar* (1930) 209 C. 737, 740, 290 P. 41; *Ring v. State Bar* (1933) 218 C. 747, 750, 24 P.2d 821; *Light v. State Bar* (1939) 14 C.2d 328, 336, 94 P.2d 35; *Werner v. State Bar* (1944) 24 C.2d 611, 623, 150 P.2d 892; *Lindenbaum v. State Bar* (1945) 26 C.2d 565, 573, 160 P.2d 9; *In re Wright* (1973) 10 C.3d 374, 377, 110 C.R. 348, 515 P.2d 292; *In re Calaway* (1977) 20 C.3d 165, 169, 141 C.R. 805, 570 P.2d 1223.)

(2) *Findings of Former Bodies.* Cases dealing with the former local committee and the board made these distinctions:

(a) Great weight was given to the local committee's findings of fact. (See *In re Cohen* (1974) 11 C.3d 935, 942, 114 C.R. 611, 523 P.2d 651 [local committee in better position than court to resolve conflicts in testimony]; *Allen v. State Bar* (1977) 20 C.3d 172, 177, 141 C.R. 808, 570 P.2d 1226; 62 *Cal. L. Rev.* 613.)

(b) The board's recommendation as to punishment was accorded the greater weight. (*In re Kreamer* (1975) 14 C.3d 524, 532, footnote 5, 121 C.R. 600, 535 P.2d 728; *In re Waisbren* (1975) 15 C.3d 553, 557, 125 C.R. 479, 542 P.2d 639; *Urbano v. State Bar* (1977) 19 C.3d 16, 20, 136 C.R. 572, 560 P.2d 1.)

It was occasionally suggested that where the evidence was conflicting and the credibility of witnesses was of crucial importance, the findings of the local administrative committee, the body that actually saw and heard the witnesses, would be given greater weight than those of the board. (See *Werner v. State Bar* (1939) 13 C.2d 666, 676, 91 P.2d 881; *In re Fahey* (1973) 8 C.3d 842, 851, 106 C.R. 313, 505 P.2d 1369, *supra*, §472; *Skelly v. State Bar* (1973) 9 C.3d 502, 509, 511, 108 C.R. 6, 509 P.2d 950; *Younger v. State Bar* (1974) 12 C.3d 274, 288, 113 C.R. 829, 522 P.2d 5; *Prantil v. State Bar* (1979) 23 C.3d 243, 246, 152 C.R. 351, 589 P.2d 859 [suggesting that findings based on deposition without panel's ability to judge credibility would not be entitled to much weight]; *Franklin v. State Bar* (1986) 41 C.3d 700, 708, 224 C.R. 738, 715 P.2d 699, citing the text [where credibility of witness is concerned,

findings of hearing panel, which actually saw and heard witness, are entitled to great weight; panel's finding, that attorney's testimony was intentionally misleading, adopted].)

A charge of unprofessional conduct should be supported by convincing proof and to a reasonable certainty, any reasonable doubts being resolved in favor of the accused. (*Black v. State Bar* (1962) 57 C.2d 219, 222, 18 C.R. 518, 368 P.2d 118; *Schullman v. State Bar* (1963) 59 C.2d 590, 599, 30 C.R. 834, 381 P.2d 658; *Skelly v. State Bar*, *supra* [evidence disclosed suspicious circumstances but, if petitioner's testimony was believed, as it was by majority of local committee, he was innocent of charges]; see *supra*, §560.) (For criticism of requirement that reasonable doubts be resolved in favor of attorney, see dissenting opinion in *Kapelus v. State Bar* (1987) 44 C.3d 179, 199, 242 C.R. 196, 745 P.2d 917.)

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2. Petition for Review.

a. Petition by Disciplined Attorney.

1 Witkin Cal. Proc. Attys § 615

[§ 615] Petition by Disciplined Attorney.

(1) *Grounds for Review.* The grounds for review of a State Bar Court decision recommending disbarment or suspension are specified in C.R.C., Rule 9.16(a). Review will be ordered when any of the following appears:

- (a) Review is necessary to settle important questions of law.
- (b) The State Bar Court has acted without or in excess of jurisdiction.
- (c) The petitioner did not receive a fair hearing.
- (d) The decision is not supported by the weight of the evidence.
- (e) The recommended discipline is not appropriate in light of the record as a whole.

(2) *Initiating Review.* Review of disciplinary decisions of the State Bar Court is initiated by the affected attorney filing a petition for review in the Supreme Court. (*B. & P.C. 6083; C.R.C., Rule 9.13.*)

(3) *Time for Filing.* The following time periods apply:

(a) A petition for review of a disbarment or suspension recommendation: within 60 days after the certified copy of the State Bar Court's decision is filed with the clerk of the Supreme Court. (*B. & P.C. 6083; C.R.C., Rule 9.13(a).*)

(b) A petition for review of a recommendation to set aside a stay of suspension or to modify probation: within 15 days after the certified copy of the State Bar Court's decision is filed with the clerk of the Supreme Court. (*C.R.C., Rule 9.13(b).*)

(c) A petition for review of an interim suspension, the exercise of the powers delegated by C.R.C., Rules 9.10(b), (c), (d), (e) (*supra*, §561), or another interlocutory matter: within 15 days after mailing of written notice of the decision to the petitioner and his or her counsel. (*C.R.C., Rule 9.13(c).*)

(d) A petition for review of other State Bar Court actions: within 60 days after mailing of written notice of the action to the petitioner. (C.R.C., Rule 9.13(d); see *B. & P.C. 6083(b)* [reprovals and inactive membership; 60 days].)

In each case, the State Bar may file an answer within 15 days after service of the petition, and the petitioner may file a reply within 5 days after service of the answer. (C.R.C., Rules 9.13(a), (b), (c), (d).)

(4) *Briefs*. If review is ordered under C.R.C., Rule 9.13(a) or (d), the State Bar may file a supplemental brief within 45 days after the order is filed, and the petitioner may file a reply brief within 15 days after service of the supplemental brief. (C.R.C., Rules 9.13(a), (d).)

(5) *Service*. All papers filed by the petitioner must include proof of service of three copies on the State Bar General Counsel in San Francisco and one copy on the clerk of the State Bar Court in Los Angeles. (C.R.C., Rule 9.13(f).)

(6) *Verification and Content*. A petition for review under C.R.C., Rule 9.13(a) or (b) must (a) be verified, (b) specify the grounds relied on, (c) show that review within the State Bar Court has been exhausted, and (d) "address why review is appropriate" under C.R.C., Rule 9.16. A copy of the State Bar Court decision must be attached. (C.R.C., Rule 9.13(e)(1).)

A petition for review under C.R.C., Rule 9.13(c) or (d) must be accompanied by a record adequate to permit review, including copies of documents and exhibits and either a transcript or a fair summary of the State Bar Court proceedings. (C.R.C., Rule 9.13(e)(2).)

(7) *No Extension of Time*. No extension of time to file petitions in State Bar cases will be granted. Late petitions submitted by attorneys will only be accepted if good cause for relief from default is demonstrated. (Supreme Court Policy Statement, January 5, 1979; see C.R.C., Rule 8.60(d) [relief from default].) Copies of policy statements are available from the Administrative Office of the Courts.

(8) *Granting Petition*. The practice of the court has been to grant petitions as a matter of course in all cases in which the State Bar recommends *disbarment or suspension*. However, for cases in which the State Bar orders *a public or private reproof* a writ of review will not issue unless the attorney files a timely petition that is sufficient as to form, supported by all necessary records, specifies the grounds relied on, is accompanied by the petitioner's brief supporting its contentions with citations to authority or legal reasoning, and makes a *prima facie* case for relief. (Supreme Court Policy Statement, January 6, 1983.)

(9) *Scope of Review Power*. The court also has the power, under *B. & P.C. 6082* and C.R.C., Rule 9.13(c), to review other actions of the Board of Governors or one of its committees. (See *Brotsky v. State Bar* (1962) 57 C.2d 287, 296, 19 C.R. 153, 368 P.2d 697 [court could review interim order of local committee, despite lack of final order by disciplinary board]; *Saleeby v. State Bar* (1985) 39 C.3d 547, 559, 216 C.R. 367, 702 P.2d 525, *supra*, §18 [former C.R.C., Rule 952 (now C.R.C., Rule 9.13) does not apply to State Bar decisions concerning individual Client Security Fund matters].)

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G. Supreme Court Review.

2. Petition for Review.

b. Petition by Chief Trial Counsel.

1 Witkin Cal. Proc. Attys § 616

[§ 616] Petition by Chief Trial Counsel.

The Chief Trial Counsel, as prescribed by the Supreme Court, may petition for a disposition different than that recommended by the Review Department or the board. (*B. & P.C. 6079.5(b)*.) C.R.C., Rule 9.14 specifies the following time periods for filing the petition:

(1) Recommendation of suspension: within 60 days of the filing of the recommendation with the Supreme Court.

(2) Recommendation that probation be modified or that reinstatement be granted: within 15 days of the filing of the recommendation with the Supreme Court.

(3) Decision not to impose or decision vacating an interim suspension or denying a petition under *B. & P.C. 6007(c)*: within 15 days of notice.

(4) Decision dismissing disciplinary proceedings or recommending reproof: within 60 days of notice.

Briefing and service of process are governed by C.R.C., Rule 9.13 (*supra*, §615). (C.R.C., Rule 9.14(b).)

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2. Petition for Review.

c. Petition by Committee of Bar Examiners.

1 Witkin Cal. Proc. Attys § 617

[§ 617] Petition by Committee of Bar Examiners.

(1) *Filing.* The Committee of Bar Examiners may petition for review of the Review Department's decision in moral character proceedings. (On moral character proceedings, see *Rules of Procedure of the State Bar, Rule 680* et seq.) The petition must be filed within 60 days after the State Bar Court decision is filed and served on the State Bar's General Counsel in San Francisco. The applicant may file and serve an answer within 15 days of service of the petition, and the committee may serve and file a reply within 5 days of service of the answer. If the Supreme Court orders review, the applicant may file a supplemental brief within 45 days after filing of the order, and the petitioner may serve and file a reply brief within 15 days after service of the brief. (C.R.C., Rule 9.15(a).) (See *In re Menna* (1995) 11 C.4th 975, 984, 47 C.R.2d 2, 905 P.2d 944, supra, §373 [first petition granted pursuant to former C.R.C., Rule 952.6 (now C.R.C., Rule 9.15)].)

(2) *Content.* A petition under C.R.C., Rule 9.15 must (a) show that review within the State Bar Court has been exhausted, and (b) address why review is appropriate under C.R.C., Rule 9.16 (supra, §615). A copy of the State Bar Court decision must be attached. (C.R.C., Rule 9.15(b).)

(3) *Service.* Pleadings filed by the committee must include proof of service by mail to the applicant's last address or attorney of record, if any. Filings by the applicant must include proof of service of three copies on the State Bar's General Counsel at the San Francisco office and one copy on the Clerk of the State Bar Court at the Los Angeles office. (C.R.C., Rule 9.15(c).) Filings are confidential unless the applicant makes a written waiver of confidentiality or the Supreme Court otherwise orders. (C.R.C., Rule 9.15(d).)

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G. Supreme Court Review.

3. Validity of Summary Denial.

1 Witkin Cal. Proc. Attys § 618

[§ 618] Validity of Summary Denial.

In re Rose (2000) 22 C.4th 430, 93 C.R.2d 298, 993 P.2d 956, involved the court's summary denial of an attorney's petition to review the State Bar Court's recommendation of disbarment. Petitioner argued that summary denial of a petition for review unconstitutionally attempts to invest the State Bar Court with judicial power, thus depriving petitioner of the right to a judicial determination whether he should be disciplined, and that Cal. Const., Art. VI, confers the right to a written opinion and oral argument. *Held*, summary denial is not unconstitutional.

(a) *Delegation of judicial power.* No judicial power in disciplinary matters is delegated to the State Bar. The State Bar Act expressly recognizes and reserves to the Supreme Court the judicial power over attorney discipline. Moreover, statutory provisions for review of State Bar Court decisions reflect that the Supreme Court exercises original jurisdiction over disciplinary proceedings and may properly utilize the State Bar Court to conduct the preliminary investigation, hearing, and determination of complaints. The Supreme Court then exercises its independent judgment as to the weight and sufficiency of the evidence relating to imposition of discipline. (22 C.4th 442.) Thus, in deciding whether to grant a petition for review, the Supreme Court makes its own judicial determination whether the attorney should be disciplined as recommended by the *State Bar Court*. (22 C.4th 443.) And both state and federal authorities support the conclusion that summary denial of a petition for review amounts to a judicial determination on the merits. (22 C.4th 446.)

(b) *Written opinion.* A petitioner has no right to a written opinion. Cal. Const., Art. VI, §14, requires that decisions of the Supreme Court that determine a cause must be in writing. Although historically the court has broadly construed "cause" in connection with the constitutional provision permitting transfer of matters from the Courts of Appeal to the Supreme Court, construction of the term in connection with the written decision requirement has been narrower. Not every matter presented to the court for a ruling, including matters of attorney discipline, is a cause that requires a written decision. And denial of a petition for review of the State Bar Court's recommendation of disbarment or suspension does not decide a cause within the meaning of Cal. Const., Art. VI, §14. (22 C.4th 450.) Moreover, determination of attorney disciplinary matters does not implicate the Supreme Court's appellate jurisdiction. (22 C.4th 453, quoting the text.)

(c) *Oral argument.* Cal. Const., Art. VI, §2, provides that concurrence of "4 judges present at the argument is necessary for a judgment." (22 C.4th 454.) However, this provision only relates to those circumstances where the court

does hear oral argument. Where, as here, governing decisions, statutes, and rules do not contemplate oral argument, the constitutional provision does not confer a right independently. (22 C.4th 455.)

(d) *No conflict with statutory right of review.* B. & P.C. 6082 (supra, §613) provides for review of the State Bar Court's action by the Supreme Court or by a Court of Appeal. However, the statute expressly provides that the action may be reviewed according to the Supreme Court's prescribed procedures, and these procedures do not provide for a written opinion or oral argument in this context. Moreover, because summary denial of a petition for review of a disciplinary recommendation constitutes a judicial determination on the merits, there is no conflict with B. & P.C. 6082. (22 C.4th 455.)

(e) *Procedural due process is satisfied.* Because summary denial of the petition for review necessarily includes a judicial determination on the merits, including an independent evaluation of the facts and the law, summary denial does not deprive a petitioner of the federal constitutional right to procedural due process. Moreover, federal decisions support the conclusion that California's disciplinary scheme affording extensive hearing and review procedures in the State Bar Court satisfies due process requirements and that no oral argument is required or written opinion need issue before denying an attorney's petition for review. (22 C.4th 456.)

