

Sixth Annual  
All-Day MCLE Event:  
Ethics, Competence, and Elimination of Bias

“Secrets You Should and Should Not Keep—Confidentiality; Conflicts and  
Inadvertent Disclosure”  
January 21, 2020  
9:00-10:00 a.m.

Edward J. McIntyre, Esq., a Professional Responsibility Lawyer  
Andrew Servais, Esq., Partner at Wingert Grebing

Topic	Materials	Audience Notes
<p>Introduction:</p> <ul style="list-style-type: none"> <li>• November 1, 2018: 69 new rules replaced 46 current Rules of Professional Conduct, bringing CA in alignment with ABA Model Rules.</li> </ul>	<p>“A violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule.” (Rule 1.0, Cmt. 1)</p> <p>“A violation of a rule may have other non-disciplinary consequences.” (<i>Ibid.</i>)</p> <p>Rules used in determining legal malpractice standards and breach of fiduciary duties. (<i>Miratibo v. Liccardo</i> (1992) 4 Cal.App.4th 41, 45-46.)</p>	
Duty of Confidentiality v. Attorney-Client Privilege	<p><b>Duty of Confidentiality:</b></p> <p>It is a duty of a lawyer: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Bus. &amp; Prof. Code § 6068(e)(1).)</p>	

	<ul style="list-style-type: none"> <li>• “The ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege.” (<i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189.)</li> <li>• Duty applies to information lawyer knows about a client or the client’s matter – <i>even if the information is public record.</i> (<i>Id.</i> [The ethical duty of confidentiality “prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment”].)</li> </ul> <p><b>Attorney-Client Privilege</b></p> <p>Cal. Rule 1.6: “(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.”</p> <p>Protects from disclosure a “confidential communication” between a lawyer and client in connection with seeking or giving legal advice. (Cal. Evid. Code, § 952 [defining “confidential communication” as “information transmitted between a client and his or</p>	
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	<p>her lawyer in the course of that relationship and in confidence . . .”)</p>	
<p>Exceptions to Attorney-Client Privilege</p>	<p>Limited to confidential <i>communications</i>; it has several exceptions:</p> <p>Evidence Code Section 958 - "There is no [attorney-client] privilege . . . as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship” but disclosure may not be any broader than is reasonably necessary to defend the claim.</p> <p><i>Dixon v. State Bar</i> (1982) 32 Cal. 3d 728, 735 - an attorney was disciplined for including in a declaration filed in an action against the attorney a gratuitous statement about a suspected affair of the client's husband "irrelevant to any issues then pending before the court."</p> <p>Evidence Code Section 912 - privilege “waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent</p>	

	<p>to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.”</p> <p>Evidence Code Section 956 –  “There is no privilege under this article [dealing with attorney-client privilege] if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.”  Crime/Fraud exception.</p>	
<p>California Rule 1.6 Exception</p>	<p>(b) <i>A lawyer may, but is not required</i> to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c).</p> <p>(c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable under the circumstances:  (1) make a good faith effort to persuade the client: (i) not</p>	

	<p>to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and (2) inform the client, at an appropriate time, of the lawyer’s ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).</p> <p>Comment [5] “No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1).”</p>	
<p>ABA Model Rule 1.6</p> <p>A lawyer shall not disclose information relating to the representation of a client unless the client gives informed consent.</p> <p><i>Wadler v. Bio-Rad Laboratories, Inc.</i> (N.D. Cal. 2016) 212 F.Supp.3d 829</p> <ul style="list-style-type: none"> <li>• Where evidence for federal and state-law claims overlaps, federal common law governs the application of the attorney-client privilege.</li> <li>• Where a retaliatory-discharge claim is brought under Sarbanes Oxley Act and overlaps with a</li> </ul>	<p>A lawyer <i>may</i> reveal information if the lawyer reasonably believes necessary:</p> <p>(1) to prevent reasonably certain death or substantial bodily harm;</p> <p><i>(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;</i></p> <p><i>(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in</i></p>	

