

California Adopts New Rules of Professional Conduct

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[*Order Re Request for Approval of Proposed Amendments to the Rules of Professional Conduct of the State Bar of California, No. S240991 \(California Supreme Court, May 10, 2018\)*](#)

Brief Summary

On May 10, 2018, the California Supreme Court issued an order approving a new set of Rules of Professional Conduct, effective November 1, 2018. This represents the first comprehensive overhaul of California's ethics rules since 1989. California joins the rest of the country by adopting a numbering and organizational system based on the ABA Model Rules, although many of the California Rules continue to be distinct from the Model Rules approach.

Complete Summary

The California Supreme Court's action brings the state's ethics rules more in line with the rules of the other 49 states in their numbering and organization, essentially conforming to those of the ABA Model Rules of Professional Conduct. The Court departed from the Model Rules in several significant respects, sometimes retaining the current California rule with new numbering.

In Rule 1.0, the Court added to the Terminology section the direction that "Person" has the meaning stated in Evidence Code section 175, which "includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity."

A new section, number 1.2.1, Assisting, Soliciting, or Inducing Violations, provides that a lawyer "shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act."

Rule 1.5 prohibits lawyers from agreeing to, charging or collecting "unconscionable or illegal" fees, while the Model Rules prohibit unreasonable fees. Comment [5] to Rule 1.5 notes that some fee agreements must be in writing, referencing Bus. & Prof. Code sections 6147 and 6148.

Rule 1.6 essentially keeps the old California rule regarding the confidentiality of client information, prohibiting lawyers from disclosing any information protected by Bus. & Prof. Code section 6068(e)(1), unless permitted by paragraph (b) of the rule, which keeps the sole exception for permissive disclosures as information that is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm.

Rule 1.7 moves away from current “checklist” approach under Rule 3-310 for current client conflicts, and adopts the Model Rules test: whether there is a direct adversity to another current client in the same or separate matter, or whether there is a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationship with another client, a former client or a third person, or by the lawyer’s own interests. Rule 1.7 retains California’s “informed written consent” standard (compared with the Model Rules “Informed consent, confirmed in writing” standard). Comment [9] recognizes advance waivers under certain circumstances, and acknowledges that the experience and sophistication of the client, as well as independent representation, are factors in determining whether the client’s consent is fully informed.

The Court added to Model Rule 1.7 a carryover from current Rule 3-310(B) the requirement that written disclosure to a client must be made, even without the significant risk that the representation will be materially limited by the lawyer’s responsibilities to or relationship with another client, a former client or a third person, or by the lawyer’s own interests, when the lawyer:

1. Has, or knows that another lawyer in the lawyer’s firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter, or
2. Knows or reasonably should know that another party’s lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer’s firm, or has an intimate personal relationship with the lawyer.

Rule 1.8.10 imposes a strict prohibition on sexual relations with a current client who is not a spouse or registered domestic partner, unless a consensual sexual relationship exists between them when the attorney client relationship commences. This is a major change from current rule 3-120, which applies only to lawyer demands for *quid pro quo* sexual relations, the lawyer’s use of coercion, intimidation or undue influence in entering sexual relations with a client, or where continued representation after sexual relations will result in incompetence. Special procedural requirements exist for Bar prosecutors if the complainant is not the client (for example, a spouse or jealous other).

Rules 1.10 and 1.8.11 and 1.18(c) codify common-law imputation principles. Rule 1.10 permits ethical screening for lateral attorneys in a new firm who did not substantially work on a former client conflict causing matter in the previous firm. Rule 1.11 permits screening for government lawyers moving into private practice who participated “personally and substantially” in the former matter.

Rule 1.15 states that advance fee deposits (commonly mislabeled as a “retainer”) must be deposited into a client trust account maintained in California. This rule uses the word “funds received or held”—which means it applies

to all such fees, even those received prior to effective date of the Rule. By contrast, current rule 4-100 only requires advance costs to be deposited into a client trust account.

Rule 1.18 codifies common law that a lawyer owes a duty of confidentiality as to confidential information received from prospective clients. Further, the lawyer shall not represent a client with material adverse interests to a prospective client in the same or substantially related matter if the lawyer received confidential information material to the matter from the prospective client – even if the lawyer was never actually hired. Rule 1.18, however, defines “prospective client” as someone who consults the lawyer for the purpose of hiring the lawyer or securing legal services/advice, and comment [2] excludes those who communicate information:

- unilaterally without a reasonable expectation that the lawyer is willing to be retained,
- after the lawyer had stated an unwillingness or inability to consult, or
- without a good faith intention to seek legal advice or representation.

Rule 5.1 and 5.3 impose a duty to supervise subordinates. A duty to supervise currently exists only as a comment to Current rule 3-110. Rule 5.2 imposes duties on subordinate lawyers to comply with the rules.

Current rule 2-400 prohibiting discriminatory conduct in a law practice expands under Rule 8.4.1, which prohibits unlawful harassment, discrimination and harassment in the representation, termination or refusing to accept the representation of a the client, and in law firm operations. Rule 8.4.1 is limited to unlawful conduct as determined by reference to applicable state and federal statutes and decisions, and excludes conduct protected by the First Amendment. Rule 8.4.1 also removes the pre-adjudication precondition that existed in Rule 2-400. Rule 8.4.1 contains various self-reporting obligations.

Proposed Rule 1.14 (Clients with Diminished Capacity) was the only proposed rule based on the ABA Model Rules that was completely rejected.

Significance

The new rules contain significant substantive changes from the current rules. All California lawyers should review the new rules in their entirety to ensure they are in compliance by November 1, 2018. For non-California lawyers, these rules changes mean that after November 1, 2018, it should be easier to find the California rule that corresponds to the rule of the lawyer’s home state.

For more information, please contact Cassidy Chivers.