One justice concurred and two justices dissented. One dissenting justice argued that California's Constitution requires oral argument and written opinions in attorney suspension and disbarment proceedings. (22 C.4th 460.) The second dissenting justice argued that the current disciplinary scheme permits the court to abandon its obligation of meaningful judicial review of attorney disciplinary recommendations. (22 C.4th 466.)

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 4. Order.

1 Witkin Cal. Proc. Attys § 619

[§ 619] Order.

(1) *Timely Petition Not Filed.* If no timely petition to review, reverse, or modify is filed (*supra*, §615 et seq.), or a petition is denied, the decision of the State Bar Court is final and enforceable. (*B. & P.C. 6084(a)*; C.R.C., Rule 9.18(b).) Denial of review constitutes a final judicial determination on the merits and the recommendation of the State Bar Court is filed as an order of the Supreme Court. (C.R.C., Rule 9.16(b).) A petition for rehearing may be filed within 15 days of the filing of the decision or order. (C.R.C., Rule 9.18(a).)

(2) *Timely Petition Filed.* If a timely petition is filed, the Supreme Court makes the order it deems proper in the circumstances. However, the Supreme Court, on its own motion, may review *de novo* a decision or order of the State Bar Court. (*B. & P.C. 6084(a)*.) Notice of the order is given to the attorney and to the State Bar. (*B. & P.C. 6084(b)*.) (On court's power to require notice to clients, cocounsel, and adverse parties on disbarment, suspension, or resignation, see *supra*, §82; on order for payment of costs, see *supra*, §602.)

(3) *Effective Date.* All orders of the Supreme Court imposing discipline become final 30 days after filing unless otherwise ordered. (C.R.C., Rule 9.18(a).) Thus, it is possible to set the effective date further into the future to give the petitioner time to wind up current business. (See *Fischer v. State Bar (1936) 6 C.2d 671, 673, 58 P.2d 1277* [disbarred; on rehearing, attorney was allowed to continue as attorney of record in pending case until its final disposition].) Orders on summary review of interim decisions under C.R.C., Rules 9.13(c) and 9.14(a)(3) (*supra*, §§615, 616) are "final forthwith" but do not have law-of-the-case effect in subsequent Supreme Court decisions. (C.R.C., Rule 9.18(a).)

(4) *Remand.* At any time before final disposition of a decision on inactive enrollment of an incompetent or insane member under *B. & P.C. 6081* (*supra*, §349), the Supreme Court may remand the matter to the State Bar Court for further proceedings. (C.R.C., Rule 9.17.)

(5) *Contempt.* A member may be held in contempt for wilful failure to comply with a disciplinary order or an order of the Supreme Court. (*B. & P.C. 6084(d)*.)

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5. Types of Decisions.

a. Recommendations Followed.

1. In General.

1 Witkin Cal. Proc. Attys § 620

[§ 620] In General.

The court, though possessed of plenary power, may, and usually does, follow the findings as to guilt and the recommendation as to punishment. (See *Roark v. State Bar* (1936) 5 C.2d 665, 668, 55 P.2d 839; *Laney v. State Bar* (1936) 7 C.2d 419, 423, 60 P.2d 845; *Flaherty v. State Bar* (1940) 16 C.2d 483, 489, 106 P.2d 617 [followed though recommendation was too lenient]; *Davis v. State Bar* (1942) 20 C.2d 332, 125 P.2d 467 [local committee recommended reprimand; board recommended disbarment; disbarred]; *Hyland v. State Bar* (1963) 59 C.2d 765, 775, 31 C.R. 329, 382 P.2d 369 [disbarment, no extenuating circumstances]; *Lefner v. State Bar* (1966) 64 C.2d 189, 49 C.R. 296, 410 P.2d 832 [same]; *In re Smith* (1967) 67 C.2d 460, 62 C.R. 615, 432 P.2d 231 [grand theft and forgery convictions, based on acts over period of 2 years; disbarment].)

The decisions reveal little pattern in the discipline imposed for serious acts of moral turpitude. Although disbarment has been viewed as an appropriate penalty, a milder recommendation is frequently approved. (See *infra*, §622.)

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5. Types of Decisions.

a. Recommendations Followed.

2. Disbarment Where No Mitigating Circumstances Exist.

1 Witkin Cal. Proc. Attys § 621

[§ 621] Disbarment Where No Mitigating Circumstances Exist.

Many cases apply the general rule that, in the absence of mitigating circumstances, the appropriate penalty for serious offenses is disbarment. The following are illustrative:

Hyland v. State Bar (1963) 59 C.2d 765, 775, 31 C.R. 329, 382 P.2d 369 [assumption of position adverse to client; commingling and converting trust funds; conversion; wilful disregard of client's instructions; obtaining false notarization of verification].

Lefner v. State Bar (1966) 64 C.2d 189, 49 C.R. 296, 410 P.2d 832 [fraud, deception, and misappropriation].

In re Smith (1967) 67 C.2d 460, 62 C.R. 615, 432 P.2d 231 [grand theft and forgery convictions].

Simmons v. State Bar (1970) 2 C.3d 719, 731, 87 C.R. 368, 470 P.2d 352, *infra*, §622 [two prior suspensions].

In re Plotner (1971) 5 C.3d 714, 97 C.R. 193, 488 P.2d 385 [criminal conviction of experienced criminal lawyer who engaged in deliberate maneuvers to avoid consequences of his acts].

Ridley v. State Bar (1972) 6 C.3d 551, 99 C.R. 873, 493 P.2d 105 [petitioner took fees for services not performed, withheld client's funds, concealed assets from creditors, made false statements to clients and bar committees, assisted unauthorized person to practice law, practiced during suspension for nonpayment of dues].

In re Wright (1973) 10 C.3d 374, 382, 110 C.R. 348, 515 P.2d 292 [grand theft conviction involving trust funds; misappropriation of another client's funds; restitution to one client from funds of other client; other misconduct].

In re Silverton (1975) 14 C.3d 517, 523, 121 C.R. 596, 535 P.2d 724 [solicitation of grand theft, conspiracy to obtain money by false pretenses, fraudulent insurance claim].

Allen v. State Bar (1977) 20 C.3d 172, 141 C.R. 808, 570 P.2d 1226 [attorney defrauded client and client's creditors]

by obtaining client's real property on false promise to reconvey; transfer of bank funds induced by fraudulent concealment of owner's death].

Hamilton v. State Bar (1979) 23 C.3d 868, 879, 153 C.R. 602, 591 P.2d 1254 [three prior disciplinary proceedings, and wilful failure to comply with rule requiring notice to clients].

In re Schwartz (1982) 31 C.3d 395, 182 C.R. 640, 644 P.2d 833 [conviction of using fictitious name to perpetrate mail fraud].

Ballard v. State Bar (1983) 35 C.3d 274, 292, 197 C.R. 556, 673 P.2d 226 [31 counts of serious misconduct adversely affecting more than 30 clients over 7-year period].

In re Possino (1984) 37 C.3d 163, 207 C.R. 543, 689 P.2d 115 [conviction of offering to sell marijuana; petitioner's sole motive was financial gain, he approached and conversed with juror during subsequent trial, and mitigating circumstances did not show present fitness to practice law].

Bambic v. State Bar (1985) 40 C.3d 314, 323, 325, 219 C.R. 489, 707 P.2d 862 [misappropriation in 19 separate matters and other misconduct, adversely affecting more than 40 clients, outweighed mitigating factors].

In re Severo (1986) 41 C.3d 493, 501, 503, 224 C.R. 106, 714 P.2d 1244 [conviction of federal crimes including bribery, concealment of material facts, and theft; claimed mitigating factors did not warrant lesser discipline].

Kapelus v. State Bar (1987) 44 C.3d 179, 186, 242 C.R. 196, 745 P.2d 917 [improper withdrawal from employment, wilful neglect of duties].

Weber v. State Bar (1988) 47 C.3d 492, 508, 253 C.R. 573, 764 P.2d 701 [misappropriation of funds, false representations to court, failure to comply with court orders, writing check with knowledge of insufficient funds to cover payment].

In re Aquino (1989) 49 C.3d 1122, 264 C.R. 833, 783 P.2d 192 [participating in sham marriage scheme for aliens].

Baca v. State Bar (1990) 52 C.3d 294, 304, 305, 276 C.R. 169, 801 P.2d 412 [misappropriation of funds, failure to perform services resulting in significant harm to client, failure to cooperate in investigation, very little mitigation].

Read v. State Bar (1991) 53 C.3d 394, 426, 279 C.R. 818, 807 P.2d 1047 [misappropriation of money, habitual disregard of clients and failure to communicate with them, high degree of dishonesty; some mitigating circumstances, but not all misconduct could be attributed to them].

In re Paguirigan (2001) 25 C.4th 1, 10, 104 C.R.2d 402, 17 P.3d 758 [felony conviction for forgery; summary disbarment].

SUPPLEMENT: [This section is current through the latest supplement]



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1 Witkin Cal. Proc. Attys § 622

[§ 622] Mild Discipline for Moral Turpitude.

The cases cited in the preceding section should be contrasted with these that imposed no greater penalty than suspension for acts involving moral turpitude.

In re Urias (1966) 65 C.2d 258, 53 C.R. 881, 418 P.2d 849, is illustrative of the earlier cases. Petitioner was convicted of grand theft, based on collection of clients' money, forging their names for deposit in his personal account, and misappropriation of the proceeds. The board first recommended disbarment, and the court observed that this is the usual punishment in grand theft conviction cases. (65 C.2d 262.) But the board then changed its recommendation to 2 years' suspension with 1 additional year of probation, and the court adopted this, considering the following additional misconduct as *mitigating factors*: Financial difficulties resulting from long addiction to alcohol, convictions for drunkenness, reckless driving, hit and run, and false information to a police officer. The board also found that petitioner, while in jail, had become rehabilitated. (65 C.2d 261.)

In *Simmons v. State Bar* (1966) 65 C.2d 281, 54 C.R. 97, 419 P.2d 161, petitioner misappropriated the funds of a client. His testimony was evasive and implausible, and the court referred to cases holding that this conduct deserves disbarment "in the absence of extenuating circumstances." (65 C.2d 287.) Then, without any indication that there were mitigating circumstances, the board's recommendation of 2 years' suspension (1 year actual, 1 year probation) was adopted. The same petitioner committed the same offense again, with much the same result (4 years' suspension, 2 years' actual suspension). (*Simmons v. State Bar* (1969) 70 C.2d 361, 74 C.R. 915, 450 P.2d 291.) The decision is amazing in the light of the following observations in the opinion: "[T]here are no clearly extenuating circumstances." (70 C.2d 366.) Petitioner filed a materially altered affidavit with the court, evidencing "an unwillingness to abide by the responsibilities of his profession." (70 C.2d 367.) His testimony before the local administrative committee "showed a complete lack of candor," and his defense "indicates his utter disregard of, and bad faith toward, the interests of his client." (70 C.2d 368.)

Later cases exhibit the same leniency:

Demain v. State Bar (1970) 3 C.3d 381, 388, 90 C.R. 420, 475 P.2d 652, citing the text [forgery and misappropriation, wilful failure to render services and fraud; disbarment would be usual penalty, but mitigating circumstances; 5 years' suspension with 6 months' actual suspension and probation].

In re Cooper (1971) 5 C.3d 256, 95 C.R. 646, 486 P.2d 174 [federal court conviction of contempt for improper use of grand jury testimony and false statements concerning source of transcripts; public reprimand by opinion].

Hulland v. State Bar (1972) 8 C.3d 440, 450, 105 C.R. 152, 503 P.2d 608 [wilful refusal to perform legal services; default judgment obtained on confession of judgment; reprimand by opinion].

Schullman v. State Bar (1973) 10 C.3d 526, 541, 111 C.R. 161, 516 P.2d 865 [persistent pattern of accepting fees and not performing services; 2 years' suspension].

Oliver v. State Bar (1974) 12 C.3d 318, 115 C.R. 639, 525 P.2d 79 [misappropriation of trust funds; 3 years' suspension on probation with 1 year's actual suspension].

Athearn v. State Bar (1977) 20 C.3d 232, 142 C.R. 171, 571 P.2d 628 [misappropriation of client's funds, mitigated by restitution, domestic difficulties, and cooperation with State Bar; 1 year's suspension].

Inniss v. State Bar (1978) 20 C.3d 552, 558, 143 C.R. 408, 573 P.2d 852 [wilful failure to perform services, but mitigating circumstances; 3 years' suspension, with probation on condition of actual 4 months' suspension].

Prantil v. State Bar (1979) 23 C.3d 243, 247, 152 C.R. 351, 589 P.2d 859 [misrepresentation to obtain retainer from friend of imprisoned accused; execution of 6-month suspension ordered suspended, with 4 years' probation granted, conditioned on restitution].

In re Battin (1980) 28 C.3d 231, 236, 168 C.R. 477, 617 P.2d 1109 [conviction of misuse of public funds; State Bar unable to agree on penalty, public reproval ordered; three justices, dissenting, favored some period of actual suspension].

Smith v. State Bar (1984) 37 C.3d 17, 206 C.R. 545, 687 P.2d 259 [four acts of misappropriation, one incident of wilful failure to perform services; mitigating factors; 4 years' probation, 1 year's actual suspension].

Murray v. State Bar (1985) 40 C.3d 575, 584, 220 C.R. 677, 709 P.2d 480 [misappropriation and commingling, withdrawal of funds from estate account without court approval, deliberate refusal to account to clients; 2 years' probation, 1 year's actual suspension].

Mephram v. State Bar (1986) 42 C.3d 943, 950, 232 C.R. 152, 728 P.2d 222 [failure to perform services or to communicate with client, withdrawal from employment without taking steps to protect client's interests, and failure to return documents and unearned fees; substantial record of discipline; 5 years' probation, 3 years' actual suspension and until restitution is made].

Guzzetta v. State Bar (1987) 43 C.3d 962, 981, 239 C.R. 675, 741 P.2d 172 [mishandling of trust account, failure to maintain adequate records and account for trust funds, failure to make prompt payment of funds and perform services for which hired; 3 years' probation, 6 months' actual suspension].

Hawk v. State Bar (1988) 45 C.3d 589, 601, 247 C.R. 599, 754 P.2d 1096 [acquisition of adverse interest, misleading of client, mitigating factors, conduct in question not previously held to constitute "adverse interest"; 4 years' probation, 6 months' actual suspension].

