HAIRY PUTTER AND THE MEDIATOR'S CURSE

Anthony M. Kennedy Inn of Court
Team 2
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TABLE OF AUTHORITIES

ACT 1

Rules of Professional Conduct of the State Bar of California

Rule 1-100: Rules of Professional Conduct, In General

A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar. For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law. The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered. These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(B) Definitions.

(1) "Law Firm" means:

(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or
(b) a law corporation that employs more than one lawyer; or
(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or
(d) a publicly funded entity that employs more than one lawyer to perform legal services.

(2) "Member" means a member of the State Bar of California.

(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) "Associate" means an employee or fellow employee who is employed as a lawyer.

(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

(C) Purpose of 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.

(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow Rules of Professional Conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California."

Rule 1-400: Advertising and Solicitation

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which 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 which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or
(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

Rule 3-100: Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not 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 member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Rule 3-110: Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Rule 5-120: Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

California Business and Professions Code

Section 6068: Duties as an Attorney

It is the duty of an attorney to do all of the following:
(a) To support the Constitution and laws of the United States and of this state.
(b) To maintain the respect due to the courts of justice and judicial officers.
(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
(d) To employ, for the purpose of maintaining the causes confided to him or her those 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.
(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.
(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall 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. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.
(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.
(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.
(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.
(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.
(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.
(2) 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.
(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).
(4) The bringing of an indictment or information charging a felony against the attorney.
(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.
(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.
(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.
(8) As used in this subdivision, “against the attorney” includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.
(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.
(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

Section 6126: Unauthorized Practice or Attempted Practice; Advertising or Holding Out; Penalties

(a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or by both that fine and imprisonment. Upon a second or subsequent conviction, the person shall be confined in a county jail for not less than 90 days, except in an unusual case where the interests of justice would be served by imposition of a lesser sentence or a fine. If the court imposes only a fine or a sentence of less than 90 days for a second or subsequent conviction under this subdivision, the court shall state the reasons for its sentencing choice on the record.

(b) Any person who has been involuntarily enrolled as an inactive member of the State Bar, or has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with

charges pending, and thereafter practices or attempts to practice law, advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or a county jail. However, any person who has been involuntarily enrolled as an inactive member of the State Bar pursuant to paragraph (1) of subdivision (e) of Section 6007 and who knowingly thereafter practices or attempts to practice law, or advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or a county jail.

(c) The willful failure of a member of the State Bar, or one who has resigned or been disbarred, to comply with an order of the Supreme Court to comply with Rule 9.20 of the California Rules of Court, constitutes a crime punishable by imprisonment in the state prison or a county jail.

(d) The penalties provided in this section are cumulative to each other and to any other remedies or penalties provided by law.

Section 6157.1: False, Misleading or Deceptive Statements; Prohibition

No advertisement shall contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive.

Section 6158: Electronic Media Advertising; False, Misleading or Deceptive Message; Factual Substantiation

In advertising by electronic media, to comply with Sections 61571.1 and 6157.2, the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated. The message means the effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message. Factually substantiated means capable of verification by a credible source.

Section 6158.3: Electronic Media Advertising; Required Disclosures

In addition to any disclosure required by Section 6157.2, Section 6157.3, and the Rules of Professional Conduct, the following disclosure shall appear in advertising by electronic media. Use of the following disclosure alone may not rebut any presumption created in Section 6158.1. If an advertisement in the electronic media conveys a message portraying a result in a particular case or cases, the advertisement must state, in either an oral or printed communication, either of the following disclosures: The advertisement must adequately disclose the factual and legal circumstances that justify the result portrayed in the message, including the basis for liability and the nature of injury or damage sustained, or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts.

California Code of Judicial Ethics

Canon 1: A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.

Canon 2: A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. Promoting Public Confidence

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. Use of the Prestige of Judicial Office

[…]

(2) A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.

ABA Model Rules of Professional Conduct

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(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;

(2) 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 furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) 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; or

(5) to comply with other law or a court order.

See also MODEL RULES OF PROF'S CONDUCT R. 1.6 cmt.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld

. . .

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

. . .

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

. . .