<p>state-law claim, and the state's ethical rules preclude the use of privileged or confidential information that SEC regulations would permit, the SEC's regulations preempt the state's rules.</p>	<p><b><i>furtherance of which the client has used the lawyer's services;</i></b></p> <p>(4) to secure legal advice about the lawyer's compliance with these Rules;</p> <p>(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;</p> <p><b><i>(6) to comply with other law or a court order; or</i></b></p> <p>(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.</p>	
<p>Rule 1.7: Conflicts of Interest</p> <p>Common Scenarios for Joint Representation</p> <ul style="list-style-type: none"> <li>• Tax planning (husband and wife or business partners)</li> </ul>	<p>(a) A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.</p> <p>(b) A lawyer shall not, without informed written</p>	

<ul style="list-style-type: none"> <li>• Estate planning (husband and wife or business partners)</li> <li>• Employment litigation (employee and company/employer)</li> <li>• Professional liability claims (a professional and his/her firm)</li> <li>• Personal injury actions (multiple plaintiffs/defendants)</li> <li>• Startups or entity formation (multiple founders principals)</li> <li>• Husband and wife in pre-litigation “friendly divorce” (<i>In re Marriage of Egedi</i> (2001) 88 Cal. App. 4th 17)</li> </ul>	<p>consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person, or by the lawyer’s own interests.</p> <p>(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written disclosure of the relationship to the client and compliance with paragraph (d) where:</p> <ol style="list-style-type: none"> <li>(1) the lawyer 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</li> <li>(2) the lawyer 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.</li> </ol>	
<p>Rule 1.9: Duties to Former Clients</p>	<p>(a) A lawyer who has formerly represented a</p>	

	<p>client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.</p> <p>(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client</p> <ul style="list-style-type: none"><li>(1) whose interests are materially adverse to that person; and</li><li>(2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.</li></ul> <p>(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:</p> <ul style="list-style-type: none"><li>(1) use information protected by Business and Professions Code</li></ul>	
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	<p>section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or</p> <p>(2) reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.</p>	
<p>Rule 1.10: Imputation of Conflicts of Interest General Rule</p>	<p>(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless</p> <p>(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or</p> <p>(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the</p>	

	<p>disqualified lawyer's association with a prior firm, and</p> <p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;</p> <p>(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and</p> <p>(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.</p> <p>(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter</p>	
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	<p>representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:</p> <p>(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and</p> <p>(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.</p> <p>(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.</p> <p>(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.</p>	
<p>Rule 1.18: Prospective Clients</p> <p><i>SkyBell Technologies, Inc. v. Ring, Inc.</i> (C.D. Cal. 2018) 2018 WL 6016156</p> <ul style="list-style-type: none"> <li>Firm disqualified after “beauty contest” meeting with potential client because despite ethical firm did not take “effective and</li> </ul>	<p>Rule 1.18 (a-b) imposes a duty of confidentiality on attorneys when meeting with prospective clients: attorneys cannot use or reveal any confidential information learned as a result of that meeting, “even when no lawyer-client relationship ensues.”</p> <p>(c) A lawyer subject to paragraph (b) shall not</p>	

<p>‘reasonable measures to avoid exposure to more information than was reasonably necessary.’” (<i>Id.</i> at *9.)</p>	<p>represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).</p> <p>(d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:</p> <p>(1) both the affected client and the prospective client have given informed written consent, or</p> <p>(2) the lawyer who received the information took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client; and</p> <p>(i) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p>	
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	<p>(ii) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.</p>	
<p>Rule 4.4: Duties Concerning Inadvertently Transmitted Writings</p>	<p>Where it is reasonably apparent to a lawyer who receives a writing relating to a lawyer’s representation of a client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall:</p> <p>(a) refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and</p> <p>(b) promptly notify the sender</p> <p>While this is newly stated as a rule of professional conduct, the rule merely reiterates the standard approved by the California Supreme Court over a decade ago. (<i>Rico v. Mitsubishi</i> (2007) 42 Cal. 4th 807, 817.)</p>	