Weller v. State Bar (1989) 49 C.3d 670, 262 C.R. 549, 779 P.2d 293 [misappropriation of funds; 5 years' suspension, 5 years' probation, 3 years' actual suspension].

King v. State Bar (1990) 52 C.3d 307, 315, 316, 276 C.R. 176, 801 P.2d 419 [wilful neglect of client matters in two cases, causing \$ 84,000 loss to one client; 4 years' probation, 3 months' actual suspension].

Colangelo v. State Bar (1991) 53 C.3d 1255, 1268, 283 C.R. 181, 812 P.2d 200 [abandonment of client and failure to refund unearned fee; 18 months' probation with no actual suspension].

SUPPLEMENT: [This section is current through the latest supplement]



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b. Different Findings on Guilt.

1 *Witkin Cal. Proc. Attys* § 623

[§ 623] Different Findings on Guilt.

The court may depart from the findings of guilt and make one of the following orders:

(1) *Dismissal of the proceeding.* (See *Herrscher v. State Bar* (1935) 4 C.2d 399, 49 P.2d 832 [disbarment recommended; dismissed]; *Furman v. State Bar* (1938) 12 C.2d 212, 83 P.2d 12 [local administrative committee recommended reprimand; board recommended disbarment; dismissed]; *Werner v. State Bar* (1939) 13 C.2d 666, 91 P.2d 881; *Hildebrand v. State Bar* (1941) 18 C.2d 816, 117 P.2d 860; *In re Fahey* (1973) 8 C.3d 842, 851, 106 C.R. 313, 505 P.2d 1369 [administrative committee found no moral turpitude; board disagreed and recommended 3 months' suspension; dismissed]; *Skelly v. State Bar* (1973) 9 C.3d 502, 509, 510, 511, 108 C.R. 6, 509 P.2d 950 [local committee recommended dismissal; board recommended disbarment; dismissed].)

(2) *Dismissal without prejudice to await outcome of pending litigation.* (*Neblett v. State Bar* (1941) 17 C.2d 77, 109 P.2d 340.)

(3) *Remand to Disciplinary Board for further investigation or hearing.* (*Gray v. State Bar* (1934) 1 C.2d 226, 33 P.2d 1016; cf. *Shaeffer v. State Bar* (1934) 220 C. 681, 687, 32 P.2d 140 [petitioner was not entitled to remand for taking of further evidence he neglected to offer at hearing].)

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 c. Different Punishment.
 1. Reduction in Punishment.

1 Witkin Cal. Proc. Attys § 624

[§ 624] Reduction in Punishment.

From the earliest days of Supreme Court review of disciplinary recommendations, reduction of the punishment has been common. The following are illustrative:

In re Petersen (1929) 208 C. 42, 56, 280 P. 124 [from disbarment to 1 year's suspension].

Barbee v. State Bar (1931) 213 C. 296, 300, 2 P.2d 353 [committee recommended disbarment, board recommended 1 year's suspension; 3 months' suspension].

Bentson v. State Bar (1932) 216 C. 58, 60, 13 P.2d 512 [same].

Egan v. State Bar (1938) 10 C.2d 458, 462, 75 P.2d 67 [same].

Browne v. State Bar (1955) 45 C.2d 165, 169, 287 P.2d 745 [from 3 years' suspension to 3 months' suspension, following recommendation of local committee rather than board].

Bodisco v. State Bar (1962) 58 C.2d 495, 498, 24 C.R. 835, 374 P.2d 803 [from disbarment to 2 years' suspension].

Linnick v. State Bar (1964) 62 C.2d 17, 24, 41 C.R. 1, 396 P.2d 33 [from 2 years' suspension to 3 months' suspension, following recommendation of local committee].

Marlowe v. State Bar (1965) 63 C.2d 304, 311, 46 C.R. 326, 405 P.2d 150, *supra*, §485 [from 6 months' suspension to 3 months' suspension].

In re Jones (1971) 5 C.3d 390, 400, 96 C.R. 448, 487 P.2d 1016 [conviction of subornation of perjury and offering false evidence; board by split vote recommended disbarment; court, considering extenuating circumstances, including suspension during criminal proceedings, ordered additional 3 years' suspension with 1 year's actual suspension and probation].

Mosesian v. State Bar (1972) 8 C.3d 60, 66, 103 C.R. 915, 500 P.2d 1115 [perjury in litigation concerning attorney's family; board recommended 1 month's suspension; court ordered public reprimand by opinion].

Abeles v. State Bar (1973) 9 C.3d 603, 611, 108 C.R. 359, 510 P.2d 719 [mistaken view of scope of former Rule 12 (communication with adverse party; see supra, §536); board (9-6) recommended 60 days' suspension; court ordered public reprimand by opinion].

Younger v. State Bar (1974) 12 C.3d 274, 289, 113 C.R. 829, 522 P.2d 5 [personal solicitation and use of cappers; local committee recommended 6 months' suspension; board recommended 9 months' suspension; court ordered 6 months' suspension].

In re Kreamer (1975) 14 C.3d 524, 531, 121 C.R. 600, 535 P.2d 728 [conviction of federal narcotic offenses; board recommended 5 years' suspension with 3 years' actual suspension; reduced to 3 years' suspension, all suspended and probation granted, because of many mitigating factors].

Davidson v. State Bar (1976) 17 C.3d 570, 131 C.R. 379, 551 P.2d 1211 [charges of misleading judge and advising client to disregard order, evidence conflicting, mitigating circumstances; recommendation of 2 years' probation reduced to reprimand by opinion].

Jackson v. State Bar (1979) 23 C.3d 509, 514, 153 C.R. 24, 591 P.2d 47 [misappropriation of clients' funds; recommendation of disbarment reduced to 5 years' suspension, with 3 years' actual suspension, in light of mitigating factors].

Price v. State Bar (1982) 30 C.3d 537, 179 C.R. 914, 638 P.2d 1311 [prosecutor's alteration of evidence in murder case; attempted concealment of alteration included meeting with defendant without defendant's attorney to request that defendant not appeal in exchange for favorable sentence; mitigating factors included no prior disciplinary record, mental and emotional stress due to heavy caseload, cooperation and remorse during proceedings; recommended disbarment reduced to 5 years' suspension, with 2 years' actual suspension; three dissenting justices urged disbarment].

Chefsky v. State Bar (1984) 36 C.3d 116, 132, 133, 202 C.R. 349, 680 P.2d 82 [misappropriation of funds, failure to perform services, and improper withdrawal from representation; recommendation of 1 year's actual suspension reduced to 30 days' actual suspension, because of many mitigating factors].

Ritter v. State Bar (1985) 40 C.3d 595, 603, 605, 221 C.R. 134, 709 P.2d 1303 [failure to advise clients to seek independent counsel concerning loan transaction with attorney, in violation of Rules of Professional Conduct; recommendation of 3 years' probation with 60 days' actual suspension reduced to 2 years' probation with 60 days' actual suspension].

In re Chira (1986) 42 C.3d 904, 909, 231 C.R. 560, 727 P.2d 753 [tax violation involving moral turpitude would ordinarily warrant suspension, but exception was justified by compelling circumstances, including petitioner's inability to practice law for 3 years, his otherwise exemplary 24-year career, and his lack of personal gain from transaction; hearing panel recommended 3 years' probation with no actual suspension; review department recommended 30 days' actual suspension; court, with two justices dissenting, ordered no actual suspension].

Lawhorn v. State Bar (1987) 43 C.3d 1357, 1365, 240 C.R. 848, 743 P.2d 908 [misrepresentation concerning freeze on client's trust account, misappropriation and commingling of trust funds; clean record, marital problems, restitution before complaint filed; recommendation of disbarment reduced to 5 years' probation, 2 years' actual suspension].

Boehme v. State Bar (1988) 47 C.3d 448, 454, 253 C.R. 245, 763 P.2d 1335 [misappropriation of funds by failing to remit settlement; absence of prior discipline or complaints as mitigating factor; recommendation of disbarment reduced to 5 years' probation and 18 months' actual suspension and restitution].

Silva-Vidor v. State Bar (1989) 49 C.3d 1071, 264 C.R. 439, 782 P.2d 680 [misappropriation of funds, abandonment, misrepresentation and other misconduct; recommendation of 2 years' actual suspension reduced to 1 year's actual suspension subject to conditions].

Porter v. State Bar (1990) 52 C.3d 518, 529, 276 C.R. 384, 801 P.2d 1135 [numerous acts of misconduct, including abandonment of clients, practice of law while suspended, forgery, and misappropriation; substantial mitigation, including recovery from emotional difficulties that were cause of misconduct, and recent involvement in legal and nonlegal communities; 5 years' probation, with recommendation of 21/2 years' actual suspension reduced to 2 years' actual suspension].

Calvert v. State Bar (1991) 54 C.3d 765, 785, 786, 1 C.R.2d 684, 819 P.2d 424 [failure to perform services competently and continued representation despite lack of time to perform competently; evidence was insufficient to support findings that petitioner improperly withdrew from representation and that client suffered substantial harm; recommendation of 1 year's probation with 6 months' actual suspension reduced to 60 days' actual suspension].

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c. Different Punishment.

2. Increase in Punishment.

1 *Witkin Cal. Proc. Attys* § 625

[§ 625] Increase in Punishment.

In a substantial number of cases the recommended punishment was found inadequate and was increased:

Burns v. State Bar (1955) 45 C.2d 296, 288 P.2d 514 [commingling and wilful misappropriation of client's funds; recommendation of 6 months' suspension increased to 2 years' suspension].

Surr v. State Bar (1959) 52 C.2d 125, 338 P.2d 897 [many deliberate acts of misappropriation of clients' funds; recommendation of 5 years' suspension increased to disbarment].

Noland v. State Bar (1965) 63 C.2d 298, 46 C.R. 305, 405 P.2d 129, supra, §508 [bald attempt to circumvent law, of "grave significance," but family in need; recommendation of public reprimand increased to 30 days' suspension].

Fielding v. State Bar (1973) 9 C.3d 446, 452, 107 C.R. 561, 509 P.2d 193 [investment of funds, withheld from settlement to pay clients' medical bills, in business with which attorney was closely connected, without clients' consent; prior record of similar misconduct; recommendation of 3 months' suspension; increased to 3 years' suspension, with 6 months' actual suspension].

Sodikoff v. State Bar (1975) 14 C.3d 422, 432, 121 C.R. 467, 535 P.2d 331 [fraud committed by attorney for administrator in attempt to buy estate property for substantially less than its value; board recommended 1 month's suspension, court ordered 6 months' suspension].

Gassman v. State Bar (1976) 18 C.3d 125, 132 C.R. 675, 553 P.2d 1147 [settlement proceeds deposited in attorney's general bank account and used for office expenses; recommendation of 2 years' probation with 6 months' actual suspension, increased to 1 year's actual suspension].

Fitzpatrick v. State Bar (1977) 20 C.3d 73, 141 C.R. 169, 569 P.2d 763 [misappropriation of funds received for clients' cash bail; forged indorsement of check received for payment of client's creditor, misappropriation of proceeds, wilful failure to perform services, attorney unrepentant; recommendation of 5 years' probation with 2 years' actual

suspension increased to disbarment].

Martin v. State Bar (1978) 20 C.3d 717, 723, 144 C.R. 214, 575 P.2d 757 [taking on more cases than could be handled properly; recommendation of 6 months' suspension increased to 2 years' suspension with 1 year's actual suspension, and 1 year's probation].

Cain v. State Bar (1979) 25 C.3d 956, 961, 160 C.R. 362, 603 P.2d 464 [evidence of inability to reform and lack of candor during disciplinary proceedings; recommendation of 1 year's suspension, with 3 years' probation increased to disbarment].

Olguin v. State Bar (1980) 28 C.3d 195, 199, 167 C.R. 876, 616 P.2d 858 [failure to protect client's interest, false representations and fabricated documents in disciplinary proceeding; recommendation of probation with 90 days' actual suspension increased to 6 months' actual suspension].

Finch v. State Bar (1981) 28 C.3d 659, 666, 170 C.R. 629, 621 P.2d 253 [numerous acts involving moral turpitude; recommendation of suspension on probation increased to add 6 months' actual suspension].

In re Mudge (1982) 33 C.3d 152, 154, 156, 187 C.R. 779, 654 P.2d 1307 [misappropriation of funds, filing of false document in court, and initial lack of candor during investigation; recommendation of 2 years' actual suspension increased to 3 years' actual suspension].

Bate v. State Bar (1983) 34 C.3d 920, 924, 196 C.R. 209, 671 P.2d 360 [misappropriation of funds; recommendation of 5 years' probation with 3 years' actual suspension accepted, with additional requirement of restitution to client].

Stuart v. State Bar (1985) 40 C.3d 838, 221 C.R. 557, 710 P.2d 357 [incompetence and wilful failure to communicate with client, resulting in dismissal of client's case; recommendation of 1 year's probation with no actual suspension increased to 1 year's probation with 30 days' actual suspension].

Franklin v. State Bar (1986) 41 C.3d 700, 710, 711, 224 C.R. 738, 715 P.2d 699 [wilful violation of oath, failure to act competently, improper withdrawal from employment; recommendation of 1 year's probation with no actual suspension increased to 45 days' actual suspension].

Carter v. State Bar (1988) 44 C.3d 1091, 1100, 245 C.R. 628, 751 P.2d 894 [neglected, deceived, and abandoned client, failed to return fees and files, prior disciplinary record, no mitigating factors; recommendation of 1 year's probation with no actual suspension increased to 2 years' probation with 6 months' actual suspension].

Matthew v. State Bar (1989) 49 C.3d 784, 263 C.R. 660, 781 P.2d 952 [failure to perform services, retaining unearned fees; recommendation of 3 years' suspension on probation increased to 60 days' actual suspension and other conditions].

Bernstein v. State Bar (1990) 50 C.3d 221, 234, 266 C.R. 625, 786 P.2d 352 [two matters, failure to perform services, failure to return client files and unearned fees; in light of prior disciplinary record and several aggravating factors, recommendation of 1 year's actual suspension increased to 2 years' actual suspension and until restitution made].

Conroy v. State Bar (1991) 53 C.3d 495, 507, 508, 280 C.R. 100, 808 P.2d 243 [failure to perform services, misrepresentations to client, abandonment of client, failure to cooperate with State Bar, no mitigating circumstances, several aggravating circumstances; recommendation of 6 months' actual suspension increased to 1 year's actual suspension].

