**Professional Responsibility**

**Duty of loyalty** – A lawyer must avoid conflicts of interest.

**Concurrent conflicts of interest** – A lawyer must not represent a client if the representation creates a concurrent conflict of interest. A concurrent conflict exists when (1) the representation of a client will be directly adverse to the interests of another client or (2) there is a significant risk that the representation of a client will be materially limited by the lawyer’s personal interests or by the interests of another client, former client, or third person. Under the ABA, despite a concurrent conflict of interest, a lawyer may undertake the representation if (1) the lawyer reasonably believes that he can competently and diligently represent each affected client, (2) the representation is not prohibited by law, (3) the representation does not involve the assertion of a claim by one client against another, and (4) each affected client gives informed, written consent. In California, there is no “reasonable lawyer” standard, the rule applies to potential and actual concurrent conflicts, and the rule only requires written disclosure, not informed, written consent.

**Conflicts with former clients** – A lawyer who formerly represented a client in a matter may not thereafter represent another client in the same or a substantially related matter if that client’s interests are materially adverse to the interests of the former client, unless the former client gives informed written consent.

**Conflicts in representing an organization or corporation** – A lawyer employed to represent an organization represents the organization and must act in the best interests of the organization. If a person associated with the organization advocates an action that may cause it substantial injury, a lawyer must ordinarily report the action to a higher authority in the organization. If the highest authority fails to take action, lawyer may report the information to appropriate persons outside the organization. However, California prohibits lawyer from disclosing confidential information to an outsider unless the disclosure is necessary to prevent a criminal act that will cause death or substantial bodily harm.

**Imputed disqualification** – Generally, if a lawyer faces a conflict of interest, no lawyer in that firm may represent the client. The client can however give informed written consent. The conflict of interest will not be imputed to the firm if the conflict arises out of the lawyer’s association with a prior firm and (1) the lawyer is timely screened from any participation, (2) disqualified lawyer receives no part of the fee, (3) written notice to affected former client, and (4) certifications of compliance with the screening procedures are provided to former client. In California, the RPC is silent as to imputed conflicts of interest, but courts have adopted screening.

**Withdrawal** – Withdrawal is mandatory or representation must be declined if (1) the representation will result in violation of the ABA or other law, (2) the lawyer’s physical or mental condition materially impairs ability to represent the client, or (3) the lawyer is discharged. In California, withdrawal is mandatory if (1) the lawyer knows or should know that the client is acting without probable cause and to harass or maliciously injure another person or (2) the representation will result in violation of ethical rules. A lawyer may withdraw if withdrawal can be accomplished without material adverse effect on the interests of the client, the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, the client has used lawyer’s services to perpetrate a crime or fraud, repugnant or fundamental disagreement, unreasonable financial burden on lawyer, or other good cause.

**Consensual sexual relationship** – Under the ABA rules, a lawyer must not have a sexual relationship with a client. This rules applies even if the relationship is consensual, and even if the client is not harmed. The sole exception is when the lawyer and client had a consensual sexual relationship before the lawyer-client relationship began. CA does not prohibit sexual relationships between lawyer and client unless the lawyer (1) demands sexual relations as a condition of representation, (2) enters into sexual relations with the client by coercion or undue influence, or (3) represents the client incompetently because of the relationship.

**Duty to avoid prejudicial extrajudicial statements (trial publicity)** – A lawyer who is participating in the litigation of a case must not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing the proceeding. A lawyer is permitted to state the offense or defense involved in the case and the identity of the persons involved. However, statements amounting to opinions as to the guilt or innocence of a defendant are likely to have a material prejudicial effect on the proceedings because a potential juror who read and believed this statement would likely be swayed.

**Duty of confidentiality** – Under the ABA model rules, an attorney must not reveal information relating to the representation of a client, unless the client consents, client sues for malpractice, or if compelled by court order. Lawyer may reveal confidential information to prevent death or substantially bodily harm. Moreover, as part of the duty of confidentiality, the ABA rules also specifically require a lawyer to act competently to preserve confidentiality – that is to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information relating to the representation. In California, while there is no delineated duty of confidentiality rule, the duty emanates from the Attorney’s Oath to maintain the confidences and secrets of their clients.

**Attorney-client privilege** – Generally, the privilege allows a client to refuse to testify and prevent his attorney from testifying in court about confidential communications. Unlike the PR rules, privilege protects only communications pertaining to legal services. However, in CA, the privilege attaches to the entire confidential communication regardless of whether it contains some unprivileged material. Exceptions to the privilege are for (1) client seeks services to commit a future crime or fraud, (2) communication relevant to breach of duties in relationship, (3) litigation between joint clients, or (4) evidence of competency or intention of client. CA provides an additional exception where necessary to prevent a criminal act that lawyer reasonably believes is likely to result in substantial bodily injury or death.

**Duty of competence** - The ABA rules provide that a lawyer must provide competent representation, which requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. In CA, lawyer is subject to discipline only if he intentionally, recklessly or repeatedly fails to perform legal services with competence.

**Duty of communication** – A lawyer must act with reasonable diligence and promptness in representing a client and must keep a client reasonably informed about the status of a matter and promptly comply with requests for information. A client has the ultimate authority as to whether to accept a settlement offer. In the course of representing the client the lawyer must act in the client’s best interest at all times.

**Communications with third parties** – A lawyer may not communicate about a representative matter with a person he knows to be represented by counsel unless permission. A lawyer may communicate with a person who is unrepresented, however the lawyer must not state or imply that he is disinterest, must clear up misunderstandings about her role in the matter, and may not give advice other than to obtain counsel if she knows that her client’s interests have a reasonable chance of being adverse to those of the unrepresented person.