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.9: Duties to Former Client

(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:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in

which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Rule 1.18: Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not 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 information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified 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).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

See also MODEL RULES OF PROF'S CONDUCT R. 1.18 cmt.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the

lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

Rule 2.3: Evaluation For Use By Third Persons

a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 3.2: Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

See also MODEL RULES OF PROF'S CONDUCT R. 3.2 cmt.

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Rule 3.6: Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall 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 an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

See also MODEL RULES OF PROF'S CONDUCT R. 3.6 cmt.

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[. . .]

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[. . .]

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 7.1: Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

See also MODEL RULES OF PROF'S CONDUCT R. 7.1 cmt.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

Rule 7.2: Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 7.3: Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 8:4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Other/Supplementary Materials

Use of Internet/Social Media

Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166.

> Chat room contact with prospective clients does not necessarily constitute solicitation under Rule 1-400(B) because chat room communications occur via a computer and not "in person" or "by telephone." When an attorney participated in the chat room for the purpose of obtaining paying clients and when an attorney identified herself as an attorney and answered questions, she "communicated" to the other participants her "availability for professional employment" within the meaning of rule 1-400(A). However, the opinion found that the communication was presumptively impermissible under Rule 1-400(D)(5), which contains a prohibition on communications transmitted in a manner involving "intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct."

Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2001-155.

> "An attorney's Internet web site providing to the public information about her availability for professional employment is a "communication" under rule 1-400(A) of the Rules of Professional Conduct and an "advertisement" under Business and Professions Code sections 6157 to 6158.3. As such, it is subject to the applicable prohibitions on false, misleading, and deceptive messages. The content of the pages constituting the web site must be prepared carefully to satisfy these rules. This applies to the words that make up the message and to the images and sounds which are part of the presentation." The web site is not a "solicitation" under rule 1-400(B) because the communication is not "delivered in person or by telephone."

Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (June 2010) (concluding that lawyers' participation in blogging, email, and chat room posts is not considered "solicitation" if the prospective client could "'turn off' the soliciting lawyer and respond or not as he or she sees fit").

ABA Formal Op. 10-457, Lawyer Websites (Aug. 5, 2010).

> "Websites have become a common means by which lawyers communicate with the public. Lawyers must not include misleading information on websites, must be mindful of the expectations created by the website, and must carefully manage inquiries invited through the website. Websites that invite inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website-initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply."

Revised Proposal Recommending Amendments to the ABA Model Rules of Professional Conduct with Regard to Technology and Client Development (Sept. 19, 2011), available at

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_client_development_posting.authcheckdam.pdf. The Revised Proposal's purpose is to address the lawyers' use of the Internet to disseminate information about the law and legal services as well as to attract new clients. The ABA Commission of Ethics 20/20 has concluded that "this development has had the salutary effect of educating the public about the existence of legal rights and options, the availability of particular types of legal services and their cost, and the background of specific lawyers." The Commission concluded that there is no need to develop new rules of professional conduct addressing lawyer's internet communications. However, the Commission recommended amendments to Rules 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients), because those Rules "have unclear implications for new forms of marketing and [because] lawyers would benefit from several clarifying amendments to those Rules."

Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113 (2009) (discussing some of the ethics issues that lawyers face when they use social networking tools).

Rachel Lee, Note, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535 (2008) (concluding that "ex parte blogging threatens the impartial administration of justice and will systematically disadvantage some litigants," and arguing that "the legal profession should consider regulating ex parte blogging, despite the contributions that counsel for parties and amici might make to public discourse about constitutional and legal issues").

Sarah Hale, *Lawyers at the Keyboard: Is Blogging Advertising and If So, How Should It Be Regulated*, 20 GEO. J. LEGAL ETHICS 669 (2007) (concluding that blogs should be considered "advertisement," and arguing that a reinterpretation of the ABA Model Rules of Professional Conduct "can allow regulation of blogs so as to ensure compliance with the purposes of the legal ethics rules while not creating an unnecessary burden on bloggers").

Amy Haywood & Melissa Jones, *Navigating a Sea of Uncertainty: How Existing Ethical Guidelines Pertain to the Marketing of Legal Services over the Internet*, 14 GEO. J. LEGAL ETHICS 1099 (2001) (discussing "the complexities that the Internet presents to a lawyer as a solicitor of business", and the adequacy of the current ethical rules in regulating legal advertisements on the Internet).