In re Morse (1995) 11 C.4th 184, 209, 44 C.R.2d 620, 900 P.2d 1170, supra, §518 [broad-scale deceptive and

misleading advertising over 4-year period aggravated by refusal to comply with order to stop, and failure to pay penalties and restitution; no mitigating circumstances; recommendation of 60 days' actual suspension increased to 3 years' actual suspension].

In re Brown (1995) 12 C.4th 205, 217, 224, 48 C.R.2d 29, 906 P.2d 1184 [conviction of three misdemeanor counts of failure to remit to state funds withheld from employees' wages, with substantial mitigating circumstances, including over 20 years of practice without prior discipline, evidence of good character, and candor and cooperation during disciplinary proceeding; recommendation of public reproof increased to 2 years' suspension with 60 days' actual suspension].

In re Silverton (2005) 36 C.4th 81, 29 C.R.3d 766, 113 P.3d 556, involved the proper sanction for an attorney previously disbarred. S, disbarred in 1975 for multiple felony convictions, was reinstated in 1992, and less than 2 years later became subject to disciplinary proceedings for violations of *Rules of Professional Conduct*, Rule 3-300 (interests adverse to client) and Rule 4-200 (unconscionable fee agreements). In determining the recommended level of discipline, the Review Department declined to apply Standard 1.7(a) of the Standards for Attorney Sanctions for Professional Conduct, which would have resulted in disbarment, in the belief that to do so would have been unjust given the remoteness in time from S's prior record. Thus, the Review Department recommended that S be placed on 2 years' stayed suspension and 3 years' probation with conditions, including 60 days' actual suspension. *Held*, S should be disbarred.

(a) Standard 1.7(a) permits an exception for remoteness only when the prior offense was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust. The Review Department made no such finding, nor does the prior disciplinary proceeding support one. S was previously disbarred for conspiring to obtain money by false pretenses involving a false insurance claim, and for soliciting another in the commission of grand theft, both serious crimes involving moral turpitude. Thus, the prior offenses were not minimal and the present proceeding does not fall within the exception. (36 C.4th 91.)

(b) Unless an attorney can establish extraordinary circumstances justifying a lesser sanction, disbarment is the proper sanction for a previously disbarred attorney who commits subsequent professional misconduct. S has failed to meet that burden. S's misconduct was neither minor nor isolated, and S clearly lacked insight into the wrongfulness of his actions. Hence, "a serious sanction must be imposed both to protect the public, the courts, and the profession as well as to deter the recalcitrant attorney from future wrongdoing." (36 C.4th 94.)

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c. Different Punishment.

3. Reprimand in Published Opinion.

1 Witkin Cal. Proc. Attys § 626

[§ 626] Reprimand in Published Opinion.

A novel form of reduction is the opinion reprimand where the court finds the misconduct not so serious as to warrant suspension, or is influenced by mitigating circumstances, and concludes that a reprimand would be sufficient discipline. Instead of directing the State Bar to administer a reproval, the court, in view of the publicity and permanent effect of its own opinion, orders that the opinion will constitute the reprimand. (*Barton v. State Bar* (1930) 209 C. 677, 684, 289 P. 818; *Eschwig v. State Bar* (1944) 24 C.2d 70, 72, 147 P.2d 529; *Fleming v. State Bar* (1952) 38 C.2d 341, 349, 239 P.2d 866; *Arden v. State Bar* (1959) 52 C.2d 310, 321, 341 P.2d 6; *Black v. State Bar* (1962) 57 C.2d 219, 227, 18 C.R. 518, 368 P.2d 118; *Grove v. State Bar* (1965) 63 C.2d 312, 316, 46 C.R. 513, 405 P.2d 553; *Steiner v. State Bar* (1968) 68 C.2d 707, 714, 68 C.R. 729, 441 P.2d 289; *Barreiro v. State Bar* (1970) 2 C.3d 912, 926, 88 C.R. 192, 471 P.2d 992; *Abeles v. State Bar* (1973) 9 C.3d 603, 611, 108 C.R. 359, 510 P.2d 719 [mistaken view of scope of former Rule 12 (communication with adverse party; see supra, §536); board recommended 60 days' suspension; court ordered public reprimand by opinion]; *Mushrush v. State Bar* (1976) 17 C.3d 487, 131 C.R. 1, 551 P.2d 321 [false statements in bankruptcy proceedings and disciplinary proceedings, held to involve moral turpitude; recommendation of 1 year's suspension reduced to opinion reprimand]; *Davidson v. State Bar* (1976) 17 C.3d 570, 131 C.R. 379, 551 P.2d 1211 [charges of misleading judge and advising client to disregard order, evidence conflicting, mitigating circumstances; recommendation of 2 years' probation reduced to reprimand by opinion]; *Gendron v. State Bar* (1983) 35 C.3d 409, 425, 197 C.R. 590, 673 P.2d 260; *Leoni v. State Bar* (1985) 39 C.3d 609, 628, 217 C.R. 423, 704 P.2d 183.)

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d. Probation.

1. In General.

1 Witkin Cal. Proc. Attys § 627

[§ 627] In General.

In *Schullman v. State Bar* (1963) 59 C.2d 590, 30 C.R. 834, 381 P.2d 658, petitioner kept legal fees that he had previously assigned to his clients for money owed to them. The local administrative committee recommended 3 years' suspension, with 2 years' probation; the board recommended 1 year's suspension; the court, observing that the act merited a substantial suspension if not actual disbarment (59 C.2d 600), nevertheless rendered a decision that, in practical effect, was little more than a public reprimand, for the following reasons:

(a) "[P]etitioner was laboring under heavy financial burdens brought about by sickness, domestic and alimony problems, and tax difficulties," and "it was his choice to attempt to pay off his obligations in full rather than resort to bankruptcy with consequent probable loss to his creditors." (59 C.2d 600.)

(b) Suspension from practice would serve no useful purpose and would diminish his earnings to the disadvantage of creditors. (59 C.2d 600.)

The court ordered suspension for 3 years, with execution stayed and probation granted for the entire period, on condition that petitioner comply with the Rules of Professional Conduct and report regularly to the State Bar concerning that compliance and his efforts at restitution. It was further ordered that if petitioner sooner established full restitution and other compliance and satisfied the board that he was rehabilitated, on recommendation of the board the order of suspension might be forthwith terminated. (59 C.2d 601.)

The *Schullman* approach was followed in later cases, and probation, even for serious offenses, is common. (See *Di Gaeta v. State Bar* (1963) 59 C.2d 116, 28 C.R. 305, 378 P.2d 577 [90 days' actual suspension, balance of 3 years on probation]; *Yapp v. State Bar* (1965) 62 C.2d 809, 44 C.R. 593, 402 P.2d 361 [same]; *Reznik v. State Bar* (1969) 1 C.3d 198, 205, 81 C.R. 769, 460 P.2d 969 [3 years' probation with actual suspension for first year]; *Ritter v. State Bar* (1985) 40 C.3d 595, 605, 221 C.R. 134, 709 P.2d 1303 [probation properly conditioned on requirement that attorney provide quarterly reports to State Bar]; *Brookman v. State Bar* (1988) 46 C.3d 1004, 1009, 251 C.R. 495, 760 P.2d 1023 [federal bankruptcy law does not prevent restitution as condition of probation even though attorney's debt to client was

discharged in bankruptcy]; *In re Kelley* (1990) 52 C.3d 487, 498, 499, 276 C.R. 375, 801 P.2d 1126 [two convictions of drunk driving, including one while on probation from first; public reproof and 3 years' probation, with referral to alcohol abuse program on condition that attorney comply with all terms of program, sufficient to protect public, and additional requirement that she abstain from use of intoxicants for 3 years unnecessary]; *Martin v. State Bar* (1991) 52 C.3d 1055, 1064, 277 C.R. 868, 804 P.2d 54 [several acts of misconduct involving mishandling of five matters over 4-year period; recommendation of 5 years' probation with 2 years' actual suspension adopted, with condition that petitioner either return client's watch, which he had improperly retained, or pay client \$ 1,000 with interest]; see supra, §620 et seq.) (On duties of probation monitor, see *Rules of Procedure of State Bar*, Rule 2702; on probation revocation proceedings, see infra, §643.)

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G. Supreme Court Review.

5. Types of Decisions.

d. Probation.

2. Condition: Professional Responsibility Examination.

1 Witkin Cal. Proc. Attys § 628

[§ 628] Condition: Professional Responsibility Examination.

For some time the State Bar recommended, as a condition of probation, that the petitioner read the State Bar Act and the Rules of Professional Conduct. In *Segretti v. State Bar* (1976) 15 C.3d 878, 126 C.R. 793, 544 P.2d 929, the court observed that this requirement would not ensure understanding of the Rules or the ability to apply the principles in ethical quandaries and concluded that the new condition for admission to practice or reinstatement--passing the Professional Responsibility Examination--was a better means of insuring that understanding and ability. (15 C.3d 889; see supra, §361 and infra, §649.) "Because punishment is not our purpose in requiring suspended attorneys to pass the Professional Responsibility Examination, no such attorney will be excused from the requirement on the ground that his misdeed was minimal and his discipline light. Rather, after the effective date of this decision each member of the bar whose conduct results in suspension from practice by order of this court will be required, as a condition of resuming or continuing practice, to demonstrate that he knows, understands, and can apply the principles of legal ethics by passing the Professional Responsibility Examination. If, as here, the order of suspension is stayed and the attorney placed on probation, the requirement that he pass the Professional Responsibility Examination will be one of the conditions of that probation, whether or not actual suspension is also a condition thereof. This requirement will thus replace in each case the previously prescribed condition ... that he 'read' the State Bar Act and Rules of Professional Conduct." (15 C.3d 891.) (See *Conroy v. State Bar* (1990) 51 C.3d 799, 805, 274 C.R. 692, 799 P.2d 772 [60 days' actual suspension for wilful failure to pass Professional Responsibility Examination within time required by disciplinary order was not excessive, even though attorney subsequently passed examination].)

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H. Notice of Discipline.

1 Witkin Cal. Proc. Attys § 629

[§ 629] Notice of Discipline.

B. & P.C. 6092.5(b) requires that the State Bar give notice of an attorney's suspension or disbarment to all of the following:

- (1) The presiding judge of the superior court in the county where the attorney most recently had a law office, with a request that the judge notify the county courts and judges.
- (2) The local bar association in the county or area of the attorney's office.
- (3) The disciplinary authority in any other jurisdiction where the attorney is admitted.

The same persons and organizations must be given notice of the attorney's reinstatement to active membership, and of an attorney's involuntary inactive enrollment and termination of inactive enrollment. (*B. & P.C. 6092.5(b).*)

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A. Conviction Proceeding.

1 Witkin Cal. Proc. Attys § 630

[§ 630] Conviction Proceeding.

(1) *Initiating Proceedings.* A proceeding initiated because of an attorney's criminal conviction (*B. & P.C. 6101*; supra, §466) is commenced by a written notice of a hearing on conviction filed and served by the clerk following the issuance of an order of reference by the State Bar Court or the Supreme Court. (*Rules of Procedure of the State Bar, Rule 600(b).*) The notice must include a copy of the reference order and must clearly and conspicuously advise that failure to timely answer the notice or failure to appear will result in entry of default and enrollment as an inactive member. (*Rules of Procedure of the State Bar, Rule 600(b).*) (See *In the Matter of Curtis* (2003) 4 Cal. State Bar Ct. Rptr. 601, 605 [conviction proceeding may proceed even if it arises from underlying facts that were basis for original disciplinary proceeding because (a) underlying issues in criminal referral case differ from those in original proceeding, (b) permitting later proceeding allows statutory standard for summary disbarment to be recommended to Supreme Court, and (c) permitting proceeding furthers goal of attorney discipline, which includes protection of public, courts, and integrity of legal profession].)

(2) *Record.* The record includes all court orders and documents on file with the clerk of the State Bar Court, whether or not introduced in evidence. (*Rules of Procedure of the State Bar, Rule 604.*)

(3) *Issues.* The issues are determined by the reference order. (*Rules of Procedure of the State Bar, Rule 605.*)

(4) *Response.* The respondent must file and serve a response within 20 days after service of the notice of hearing, subject to any approved extension. The response must contain the attorney's position on the issues, objections to them, and an address for service. (*Rules of Procedure of the State Bar, Rule 601.*) (On default, see *Rules of Procedure of the State Bar, Rules 200, 602, 603.*)

(5) *Summary Disbarment.* The Review Department may direct the Hearing Department to conduct a hearing solely to determine whether summary disbarment is warranted. Review of the Hearing Department's decision is governed by *Rules of Procedure of the State Bar, Rule 301* (supra, §603). (*Rules of Procedure of the State Bar, Rule 606.*)

(6) *Waiver of Finality of Conviction.* The parties may stipulate that the court may decide the issues as to the discipline to be imposed even if the criminal conviction is not final. (*Rules of Procedure of the State Bar, Rule 607.*)

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B. Perpetuation of Testimony on Resignation.

1 Witkin Cal. Proc. Attys § 631

[§ 631] Perpetuation of Testimony on Resignation.

(1) *Nature and Purpose of Proceeding.* An attorney against whom charges are pending may elect to relinquish the right to practice and resign from the State Bar. (C.R.C., Rule 9.21(a).) "Charges are pending when the member is the subject of an investigation by the Office of Investigations, or a disciplinary proceeding ... , or when the member is the subject of a criminal charge or investigation, or has been convicted of a felony or misdemeanor." (*Rules of Procedure of the State Bar, Rule 650.*) (On provisions governing resignation, see C.R.C., Rule 9.21.)