**Fees & Compensation for legal services** – California requires a written fee agreement if the fees will exceed $1,000 except when the client is a corporation, the client states in writing that does not want written agreement, legal services of same kind that client previously paid for, lawyer acted in emergency to protect client’s rights or writing is impractical for other reasons. Additionally, lawyer’s fee must be reasonable based on factors such as time, labor and skill required to perform the work.

**Contingency Fee Agreement** – A contingency fee agreement must be in writing, must state the percentage of the recovery the lawyer will take, must state what expenses will be paid out of the recovery, and must state whether such expenses will be paid before or after the lawyer’s percentage is calculated.

**Referral fees** – Referral fees are unethical. However, a lawyer may ethically divide fees with an outside lawyer if the division is in proportion to the services performed by each lawyer. The fee split must be in writing, state the share each lawyer is to receive, and signed by client.

**Advancing litigation fees and living expenses** – The ABA rules prohibit a lawyer from providing financial assistance to a client in connection with pending or contemplated litigated except that (1) a lawyer may advance court costs and expenses of litigation the repayment of which may be contingent on the outcome and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

The California rule (1) applies in all contexts not just litigation (2) prohibits a lawyer from “buying” a potential client with a promise to pay the potential client’s personal or business debts, and (3) after the lawyer is hired he may lend the client money for any purpose if the client gives him a written promise to repay the loan.

**Agreement to pay client’s expenses to third persons** – In California, must obtain a client’s consent before agreeing to pay the client’s expenses to third persons from funds collected or to be collected for the client as a result of the representation.

**Compensation from Party other than Client** – A lawyer must not accept compensation for representing a client from someone other than the client unless the client gives informed consent, there is no interference with lawyer’s independence of professional judgment or with the lawyer-client relationship, and information relating to the representation of the client is protected. In California, the consent must be in writing.

**Duties of fairness to opposing counsel** – A lawyer owes a duty of fairness to the opposing party and counsel. Under ABA and California rules, a lawyer must not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act. Moreover, a lawyer cannot request a person other than a client to refrain from voluntarily giving relevant information to another party, unless the person is a relative, employee or agent of a client and the lawyer reasonably believes that the person’s interest will not be adversely affected by refraining from giving such information. Finally, California forbids a lawyer from threatening to bring disciplinary, administrative or criminal proceedings to gain an advantage in a civil dispute.

**Documents sent inadvertently** – The lawyer must stop examining documents or information that appear to be confidential and privileged and must promptly notify the sender.

**Special duties of prosecutors** – Prosecutors have an affirmative duty to make timely disclosure to the defense of all evidence or information that tends to negate the guilt of the accused. Moreover, the prosecutor must refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. Prosecutor must also refrain from making extrajudicial comments that have a substantial likelihood of public condemnation of the accused.

**Duty of candor to the court** – A lawyer must not knowingly make a false statement of material fact or law, must correct a false statement of material fact or law previously made, must disclose to tribunal controlling legal authority that is directly adverse to the position of the client and not disclosed by opposing counsel, and must not offer false evidence.

**Criminal Defendant Who Insists on Testifying Falsely** – A lawyer must allow the defendant to testify even if the lawyer reasonably believes that the testimony will be false. However, if the lawyer knows the testimony will be false, he must try to convince the defendant not to testify falsely. If that fails, he may ask the tribunal to withdraw. If he cannot withdraw, the lawyer must disclose the matter to the tribunal, even if it is privileged or confidential. In California, the lawyer must first try to persuade the defendant not to testify falsely. If that fails, lawyer may ask tribunal for permission to withdraw. If that fails, lawyer may call defendant as a witness and question him in the ordinary manner up to the point where lawyer knows defendant will testify falsely. From that point on, the lawyer may allow the defendant to testify in a narrative fashion. Howe ver, the lawyer may not use any false testimony in his closing argument.

**Improper Contact with Jurors** – A lawyer must not seek to influence a judge, juror, prospective juror or other official by means prohibited by law. A lawyer must not communicate ex parte with such a person except as permitted by law or court order. A lawyer must not engage in conduct intended to disrupt a tribunal.

**Duty to avoid unauthorized practice of law** – The ABA rules prohibit a lawyer from the unauthorized practice of law as well as from assisting another in unauthorized practice of law. There is a limited exception when professional judgment is not required.

**Duty to avoid false or misleading advertisements** – Advertisements must be true and not misleading, which occurs if it contains a material misrepresentation of law or fact or if it omits information that is necessary to make the communication as a whole not materially misleading. Additionally, in California, lawyer is prohibited from making advertisements that contain a guarantee or warranty of the outcome of a case, an impersonation of a lawyer or client without disclosing it, words or symbols that suggest quick cash or settlement, and contingent fee offer that does not warn client who loses must still pay costs if necessary.

**Duty to not improperly solicit clients** – A lawyer must not seek fee-paying work by initiating personal or live telephone contact with a person who is not a lawyer and with whom lawyer has no personal, family or prior professional connection. In California, all telephone contact, not merely live, is prohibited, and it prohibits any type of contact when lawyer knows the person is already represented by counsel.

**Failure to report ethical violations** – Under the ABA rules, a lawyer who knows that another lawyer has committed a violation of the rules that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects must inform the appropriate professional authority. California has no ethics rule requiring a lawyer to report misconduct by another lawyer, but they are required to report themselves when if they have been sued for malpractice three times in 12 months, found civilly liable for fraud or breach of fiduciary duty, sanctioned for more than $1,000, charged with a felony, convicted of certain serious crimes, or disciplined in another jurisdiction.

**Failure to supervise employees** – In California and under the ABA rules, a lawyer having direct supervisory authority over a non-lawyer must make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer. This means the lawyer may delegate work to paralegals or law clerks but must supervise the delegated work carefully.