This election would avoid the harsh effects of a protracted hearing and review, and save time and effort of all parties. However, it would not preclude a later application for readmission, at a time when evidence of the attorney's misconduct might be difficult to obtain. To meet this situation, *Rules of Procedure of the State Bar, Rule 651* et seq. authorize a proceeding for the perpetuation of testimony (see *2 Cal. Evidence (4th), Discovery, §210*), to make available to the State Bar evidence "pertaining to the conduct of the member which is pertinent in any future inquiry into the member's conduct or qualification to practice law." (*Rules of Procedure of the State Bar, Rule 651.*)

(2) *Procedure.* The procedure is as follows:

(a) The proceeding is commenced by the Office of the Chief Trial Counsel filing and serving a notice of intent to perpetuate evidence. The notice must be filed within 30 days of the member's resignation. (*Rules of Procedure of the State Bar, Rules 652, 653(a).*)

(b) Perpetuation is accomplished by depositions or stipulations as to facts. The member can take depositions only by order of the court for good cause shown. (*Rules of Procedure of the State Bar, Rule 653(b).*)

(c) If a motion is filed in the course of perpetuation, a hearing judge must be assigned to rule on the motion. The judge may set status conferences or require status reports to monitor the progress. (*Rules of Procedure of the State Bar, Rule 653(c).*)

(d) On conclusion, the Office of the Chief Trial Counsel must file and serve on the member a notice that perpetuation is completed. The member may obtain a copy of the evidence perpetuated from the Office of the Chief Trial Counsel. (*Rules of Procedure of the State Bar, Rule 654.*)

(3) *Use of Perpetuated Evidence.* Evidence perpetuated "may be admitted in evidence in any future proceeding pertaining to the member's conduct or qualifications to practice law" subject to *Rules of Procedure of the State Bar, Rule 214* (rules of evidence). (*Rules of Procedure of the State Bar, Rule 655.*)

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C. Involuntary Inactive Enrollment.

1. In General.

1 Witkin Cal. Proc. Attys § 632

[§ 632] In General.

(1) *Grounds.* Inactive enrollment proceedings in the State Bar Court are governed by *Rules of Procedure of the State Bar, Rule 400* et seq. An attorney may be transferred to involuntary inactive status (*supra*, §349) on the following grounds:

(a) When the attorney requires involuntary treatment under specific provisions of the Welfare and Institutions Code due to mental incompetency or insanity. (*B. & P.C. 6007(a)*; see *supra*, §350.)

(b) When the attorney asserts a claim of insanity or mental incompetency in a pending action or proceeding. (*B. & P.C. 6007(b)(1)*; *Rules of Procedure of the State Bar, Rule 401* et seq.; see *infra*, §633.)

(c) When the court assumes jurisdiction over the attorney's law practice. (*B. & P.C. 6007(b)(2)*; *Rules of Procedure of the State Bar, Rule 410* et seq.; see *infra*, §634.)

(d) When an attorney is unable or habitually fails to perform his or her duties or undertakings competently, or is unable to practice law without danger to the attorney's clients or the public. (*B. & P.C. 6007(b)(3)*; *Rules of Procedure of the State Bar, Rule 420* et seq.; see *infra*, §635.)

(e) When the attorney poses a substantial threat of harm to the interest of the attorney's clients or the public. (*B. & P.C. 6007(c)(1)*, (c)(2), (c)(3); *Rules of Procedure of the State Bar, Rule 460* et seq.; see *infra*, §636.)

(f) When the attorney fails to maintain an address of record under *B. & P.C. 6002.1*. (*B. & P.C. 6007(c)(1)*; *Rules of Procedure of the State Bar, Rule 450* et seq.; see *infra*, §638.)

(g) When the attorney fails to file a response in disciplinary proceedings. (*B. & P.C. 6007(e)*; *Rules of Procedure of the State Bar, Rule 500* et seq.; see *infra*, §639.)

(h) When the attorney violates probation and is under a suspension order, and the Board of Governors recommends that the attorney receive actual suspension. (*B. & P.C. 6007(d)*; *Rules of Procedure of the State Bar, Rule 564* et seq.) (On probation revocation proceedings, see *infra*, §643.) (See *In the Matter of Tiernan* (1996) 3 Cal. State Bar Ct. Rptr.

523, 531 [involuntary inactive enrollment under *B. & P.C. 6007(d)* is proper only when necessary for public protection].)

(2) *Interim Remedies.* The Board of Governors may order interim remedies or final discipline short of involuntary inactive enrollment, including conditions of probation following final discipline. The conditions may include restrictions as to scope of practice, monetary accounting procedures, review of performance by board-appointed monitors, or other measures determined appropriate after a hearing. (*B. & P.C. 6007(h)*.) (On procedure governing orders for interim remedies under *B. & P.C. 6007(h)*, see *Rules of Procedure of the State Bar, Rule 510* et seq.; on modification or termination of interim remedies, see *Rules of Procedure of the State Bar, Rule 530* et seq.)

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2. Insanity or Mental Incompetence.

1 *Witkin Cal. Proc. Attys* § 633

[§ 633] Insanity or Mental Incompetence.

(1) *Nature of Proceeding.* The Board of Governors may enroll an attorney as an inactive member when the attorney asserts a claim of insanity or mental incompetence in a pending action or proceeding, alleging inability to understand the nature of the action or proceeding, or inability to assist counsel in the matter. (*B. & P.C. 6007(b)(1)*; see *supra*, §350.)

(2) *Initiating Proceeding.* The proceeding may be initiated by the following methods:

(a) A motion filed by the Office of the Chief Trial Counsel alleging that an attorney has asserted a claim of insanity or mental incompetence. (*Rules of Procedure of the State Bar, Rule 401(a)(1)*.)

(b) An order to show cause issued by the court in a proceeding when the attorney is a party and asserts the claim. (*Rules of Procedure of the State Bar, Rule 401(a)(2)*.)

(c) A motion filed by the attorney asserting a claim of insanity or mental incompetence. (*Rules of Procedure of the State Bar, Rule 401(a)(3)*.)

The motion or order to show cause must be served on all parties as provided by the rule for service of initial pleadings (*Rules of Procedure of the State Bar, Rule 60*; *supra*, §564). (*Rules of Procedure of the State Bar, Rule 401(b)*.) In proceedings on an order to show cause, the parties have 10 days from service of the order to file and serve responses. (*Rules of Procedure of the State Bar, Rule 403*.)

(3) *Determination.* Under either a motion or order to show cause, the court may do any of the following (*Rules of Procedure of the State Bar, Rules 402, 403*):

(a) Order the attorney enrolled as an inactive member without notice or hearing if clear and convincing evidence establishes that the action is appropriate under *B. & P.C. 6007(b)(1)*.

(b) Conduct further proceedings to determine the necessity of inactive enrollment.

(c) Deny the motion or decline to order the attorney's involuntary inactive enrollment if the evidence fails to clearly and convincingly demonstrate the enrollment would be authorized under *B. & P.C. 6007(b)(1)*.

(4) *Effective Date.* An order of involuntary inactive enrollment under *B. & P.C. 6007(b)(1)* is effective on personal service, or 3 days after service by mail, whichever is earlier, unless the court orders otherwise. (*Rules of Procedure of the State Bar, Rule 405.*)

(5) *Review.* The order is reviewable as an interlocutory order under *Rules of Procedure of the State Bar, Rule 300* (supra, §594). (*Rules of Procedure of the State Bar, Rule 406.*)

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3. Court Order Assuming Jurisdiction Over Law Practice.

1 Witkin Cal. Proc. Attys § 634

[§ 634] Court Order Assuming Jurisdiction Over Law Practice.

(1) *Nature of Proceeding.* The Board of Governors may enroll an attorney as an inactive member when the superior court has assumed jurisdiction over the attorney's law practice. (*B. & P.C. 6007(b)(2)*; see *supra*, §85 et seq.) The superior court is authorized to assume jurisdiction when an attorney is disbarred or suspended or has, for any reason, become incapable of devoting time and attention to servicing clients. (*B. & P.C. 6180, 6190.*)

(2) *Initiating Proceeding.* The proceeding is initiated by a motion filed by the Office of the Chief Trial Counsel. The motion must be accompanied by evidence establishing that the superior court has assumed jurisdiction over an attorney's law practice. (*Rules of Procedure of the State Bar, Rule 411(a).*) The motion must be served on the attorney according to the rule for service of initial pleadings (*Rules of Procedure of the State Bar, Rule 60, supra*, §564). (*Rules of Procedure of the State Bar, Rule 411(b).*)

(3) *Determination.* The court may do any of the following:

(a) Order the attorney enrolled as an inactive member, without notice or hearing, if the evidence shows clearly and convincingly that the order is appropriate under *B. & P.C. 6007(b)(2)*. The order is subject to appropriate exceptions specified in the court order assuming jurisdiction over the attorney's law practice. (*Rules of Procedure of the State Bar, Rule 412(a).*)

(b) Conduct further proceedings to determine whether the attorney should be enrolled as an inactive member. If so, the issues must be limited to determining whether clear and convincing evidence establishes (1) that the superior court has assumed jurisdiction over the attorney's law practice, (2) whether the order remains in effect, and (3) whether the order contains exceptions. (*Rules of Procedure of the State Bar, Rule 412(b).*)

(c) Deny the motion. (*Rules of Procedure of the State Bar, Rule 412(c).*)

The court may not impose interim remedies under *B. & P.C. 6007(h)* in lieu of inactive enrollment, but must make exceptions necessary to effectuate any exceptions in the superior court order. (*Rules of Procedure of the State Bar, Rule 413.*)

(4) *Review*. The order is reviewable as an interlocutory order under *Rules of Procedure of the State Bar, Rule 300* (supra, §594). (*Rules of Procedure of the State Bar, Rule 415.*)

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4. Failure To Perform Duties Competently.

1 Witkin Cal. Proc. Attys § 635

[§ 635] Failure To Perform Duties Competently.

(1) *Nature of Proceeding.* The Board of Governors must enroll an attorney as an inactive member when, after notice and opportunity to be heard, the board finds that the attorney, either because of mental infirmity, or because of the habitual use of intoxicants or drugs, is (a) unable or habitually fails to perform his or her duties competently, or (b) unable to practice law without substantial threat of harm to clients or the public. (*B. & P.C. 6007(b)(3)*; see supra, §351.) A proceeding may be instituted only after a preliminary investigation or a disciplinary proceeding establishes probable cause. However, the determination of probable cause is administrative in character and does not require notice or a hearing. (*B. & P.C. 6007(b)(3)*; *Rules of Procedure of the State Bar, Rule 421.*)

(2) *Initiating Proceeding.* The proceeding must be initiated by a notice to show cause why the attorney should not be transferred to inactive enrollment, issued by the court after a determination of probable cause. (*Rules of Procedure of the State Bar, Rule 421(a).*) Any party may file a motion requesting issuance of the notice. (*Rules of Procedure of the State Bar, Rule 421(b)(2).*) Each party must file a response within 20 days of (a) service of the notice, or (b) service of an order appointing counsel (*infra*, this section), whichever is later. (*Rules of Procedure of the State Bar, Rule 421(d)(3).*)

(3) *Probable Cause Hearing.* The court may order a hearing if it deems one desirable on the issue of probable cause. If so, the hearing is informal, and the rules of evidence do not apply. (*Rules of Procedure of the State Bar, Rule 421(c).*)

(4) *Representation by Counsel.* When the notice to show cause issues, the affected attorney must be represented by counsel, and if not represented, the court must appoint counsel without expense to the attorney. (*Rules of Procedure of the State Bar, Rule 422.*) On request and at no cost, the clerk must furnish appointed counsel with copies of tapes or transcripts of relevant State Bar Court proceedings, including a hearing under *Rules of Procedure of the State Bar, Rule 421(c)*. (*Rules of Procedure of the State Bar, Rule 422(b).*) Appointed counsel may file motions to abate or continue other pending State Bar Court proceedings involving the same member. (*Rules of Procedure of the State Bar, Rule 422(d)*; see supra, §590.) The failure or inability of the member to assist counsel, standing alone, is not a basis for (a) abatement of the proceeding, (b) a continuance, or (c) a motion by counsel to be relieved as attorney of record. (*Rules of Procedure of the State Bar, Rule 422(c).*)

(5) *Physical or Mental Examination*. In a proceeding in which the mental or physical condition of an attorney is at issue, the State Bar may move for an order requiring the attorney to undergo a physical or mental examination. (B. & P.C. 6053; *Rules of Procedure of the State Bar, Rule 184(b)*.) The attorney's failure to comply with the order may constitute probable cause to issue a notice to show cause. (*Rules of Procedure of the State Bar, Rule 423(a)*.) If the notice issues, and the attorney fails without good cause to obey the order for the examination, that failure may be considered as evidence in determining the transfer to inactive enrollment. (*Rules of Procedure of the State Bar, Rule 423(b)*.)

(6) *Stipulation for Transfer*. The parties may stipulate to the transfer of the attorney to inactive enrollment. The stipulation must be approved by the court and, if approved, is binding on the parties. (*Rules of Procedure of the State Bar, Rule 424(a)*.) (On contents of stipulation, see *Rules of Procedure of the State Bar, Rule 424(b)*.)

(7) *Hearing on the Merits*. A hearing on the merits must be held as soon as practicable after issuance of the notice to show cause. (*Rules of Procedure of the State Bar, Rule 425(a)*.) (On procedural issues regarding hearing, see *Rules of Procedure of the State Bar, Rule 425*.)

(8) *Decision*. The attorney must be enrolled as an involuntary inactive member if the court finds by clear and convincing evidence that the enrollment is warranted. Further, the court must make appropriate findings as to the member's ability to conduct or assist in the defense of disciplinary proceedings. (*Rules of Procedure of the State Bar, Rule 426(a)*.) However, the court must dismiss the proceeding if there is no clear and convincing showing that inactive enrollment is warranted. (*Rules of Procedure of the State Bar, Rule 426(b)*.) The dismissal is with prejudice to the commencement of a new proceeding based solely on the same facts; it is without prejudice to the commencement of a new proceeding based on additional or different facts. (*Rules of Procedure of the State Bar, Rule 426(b)*.)

(9) *Effective Date*. Unless the court determines otherwise, the order granting or denying involuntary inactive enrollment is effective on personal service or 3 days after service by mail, whichever is earlier. (*Rules of Procedure of the State Bar, Rule 427*.)

(10) *Review*. The order is reviewable under *Rules of Procedure of the State Bar, Rule 301* (supra, §603). (*Rules of Procedure of the State Bar, Rule 428*.)

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C. Involuntary Inactive Enrollment.

5. Threat of Harm.

a. In General.

1 Witkin Cal. Proc. Attys § 636

[§ 636] In General.

(1) *Nature of Proceeding.* The Board of Governors may enroll an attorney as an inactive member when the attorney's conduct poses a substantial threat of harm to clients or to the public. (*B. & P.C. 6007(c)(1)*; see *supra*, §351.) An attorney's conduct poses a substantial threat of harm if the following factors are established:

(a) The attorney has caused or is causing substantial harm to clients or the public. (*B. & P.C. 6007(c)(2)(A)*.)

(b) The attorney's clients or the public are likely to suffer greater injury from the denial of the involuntary inactive enrollment than the attorney is likely to suffer if it is granted, or there is a reasonable likelihood that the harm will reoccur or continue. (*B. & P.C. 6007(c)(2)(B)*.)

(c) There is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter. (*B. & P.C. 6007(c)(2)(C)*.) (See *Conway v. State Bar* (1989) 47 C.3d 1107, 255 C.R. 390, 767 P.2d 657, *supra*, §353 [procedure for involuntary inactive enrollment under *B. & P.C. 6007(c)* satisfies requirements of due process].)

(2) *Initiating Proceeding.* The Office of the Chief Trial Counsel files a verified application and supporting documents with the clerk of the State Bar Court. (*Rules of Procedure of the State Bar, Rule 461(a)*.) The application may request a hearing (*Rules of Procedure of the State Bar, Rule 461(a)(2)*), and, if so, the clerk must set the hearing on an expedited basis (*Rules of Procedure of the State Bar, Rule 461(c)*).

The application must demonstrate through specific facts that the attorney's conduct poses a substantial threat of harm to clients or the public. (*Rules of Procedure of the State Bar, Rule 461(a)(1)*.) The application must identify any investigation matters and pending disciplinary proceedings that involve the same transactions or occurrences on which it relies. (*Rules of Procedure of the State Bar, Rule 461(a)(3)*.)

(3) *Response.* The application must contain a notice in prominent type advising the attorney to file a verified response and request a hearing or the right to a hearing will be waived. (*Rules of Procedure of the State Bar, Rules 461(b), 462*.) The attorney has 10 days from service of the application to file the response and request the hearing. (

Rules of Procedure of the State Bar, Rule 462.)

(4) *Stipulation.* The attorney may stipulate to involuntary inactive enrollment. The stipulation must include its factual basis and will be reviewed by the court. (*Rules of Procedure of the State Bar, Rule 463.*)

(5) *Hearing.* The court must conduct a hearing if timely requested by a party. This is an expedited hearing, and must be completed as soon as practicable. Thus, it will be neither interrupted nor continued except for good cause. (*Rules of Procedure of the State Bar, Rule 464.*) (On permissible evidence, see *Rules of Procedure of the State Bar, Rule 465.*)

(6) *Decision.* The decision may (a) order that the attorney be enrolled as an inactive member, or (b) order interim remedies under *B. & P.C. 6007(h)* (e.g., restricted or supervised practice). (*Rules of Procedure of the State Bar, Rule 466(c).*) The decision must include findings of fact whether the attorney was given notice of the proceeding, and whether clear and convincing evidence establishes the factors prescribed by *B. & P.C. 6007(c)(2)*. (*Rules of Procedure of the State Bar, Rule 466(b).*) The denial of an application is without prejudice to a subsequent application based on additional facts. (*Rules of Procedure of the State Bar, Rule 466(d).*)

(7) *Review.* A decision under *B. & P.C. 6007(c)(2)* is reviewable by petition for interlocutory review (*Rules of Procedure of the State Bar, Rule 300*, *supra*, §594), and only on the grounds of error of law or abuse of discretion. (*Rules of Procedure of the State Bar, Rule 467.*)

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5. Threat of Harm.

b. Expedited Disciplinary Proceeding.

1 *Witkin Cal. Proc. Attys* § 637

[§ 637] Expedited Disciplinary Proceeding.

Disciplinary proceedings involving the underlying matters supporting an application under *B. & P.C. 6007(c)(2)* (supra, §636) must be expedited and are governed by *Rules of Procedure of the State Bar, Rule 480* et seq. Unless the time limitations are waived or extended for good cause, the notice of disciplinary charges must be filed within 45 days following the effective date of the involuntary, inactive enrollment. (*Rules of Procedure of the State Bar, Rule 482(a).*) Discovery must begin on filing of the notice, and must be completed within 90 days following service of the notice. (*Rules of Procedure of the State Bar, Rules 482(b), 482(c).*) A decision on the merits must be filed within 6 months of the effective date of the involuntary inactive enrollment, and a request for review must be decided within 5 months of the filing of the request. (*Rules of Procedure of the State Bar, Rules 482(d), 482(e).*) A motion for transfer to *active* enrollment will be granted on proof of failure to adhere to any of the expedited procedures set forth in *Rules of Procedure of the State Bar, Rule 482*, unless the respondent or respondent's counsel caused the delay, or the delay was otherwise justified. (*Rules of Procedure of the State Bar, Rule 483.*)

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6. Failure To Maintain Address of Record.

1 Witkin Cal. Proc. Attys § 638

[§ 638] Failure To Maintain Address of Record.

(1) *Nature of Proceeding.* The Board of Governors may enroll an attorney as an inactive member when the attorney has not maintained an address of record (*B. & P.C. 6002.1*) and cannot be located after reasonable investigation. (*B. & P.C. 6007(c)(1).*)

(2) *Procedure.* Proceedings are initiated by the Office of the Chief Trial Counsel filing a verified application and supporting documents with the clerk of the State Bar Court. (*Rules of Procedure of the State Bar, Rule 452.*) No hearing is required, but the court may hold one on an expedited basis if so requested by the Office of the Chief Trial Counsel, or if the court deems it desirable. (*Rules of Procedure of the State Bar, Rule 453.*) An order denying the application is reviewable under *Rules of Procedure of the State Bar, Rule 300* (*supra*, §594). (*Rules of Procedure of the State Bar, Rule 455.*)

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7. Failure To File Response in Disciplinary Proceeding.

1 *Witkin Cal. Proc. Attys* § 639

[§ 639] Failure To File Response in Disciplinary Proceeding.

(1) *Authorization.* The Board of Governors must order the involuntary inactive enrollment of an attorney whose default has been entered pursuant to the Rules of Procedure of the State Bar. (*B. & P.C. 6007(e); Rules of Procedure of the State Bar, Rule 500* et seq.)

(2) *Conditions.* The order is administrative in character, but may only issue when the following conditions are met:

(a) The notice was duly served pursuant to *B. & P.C. 6002.1(c)* (rules for service). (*B. & P.C. 6007(e)(1)(A).*)

(b) The notice contained specified language in prominent type, at or near its beginning, advising the respondent of the consequences of a failure to respond and default. (*B. & P.C. 6007(e)(1)(B).*)

(3) *Termination of Inactive Enrollment.* Inactive enrollment must be terminated when the default is set aside or the disciplinary proceedings are completed. (*B. & P.C. 6007(e)(2); Rules of Procedure of the State Bar, Rule 501.*)

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8. Transfer to Active Status.

a. Claim of Insanity or Mental Incompetence.

1 Witkin Cal. Proc. Attys § 640

[§ 640] Claim of Insanity or Mental Incompetence.

(1) *Petition.* An attorney may file a verified petition to terminate involuntary inactive enrollment ordered under *B. & P.C. 6007(b)* (supra, §632 et seq.). (*Rules of Procedure of the State Bar, Rule 440.*) The petition must be accompanied by the attorney's written authorization enabling the State Bar to examine and copy relevant medical and hospital records. (*Rules of Procedure of the State Bar, Rule 441.*)

(2) *Stipulation.* The parties may stipulate to the attorney's transfer to active enrollment. The stipulation must be approved by a hearing judge, and once approved, is effective and binding on all parties. (*Rules of Procedure of the State Bar, Rule 442(a).*) *Rules of Procedure of the State Bar, Rule 442(b)* requires that the stipulation state the following:

(a) The condition that was the basis for the transfer to inactive enrollment no longer exists.

(b) The attorney is able to practice law competently and without danger to the interests of clients or the public.

(c) The attorney understands that he will continue to be precluded from practicing law until the court approves the stipulation.

(3) *Hearing.* If the attorney seeks a hearing, the petition must request one. The deputy trial counsel may also request a hearing, and if so, must file the request within 20 days after the petition is served. (*Rules of Procedure of the State Bar, Rule 443(a).*) The court may also order a hearing if it deems it desirable. (*Rules of Procedure of the State Bar, Rule 443(b).*) If ordered, the hearing must be held as soon as practicable. (*Rules of Procedure of the State Bar, Rule 443(c).*)

(4) *Decision.* The decision may (a) grant the petition and terminate the inactive enrollment if warranted by clear and convincing evidence, (b) impose interim remedies in lieu of inactive enrollment if clear and convincing evidence shows that, based on the attorney's condition, the remedies will be sufficient to protect the attorney's clients and the public, or (c) deny the petition. (*Rules of Procedure of the State Bar, Rule 444.*)

(5) *Review.* An order granting or denying a petition is reviewable under *Rules of Procedure of the State Bar, Rule*

300 (supra, §594). (*Rules of Procedure of the State Bar, Rule 446.*)

(6) *Effect of Transfer.* A transfer to active enrollment does not relieve the attorney of a previously imposed suspension, or of other independent restrictions on the attorney's right to practice law. (*Rules of Procedure of the State Bar, Rule 445.*)

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8. Transfer to Active Status.

b. Conduct Posing Substantial Threat of Harm.

1 Witkin Cal. Proc. Attys § 641

[§ 641] Conduct Posing Substantial Threat of Harm.

(1) *Petition.* An attorney may file a verified petition to terminate an involuntary inactive enrollment ordered under *B. & P.C. 6007(c)(2)* (supra, §636). (*Rules of Procedure of the State Bar, Rule 490(a).*)

(2) *Stipulation.* The parties may stipulate to the attorney's transfer to active enrollment. The stipulation must state facts sufficient to warrant the relief and may include expert testimony. It is reviewed by the court, which retains discretion to reject it. (*Rules of Procedure of the State Bar, Rule 491.*)

(3) *Decision.* The court must render a decision on the petition, including findings of fact, which must be filed within 10 court days after either the date set for hearing if no hearing is held, or after the conclusion of a hearing. (*Rules of Procedure of the State Bar, Rule 492(a).*) A denial of a petition is without prejudice to a subsequent petition based on additional facts. (*Rules of Procedure of the State Bar, Rule 492(c).*)

(4) *Review.* The decision is reviewable under *Rules of Procedure of the State Bar, Rule 300* (supra, §594). (*Rules of Procedure of the State Bar, Rule 494.*)

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D. Probation.

1. Modification or Early Termination.

1 Witkin Cal. Proc. Attys § 642

[§ 642] Modification or Early Termination.

(1) *Motions.* A motion for modification of probation may be made in the State Bar Court at any time. A motion for early termination of probation may be made no earlier than 6 months after the effective date of the order imposing probation. (*Rules of Procedure of the State Bar, Rule 550(a).*) Both motions must demonstrate (a) that the request is consistent with the protection of the public, (b) the successful rehabilitation of the respondent and the degree of compliance with the conditions of probation, and (c) the maintenance of the integrity of the legal profession. (*Rules of Procedure of the State Bar, Rule 550(a).*) The motion must clearly specify the relief requested and must be accompanied by declarations demonstrating that the relief is warranted and consistent with the objectives of probation. (*Rules of Procedure of the State Bar, Rule 550(c).*) The filing party must serve the motion on all parties. (*Rules of Procedure of the State Bar, Rules 60, 550(e).*)

(2) *Response and Request for Hearing.* A response must be filed within 30 days of service of the motion. (*Rules of Procedure of the State Bar, Rule 550(d).*) A party may file and serve a written request for a hearing either at the time of filing the motion or within 10 days following service of the response. (*Rules of Procedure of the State Bar, Rule 550(d).*)

(3) *Hearing.* Failure to request a hearing constitutes a waiver of a hearing. (*Rules of Procedure of the State Bar, Rule 550(d).*) However, the court will hold a hearing if timely requested, or if the court determines that a hearing would aid it in considering the motion. (*Rules of Procedure of the State Bar, Rule 550(f).*)

(4) *Stipulation.* The parties may stipulate to a modification or correction of the conditions of probation, or to early termination of probation. (*Rules of Procedure of the State Bar, Rule 551; C.R.C., Rule 9.10(c).*) The court must review the stipulation and retains the discretion to reject it in the interest of justice. (*Rules of Procedure of the State Bar, Rule 551.*)

(5) *Degree of Proof, Discovery, and Evidence.* Proof must be by clear and convincing evidence. (*Rules of Procedure of the State Bar, Rule 552(a).*) Discovery is not available unless otherwise ordered by the court. However, the Office of Probation may depose the moving party promptly after the motion is filed. (*Rules of Procedure of the State Bar, Rule 552(b).*) If no hearing is held, the only evidence necessary consists of the declarations offered in support or

opposition to the motion, subject to objections. If a hearing is held, permissible evidence includes the declarations, and the party who filed a declaration must produce the declarant for cross-examination if so requested in writing by an opposing party. (*Rules of Procedure of the State Bar, Rules 552(c), 552(d).*)

(6) *Order*. The court must issue a written order containing its ruling and reasons. (*Rules of Procedure of the State Bar, Rule 553(a).*) (On form of rulings, see *Rules of Procedure of the State Bar, Rules 553(a)(1), (a)(2).*) A ruling by a hearing judge on the motion is reviewable only by a petition for interlocutory review (*Rules of Procedure of the State Bar, Rule 300; supra, §594.*) (*Rules of Procedure of the State Bar, Rule 553(b).*)

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D. Probation.

2. Revocation.

1 *Witkin Cal. Proc. Attys* § 643

[§ 643] Revocation.

(1) *Nature and Purpose of Proceeding.* Whenever probation is imposed, either by the State Bar Court or by the Office of the Chief Trial Counsel with the member's agreement, conditions may also be imposed that will reasonably serve the purposes of the probation. (*B. & P.C. 6093(a)*; on decisions imposing probation, see *supra*, §627.) An attorney has a duty to comply with all conditions of a disciplinary probation (*B. & P.C. 6068(k)*), and failure to do so is cause for revocation of probation and may be cause for discipline (*B. & P.C. 6093(b)*). (See *Potack v. State Bar* (1991) 54 C.3d 132, 139, 284 C.R. 335, 813 P.2d 1365 [failure to comply with conditions of probation, despite ample opportunity to do so, warranted revocation of probation and imposition of previously stayed 2 years' actual suspension]; *In the Matter of Taggart* (2001) 4 Cal. State Bar Ct. Rptr. 302, 308 [failure to pay restitution as ordered; probation revoked and discipline increased to 2 years' stayed suspension, 6 months' actual suspension and until restitution paid, and 2 years' probation with further conditions]; *In the Matter of Laden* (2004) 4 Cal. State Bar Ct. Rptr. 678, 686 [repeated failure to make timely restitution; 90-day actual suspension and until full restitution paid].)

On reasonable cause to believe that an attorney has violated a condition of probation, the Office of the Chief Trial Counsel may charge the probation violation in either or both (a) an original disciplinary proceeding for violation of *B. & P.C. 6068(k)*, or (b) a probation revocation proceeding (*Rules of Procedure of the State Bar, Rule 560 et seq.*). (*Rules of Procedure of the State Bar, Rule 560.*) Revocation proceedings must be expedited, and the standard of proof is a preponderance of the evidence. (*B. & P.C. 6093(c)*; *Rules of Procedure of the State Bar, Rule 561.*)

(2) *Initiating Proceeding.* The proceeding is initiated by a motion to revoke probation. If a hearing is requested, the motion must so state, or the right is waived. The motion and supporting pleadings and evidence must be served on the attorney according to *Rules of Procedure of the State Bar, Rule 60* (service of initial pleadings). (*Rules of Procedure of the State Bar, Rule 563(a).*) No discovery is permitted except by leave of the court on good cause shown. (*Rules of Procedure of the State Bar, Rule 563(c).*)

(3) *Response.* The respondent must file a response within 20 days of service of the motion. Failure to do so constitutes an admission of the allegations contained in the motion. If the respondent desires a hearing, the response must so state, otherwise the right is waived. (*Rules of Procedure of the State Bar, Rule 563(b).*)

(4) *Hearing*. The court must hold a hearing if timely requested by any party, and the hearing must be set on an expedited basis. (*Rules of Procedure of the State Bar, Rule 563(d)*.) Unless the respondent has expressly requested the hearing and an opportunity to cross-examine declarants, the declarations submitted in support of the motion are admitted in evidence as direct testimony. (*Rules of Procedure of the State Bar, Rule 563(d)(2)*.) If the respondent has submitted declarations in response to the motion, the declarations will be admitted in evidence as the declarants' direct testimony only if (a) the respondent produces the declarants at the hearing, or (b) the deputy trial counsel waives the right to cross-examine the declarants. (*Rules of Procedure of the State Bar, Rule 563(d)(3)*.)

(5) *Order*. The court must issue a written order stating its reasons for the recommended action. (*Rules of Procedure of the State Bar, Rule 563(f)*.) An actual suspension recommended must not exceed the entire period of stayed suspension. Further, the order may recommend that all or part of the actual suspension imposed as a result of the probation revocation be stayed, and that a new period of probation be imposed. The new period may be of a different duration and under different conditions than the original probation. (*Rules of Procedure of the State Bar, Rule 562*.) The court may also order involuntary inactive enrollment if each of the elements in *B. & P.C. 6007(d)* (*supra*, §352) has occurred. (*Rules of Procedure of the State Bar, Rule 564*; on involuntary inactive enrollment, see *infra*, §632 et seq.) (See *In the Matter of Luis* (2004) 4 Cal. State Bar Ct. Rptr. 737, 741 [hearing judge has authority to impose condition in probation revocation recommendation that attorney demonstrate rehabilitation and fitness to practice even if that condition (a) was not contained in original stayed suspension, or (b) could extend length of actual suspension beyond length of original stay].)

(6) *Review*. C.R.C., Rule 9.13(b) provides an expedited review procedure when the State Bar Court recommends that the stay of execution be set aside or that the duration or conditions of probation be modified. The attorney may file a petition with the Supreme Court within 15 days after a certified copy of the decision is filed with the clerk of the Supreme Court. The State Bar has 15 days to file an answer. The petitioner may serve and file a reply within 5 days after service of the answer.

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E. Relief From Actual Suspension.

1 Witkin Cal. Proc. Attys § 644

[§ 644] Relief From Actual Suspension.

(1) *Nature of Proceeding.* An attorney on actual suspension for 2 years or more pursuant to the Standards for Attorney Sanctions for Professional Misconduct, Standard 1.4(c)(ii), where the disciplinary order requires as a condition for resuming practice that the attorney demonstrate rehabilitation and present fitness to practice, may petition the Office of the Chief Trial Counsel for relief from suspension. Expedited procedures govern the hearing and disposition of petitions. (*Rules of Procedure of the State Bar, Rule 630 et seq.*) The attorney remains on suspension while the petition is pending; if it is granted, the attorney remains on suspension for the duration of the period set forth in the governing disciplinary order and until all other requirements are satisfied. (*Rules of Procedure of the State Bar, Rule 640.*)

(2) *Procedure.* The attorney must file a verified petition that demonstrates the attorney's rehabilitation, present fitness to practice, and present learning and ability in the general law. (*Rules of Procedure of the State Bar, Rule 631(a).*) The petition may not be filed earlier than 6 months prior to the earliest date the actual suspension can be terminated and no earlier than 6 months following the finality of an adverse decision on a prior petition, unless the court has ordered a shorter period. (*Rules of Procedure of the State Bar, Rule 632.*)

Once served, the Chief Trial Counsel has 45 days to respond by either opposing the petition, stating no opposition, or stating insufficient knowledge to decide. If unopposed, the court may grant the petition without a hearing. If opposed or undecided, a hearing must be set within 35 days of service of the response. (*Rules of Procedure of the State Bar, Rule 633.*) Unless the attorney waives the time, the State Bar Court must file its decision within 15 days after the hearing concludes, within 15 days after the Chief Trial Counsel files a response if no hearing is held, or within 15 days from the date a response was due but not filed. (*Rules of Procedure of the State Bar, Rule 638.*) (On discovery and evidence, see *Rules of Procedure of the State Bar, Rule 635 et seq.*)

(3) *Burden of Proof.* The attorney bears the burden of proving by a preponderance of the evidence the requisite rehabilitation, fitness to practice, and level of present learning and ability in the general law. (See *In the Matter of Terrones* (2001) 4 State Bar Ct. Rptr. 289, 298 [standard of proof is necessarily less than that required in disbarment cases]; *In the Matter of Henschel* (2006) 4 Cal. State Bar Ct. Rptr. 867, 878 [petitioner failed to meet standard of proof where his effort to improve his professional conduct was undermined by continued unreasonable and unreasonable conduct].) (On standard of proof for reinstatement in disbarment cases, see *infra*, §647.)

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F. Reinstatement Proceeding.

1. Nature and Purpose.

1 Witkin Cal. Proc. Attys § 645

[§ 645] Nature and Purpose.

An order of disbarment, though permanent, is not irrevocable, and the Supreme Court, pursuant to its power over admission to practice, may readmit or reinstate a disbarred attorney. The underlying theory is that disbarment is not a punishment but a means of protecting the public and profession, and that reformation or "rehabilitation" is possible and desirable and should receive its reward. (*In re Andreani* (1939) 14 C.2d 736, 747, 97 P.2d 456; see 7 Am.Jur.2d (2007 ed.), Attorneys at Law §115 et seq.; 39 A.L.R.4th 567 [reinstatement as affected by alcohol abuse]; 39 A.L.R.4th 586 [conditioning reinstatement on reaffirmation of debt discharged in bankruptcy].) (On persons and organizations that must be notified of attorney's reinstatement, see *supra*, §629.)

A full pardon to an attorney disbarred after a criminal conviction cannot be the basis of compulsory reinstatement; the court has paramount judicial power to grant or deny reinstatement, free from legislative or executive interference. (*In re Lavine* (1935) 2 C.2d 324, 41 P.2d 161 [petition was denied without prejudice to renewal on sufficient showing of moral rehabilitation].)

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F. Reinstatement Proceeding.

2. Procedure.

1 Witkin Cal. Proc. Attys § 646

[§ 646] Procedure.

(1) *Initiating Proceeding.* Reinstatement proceedings are governed by the *Rules of Procedure of the State Bar, Rule 660* et seq. The proceeding is initiated by a verified petition that contains proof of payment of the required fee in an amount specified by the Board of Governors as well as proof of reimbursements to the Client Security Fund. (*Rules of Procedure of the State Bar, Rules 660, 661(c).*) The petition is addressed to the State Bar Court and is filed, with three copies, with the clerk of the State Bar Court. (*Rules of Procedure of the State Bar, Rule 661(a).*) The petitioner must serve a copy of the petition on the Office of Trials accompanied by two sets of original fingerprints. (*Rules of Procedure of the State Bar, Rule 661(b).*)

(2) *Earliest Time for Filing.* If the petitioner has resigned without charges pending, the petition may be filed at any time. (*Rules of Procedure of the State Bar, Rule 662(a).*) However, when the petitioner has been disbarred, has been placed on interim suspension following criminal conviction, or has resigned with charges pending, a petition may not be filed within 5 years after the effective date of the disbarment or interim suspension, or the filing date of the resignation, whichever occurred earliest. (*Rules of Procedure of the State Bar, Rule 662(b).*) A subsequent petition following disbarment or resignation with charges pending may not be filed earlier than 2 years after the effective date of the adverse decision on a prior petition, unless a shorter period is ordered for good cause. (*Rules of Procedure of the State Bar, Rule 662(d).*)

(3) *Investigation and Discovery.* The Office of the Chief Trial Counsel must investigate the petition within 120 days from its filing, but the period may be extended by the court. (*Rules of Procedure of the State Bar, Rule 663(a).*) Discovery under *Rules of Procedure of the State Bar, Rule 180* et seq. (supra, §584) may be conducted at the end of the investigation period provided that (a) formal discovery is completed within 120 days, unless extended by the court, and (b) all discovery conference and report time limits are computed from the end of the investigation period. (*Rules of Procedure of the State Bar, Rule 663(c).*)

(4) *Fingerprinting.* The State Bar is required to fingerprint reinstatement applicants to establish identity and determine whether the applicant has a criminal record. Any information obtained is limited to establishing identity and determining character and fitness for reinstatement. Costs are paid by the State Bar. Following reinstatement, the fingerprints are retained "for the limited purpose of criminal arrest notification." (*B. & P.C. 6054.*)

(5) *Criminal History Information.* State and local court, law enforcement, and licensing agency personnel are required to assist the State Bar in investigations related to reinstatement and to furnish state and local summary criminal history information. The cost of providing the information is paid by the State Bar. (*B. & P.C. 6054.*)

(6) *Notice and Publication.* The clerk serves notice of the hearing on the parties. The Office of the Chief Trial Counsel may publish the fact that a reinstatement petition has been filed, identifying the petitioner and other relevant information about the proceeding. (*Rules of Procedure of the State Bar, Rule 664.*)

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(1) *Initiating Proceeding.*

(*New*) A petitioner who has been disbarred by the Supreme Court on two previous occasions may not apply for readmission or reinstatement. (C.R.C., Rule 9.10(f), as amended in 2009.)



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F. Reinstatement Proceeding.

3. Showing Required.

a. In General.

1 Witkin Cal. Proc. Attys § 647

[§ 647] In General.

(1) *Professional Responsibility Examination.* In order to be eligible for reinstatement, a petition must show proof of passage of the professional responsibility examination after the effective date of disbarment or resignation, but not more than 1 year before the filing of the reinstatement petition. (*Rules of Procedure of the State Bar, Rule 665(a)*; see C.R.C., Rule 9.10(f)(1).) (See *In the Matter of Sheppard* (1999) 4 Cal. State Bar Ct. Rptr. 91, 96 [passage of examination is not condition precedent to *filing* petition].)

(2) *Standard of Proof.* The petitioner must establish by clear and convincing evidence (a) rehabilitation (*infra*, §648), (b) present moral qualifications for reinstatement, and (c) present ability and learning in the general law (*infra*, §649). (*Rules of Procedure of the State Bar, Rule 665(b)*.) A petitioner who resigned without charges pending must establish all the elements except rehabilitation, and may pass the professional responsibility examination required of applicants for admission. (*Rules of Procedure of the State Bar, Rule 665(c)*.) (See *In the Matter of Salyer* (2005) 4 Cal. State Bar. Ct. Rptr. 816, 822 [knowledgeable and impressive character witnesses, community service, and successful recovery from substance abuse for over 17 years constituted clear and convincing evidence of attorney's fitness to practice].)

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3. Showing Required.

b. Rehabilitation.

1 Witkin Cal. Proc. Attys § 648

[§ 648] Rehabilitation.

An applicant for reinstatement must establish rehabilitation and present moral qualifications for readmission. (C.R.C., Rule 9.10(f)(2).)

(1) *Adverse Recommendations.* The petitioner has the burden of affirmatively showing rehabilitation, and many decisions uphold adverse recommendations by the Board of Governors. (See *Vaughan v. State Bar* (1930) 208 C. 740, 284 P. 909; *In re Lacey* (1938) 11 C.2d 699, 81 P.2d 935; *In re Gehring* (1943) 22 C.2d 708, 140 P.2d 413; *Wettlin v. State Bar* (1944) 24 C.2d 862, 151 P.2d 255; *McArthur v. State Bar* (1946) 28 C.2d 779, 172 P.2d 55; *Beeks v. State Bar* (1950) 35 C.2d 268, 217 P.2d 409; *Feinstein v. State Bar* (1952) 39 C.2d 541, 248 P.2d 3; *Roth v. State Bar* (1953) 40 C.2d 307, 253 P.2d 969; *Tardiff v. State Bar* (1980) 27 C.3d 395, 403, 165 C.R. 829, 612 P.2d 919 [reinstatement denied, two justices dissenting]; 7 *Am.Jur.2d* (2007 ed.), *Attorneys at Law* §117.)

In *Kepler v. State Bar* (1932) 216 C. 52, 13 P.2d 509, the court said: "It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character." (216 C. 55.)

In *Hippard v. State Bar* (1989) 49 C.3d 1084, 264 C.R. 684, 782 P.2d 1140, the majority opinion upheld the State Bar's denial of a petition for reinstatement. "We hold that petitioner's discharge in bankruptcy of indebtedness to clients arising from misconduct did not preclude the State Bar from considering, as an indicator of rehabilitation, petitioner's efforts, if any, to make restitution; that petitioner did not meet his burden of demonstrating rehabilitation because he failed to prove either an inability to make restitution in whole or in part or an objectively verifiable effort to make restitution reasonably related to his ability to pay; and that the appropriate showing regarding restitution must be made before the granting of reinstatement, and not thereafter as a condition of reinstatement." (49 C.3d 1088.)

A number of additional decisions are illustrative. (See *In the Matter of Giddens* (1990) 1 Cal. State Bar Ct. Rptr. 25, 29 [despite strong favorable character testimony, petitioner failed to mention in application two lawsuits to which he

was a party; reinstatement denied]; *In the Matter of Wright* (1990) 1 Cal. State Bar Ct. Rptr. 219, 288 [failure to inform creditors of address, noncompliance with order to notify clients of disciplinary action, concealment of disbarment from employer, omission of civil suit from application; reinstatement denied]; *In the Matter of McCray* (1991) 1 Cal. State Bar Ct. Rptr. 373, 377 [omission of significant items from petition, false testimony about arrangements with creditors, holding himself out as attorney after disbarment; reinstatement denied]; *In the Matter of Kirwan* (1997) 3 Cal. State Bar Ct. Rptr. 630, 633, 635 [finding that petitioner failed to present moral qualifications for reinstatement was supported by his involvement in failed casino project; reinstatement denied]; *In the Matter of Ainsworth* (1998) 3 Cal. State Bar Ct. Rptr. 894, 897 [rehabilitation was not shown where petitioner failed to understand his professional duties and appreciate gravity of his misconduct, which involved misleading judicial officer, failing to communicate with clients, breaching fiduciary duties, and continually minimizing and denying his serious wrongdoing]; *In the Matter of Bellicini* (2006) 4 Cal. State Bar Ct. Rptr. 883, 893 [although petitioner was in recovery from alcoholism and gambling for 2 years, petitioner failed to demonstrate exemplary conduct and "overall rehabilitation" over extended period; however, due to petitioner's significant efforts at rehabilitation he was permitted to file subsequent petition 1 year from order denying reinstatement]; *In the Matter of Rudnick* (2007) 5 Cal. State Bar Ct. Rptr. 27, 35 [in failing to establish significant restitution for misappropriated trust funds from numerous clients, and in not disclosing pending civil actions against him, attorney failed to demonstrate understanding of magnitude of his misconduct or manner in which he rectified extensive harm he caused].)

(2) *Reinstatement Granted*. The leading case in which reinstatement was ordered, following the recommendation of the local administrative committee, and overruling the Board of Governors, is *In re Andreani* (1939) 14 C.2d 736, 97 P.2d 456. The court was impressed by the petitioner's 6 years of "professional and social ostracism," his public service during the period, letters expressing confidence in his fitness for reinstatement from 23 judges and many members of the bar and prominent laypersons, and his continual study of developments in the law. The opinion rejects the notion that disbarment for a serious offense should be final. "The 'door of hope' should no more be conclusively or finally shut as to them than it should be thus closed as against any other person who has erred and consequently may have suffered a somewhat similar penalty through the disciplinary functioning of the law. ... Although it has been declared that disbarment is not adjudged as a punishment, but is a method judicially devised to insure protection to the public,--it is clear that when reformation of a disbarred member has been effected the public is no longer in need of such protection." (14 C.2d 749.)

In *Preston v. State Bar* (1946) 28 C.2d 643, 171 P.2d 435, again accepting the determination of the local committee instead of the board, the court said: "Testimony of members of the bar and bench of high repute is also entitled to careful consideration when the petitioner has been close to their observation. ... Such witnesses are morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement unless they are satisfied of the rehabilitation of his character." (28 C.2d 651.)

In *Resner v. State Bar* (1967) 67 C.2d 799, 805, 63 C.R. 740, 433 P.2d 748, disbarment was ordered in 1960, and in 1965 petitioner sought reinstatement. A special administrative committee voted 2 to 1 in his favor, but the board voted 12 to 1 against him. The court granted the petition, relying heavily on statements of many lawyers, and finding little substance in the board's objections to his post-disbarment conduct. The board further contended, however, that his financial liabilities, greater than those that caused pressures leading to his original misconduct, could have similar results on reinstatement. The court refused to accept the view that straitened circumstances or the inability to make restitution are proper tests for rehabilitation; the only issue is present moral fitness. (67 C.2d 811.)

In *Calaway v. State Bar* (1986) 41 C.3d 743, 225 C.R. 267, 716 P.2d 371, petitioner had been disbarred after his conviction of federal gambling offenses. Following the recommendation of the hearing panel instead of the review department, the court ordered reinstatement.

(a) Regarding petitioner's claimed lack of contrition, the court said: "We do not believe petitioner's original offense was so horrendous as to merit a permanent mark of Cain. Understandably he sought to minimize the seriousness of the offense of which he had been convicted. In doing so he made two convincing points: first, no client had ever been

damaged by his past conduct; and second, the federal judge who presided over his trial ... did not regard the conduct as heinous as does the State Bar." (41 C.3d 748.)

(b) With respect to petitioner's omission from his reinstatement application of details concerning ancillary judicial proceedings, the hearing panel's finding that there was no intent to mislead or to conceal information was persuasive. (41 C.3d 748.) Two justices dissented, arguing that petitioner's failure to mention the ancillary proceedings demonstrated lack of candor, and thus that he had not met his burden of demonstrating present fitness. (41 C.3d 749, 757.)

A number of additional decisions are illustrative:

Werner v. State Bar (1954) 42 C.2d 187, 265 P.2d 912 [reinstatement ordered, after full review of evidence, contrary to recommendation of local committee and board].

Allen v. State Bar (1962) 58 C.2d 912, 26 C.R. 771, 376 P.2d 835 [strong showing, reinstatement ordered].

In the Matter of Brown (1993) 2 Cal. State Bar Ct. Rptr. 309, 320 [15 years since misconduct, extensive pro bono work, remorse, change of values, and favorable character testimony; reinstatement granted].

In the Matter of Miller (1993) 2 Cal. State Bar Ct. Rptr. 423, 437 [restitution, pro bono work, proper handling of fiduciary responsibilities, lifestyle changes, awareness of gravity of misconduct, evidence of good character; reinstatement granted].

In the Matter of Salant (1999) 4 Cal. State Bar Ct. Rptr. 1, 4 [11 years since disbarment, sensitive paralegal responsibilities with IRS, open acknowledgement of misconduct and significant demonstration of remorse, community service, extensive favorable character evidence, and psychological rehabilitation].

In the Matter of Bodell (2002) 4 Cal. State Bar Ct. Rptr. 459, 464 [10 years since resignation with charges pending, abundant witnesses establishing petitioner's growth and moral character, successful law clerk employment, important contributions to church, sharing misconduct in lectures to law students, and demonstrating importance of honesty as attorney].

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XII. MISCELLANEOUS PROCEEDINGS

F. Reinstatement Proceeding.

3. Showing Required.

c. Fitness To Practice.

1 Witkin Cal. Proc. Attys § 649

[§ 649] Fitness To Practice.

If a petitioner fails to make an affirmative showing of sufficient present ability and learning in the general law, the court may require the petitioner to pass, within 2 years, a general bar examination required of applicants for admission. An order requiring the examination constitutes sufficient qualification to take the examination on payment of the required fee. (*Rules of Procedure of the State Bar, Rule 665(d)*; see C.R.C., Rule 9.10(f)(3).) (See *In the Matter of Salant* (1999) 4 Cal. State Bar Ct. Rptr. 1, 3 [ability and learning since disbarment was shown through petitioner's employment responsibilities as paralegal with IRS].)

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(*New*) *Proof of Passing Attorneys' Examination.* C.R.C., Rule 9.10(f)(3), as amended in 2009, provides that at the time of filing for reinstatement or readmission, petitioners must establish present ability and learning in the general law by providing proof that they have taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners as follows:

(1) Petitioners who resigned without charges pending more than 5 years before filing the petition for readmission or reinstatement must provide proof that they passed the examination within 5 years prior to the filing.

(2) Petitioners who resigned with charges pending or who were disbarred must provide proof that they passed the examination within 3 years prior to the filing.



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XII. MISCELLANEOUS PROCEEDINGS

G. Expedited Proceeding Based on Professional Misconduct in Another Jurisdiction.

1 Witkin Cal. Proc. Attys § 650

[§ 650] Expedited Proceeding Based on Professional Misconduct in Another Jurisdiction.

(1) *Rules of Procedure.* *Rules of Procedure of the State Bar, Rule 620* et seq. govern expedited disciplinary proceedings on receipt of a certified copy of a final order in another jurisdiction finding an attorney guilty of professional misconduct in that jurisdiction. (*B. & P.C. 6049.1(b).*)

(2) *Issues.* The issues in the expedited proceeding are limited to the following: (a) What discipline to impose; (b) whether, "as a matter of law," the member's culpability as determined in the other proceeding would *not* warrant discipline under the California laws or rules in existence at the time of the misconduct; (c) whether the other jurisdiction's proceedings "lacked fundamental constitutional protection." (*B. & P.C. 6049.1(b).*) The attorney has the burden of establishing that the second and third issues do not warrant imposition of discipline in California. (*B. & P.C. 6049.1(b).*) (See *In the Matter of Kauffman* (2001) 4 Cal. State Bar Ct. Rptr. 213, 218 [neither law nor record required California discipline to be retroactive to date of respondent's discipline in Illinois].)

(3) *Commencing Proceedings.* Proceedings are commenced by filing and serving a notice of disciplinary charges on the respondent. (*Rules of Procedure of the State Bar, Rule 621(a).*) The notice may recite as its only basis the certified copy and final order of the other jurisdiction, and the certified copy must accompany the notice. (*Rules of Procedure of the State Bar, Rule 621(b).*) The respondent must respond within 20 days of service of the notice. The response is limited to the issues set forth in *B. & P.C. 6049.1(b).* (*Rules of Procedure of the State Bar, Rule 621(c).*)

(4) *No Formal Discovery.* No formal discovery is conducted unless the court so orders on good cause shown and then under specific terms and conditions. (*B. & P.C. 6049.1(c); Rules of Procedure of the State Bar, Rule 623.*)

(5) *Record as Evidence.* A certified copy of any portion of the record of the disciplinary proceedings of another jurisdiction is admissible and conclusive evidence that the attorney is culpable of professional misconduct in California, subject only to the exceptions set forth in *B. & P.C. 6049.1(b).* (*B. & P.C. 6049.1(a); Rules of Procedure of the State Bar, Rule 624.*)

(6) *Other Proceedings Are Not Prohibited.* *B. & P.C. 6049.1* does not prohibit the institution of proceedings under *B. & P.C. 6044* (investigations by board; see *supra*, §§403 et seq., 576) or under *B. & P.C. 6101* or *6102* (conviction of crime; see *supra*, §466 et seq.), based on the attorney's conduct in another jurisdiction. (*B. & P.C. 6049.1(e).*)

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VIII. RULES OF PROFESSIONAL CONDUCT

B. California Rules.

2. Professional Integrity.

h-1. (New) Limited Legal Services Programs (Rule 1-650).

1 Witkin Cal. Proc. Attys § 420A

[§ 420A] (New) Limited Legal Services Programs (Rule 1-650).

(1) *Nature of Rule.* *Rules of Professional Conduct, Rule 1-650*, added in 2009, recognizes an attorney's participation in programs sponsored by courts, government agencies, bar associations, law schools, and nonprofit organizations that provide short-term legal services. Under these programs, such as legal-advice hotlines, advice-only clinics, or pro se counseling programs, there is no expectation by either the attorney or the client that there will be continuing representation in the matter. Nevertheless, conflicts of interest, informed consent, and confidentiality are relevant concerns and are addressed by the rule. (Discussion [1] to *Rules of Professional Conduct, Rule 1-650*.)

(2) *Conflicts of Interest and Disqualification.* The rule governs conflicts of interest and disqualification as follows:

(a) An attorney participating in these programs is subject to the rule against representation of adverse interests (*Rules of Professional Conduct, Rule 3-310*, text, §438) only if the attorney knows that the representation involves a conflict of interest. Moreover, the attorney has an imputed conflict of interest only if the attorney knows that another attorney in the law firm (if applicable) would have a conflict under Rule 3-310. (*Rules of Professional Conduct, Rule 1-650(A)*.)

(b) A conflict of interest that arises from an attorney's participation in a limited legal services program will not be imputed to the attorney's law firm, except as specified in Rule 1-650(A). (*Rules of Professional Conduct, Rule 1-650(B)*.)

(c) A personal disqualification of an attorney participating in the program will not be imputed to other lawyers participating in the program. (*Rules of Professional Conduct, Rule 1-650(C)*.)

(3) *Informed Consent.* An attorney representing a client in a limited legal services program must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the attorney may offer advice to the client but must also advise of the need for further assistance of counsel. (Discussion [2] to *Rules of Professional Conduct, Rule 1-650*.)

(4) *Confidentiality*. The rules governing the inviolability of the client's confidence, including the Rules of Professional Conduct, the State Bar Act, and *B. & P.C. 6068(e)(1)* (text, §90) are applicable to an attorney's limited representation under Rule 1-650. (Discussion [2] to *Rules of Professional Conduct, Rule 1-650*.)

(5) *Ongoing Representation*. If in the course of a short-term limited representation an attorney undertakes to represent the client in the matter on an ongoing basis, *Rules of Professional Conduct, Rule 3-310* and "all other rules become applicable." (Discussion [5] to *Rules of Professional Conduct, Rule 1-650*.)

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VIII. RULES OF PROFESSIONAL CONDUCT

B. California Rules.

4. Professional Relationship With Clients.

i-1. (New) Disclosure of Lack of Professional Liability Insurance (Rule 3-410).

1 Witkin Cal. Proc. Attys § 444A

[§ 444A] (New) Disclosure of Lack of Professional Liability Insurance (Rule 3-410).

(1) *Written Notice to Client.* *Rules of Professional Conduct, Rule 3-410*, added in 2009, requires an attorney who knows, or should know, that he or she does not have professional liability insurance to inform a client of this in writing at the time the client engages the attorney where it is reasonably foreseeable that representation will exceed 4 hours. (*Rules of Professional Conduct, Rule 3-410(A).*)

If an attorney does not provide the notice required under Rule 3-410(A) but subsequent to the engagement knows, or should know, that he or she no longer has professional liability insurance, the attorney must inform the client in writing of the fact within 30 days of discovering the lack of insurance. (*Rules of Professional Conduct, Rule 3-410(B).*) (For suggested language and form of notice, see Discussions [2] and [3] to *Rules of Professional Conduct, Rule 3-410.*)

(2) *Exemptions.* *Rules of Professional Conduct, Rule 3-410* does not apply under the following circumstances:

(a) Where an attorney is employed as a government attorney or in-house counsel and is representing or providing legal advice to a client in that capacity. (*Rules of Professional Conduct, Rule 3-410(C).*) These exemptions are limited to direct employment and representation situations. Thus, the exemptions would not apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (See Discussion [4] to *Rules of Professional Conduct, Rule 3-410.*)

(b) Where the legal services are rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client. (*Rules of Professional Conduct, Rule 3-410(D).*)

(c) Where the attorney has previously advised the client under Rule 3-410(A) or (B) of the lack of insurance. (*Rules of Professional Conduct, Rule 3-410(E).*)

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