Legal Pundits

Gentile v. State Bar of Nevada 501 U.S. 1030 (1991).

> The Supreme Court held that the Nevada court's interpretation of the rule prohibiting lawyer from making extrajudicial statements to press that he knows or reasonably should know have "substantial likelihood of materially prejudicing" adjudicative proceeding was void for vagueness. However, the Court concluded that the "substantial likelihood of material prejudice" test applied by Nevada satisfied the First Amendment. The Court stated that "lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." The Court further emphasized, "Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses."

In re Oliver 452 F.2d 111 (7th Cir. 1971).

> Court held that the policy adopted by a district court which contained blanket prohibition against all extrajudicial comment by counsel in all pending cases whether tried before judge or jury without regard

to whether such comment is or even could be prejudicial to fair administration of justice was violative of the First Amendment and was null and void.

Ramsey v. Bd. of Prof'l Responsibility of Sup. Ct. 771 S.W.2d 116 (Tenn. 1989).

Lawyers have First Amendment rights to criticize judges and courts after case is concluded, so long as criticisms are made in good faith with no intent or design to willfully or maliciously misrepresent those persons and institutions or to bring them into disrepute; there is no First Amendment protection, however, for such improperly motivated misrepresentations, the making of which will subject lawyer to disciplinary sanctions.

Grievance Adm'r v. Fieger, 476 Mich. 231, 719 N.W.2d 123 (Mich. 2006).

An attorney, in his regular radio program, referred to the appellate court judges as "jackass," "Hitler," "Goebbels," and "[Eva] Braun," and suggested that he was "declar[ing] war" on them and that judges should "[k]iss [his] ass," and should be sodomized. The Michigan Supreme Court held that the attorney's comments with respect to judges were not entitled to First Amendment protection, balanced against state's compelling interest in maintaining public respect for integrity of legal process, where no reasonable construction of remarks at issue could lead to conclusion that comments went to professional performance of judges at issue. The Court also concluded that the attorney's remarks violated attorney disciplinary rules prohibiting undignified or discourteous conduct toward a tribunal and requiring attorneys to treat with courtesy and respect all persons involved in the legal process.

Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator,* 69 S. CAL. L. REV. 1303 (1996) (discussing the problems with being a commentator and the lack of guidance for handling this role in the aftermath of the O.J. Simpson's trial).

Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997) (proposing some ethics guidelines for legal commentators).

Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator III*, 50 MERCER L. REV. 737 (1999) (emphasizing the need for development of a voluntary code of ethics for legal commentators).

Jacquenette M. Helmes, Note, *An Ethical Code for Legal Commentators: What is its Value?*, 12 GEO. J. LEGAL ETHICS 767 (1999) (analyzing the need for the voluntary code for legal commentators and whether it is a realistic and effective tool to address irresponsible commentary).

A Proposed Code of Ethics for Legal Commentators: A Symposium, 50 MERCER L. REV. 669 (1999) (focusing on the national debate over the need for tougher standards for legal commentators).

Cameras in the Court and Talking Heads, http://blog.ctnews.com/meehan/2011/06/30/cameras-in-the-court-and-talking-heads/ (June 30, 2011, 3:04 pm).

Budget Crisis/Limited Court Resources

People v. Engram 50 Cal.4th 1131 (2010).

California Supreme Court upheld the superior court's decision to grant defendant's motion to dismiss under speedy trial statute when a courtroom was unavailable. The Supreme Court held that the superior court acted within its discretion in determining that the unavailability of a judge or courtroom to try a

> criminal case was not good cause to grant a continuance when the unavailability of a judge or courtroom was fairly attributable to the state's fault in having a chronic congestion of the court's trial docket.

People v. Johnson 26 Cal.3d 557 (1980).

> California Supreme Court approvingly cited the ABA's Standards for Speedy Trial (ABA Project on Standards for Crim. Justice, Stds. Relating to Speedy Trial (Approved Draft 1968)) discussing the problem of delay caused by court congestion. The Standards state that "delay arising out of the chronic congestion of the trial docket should not be excused. . . . (P) But, while delay because of a failure to provide sufficient resources to dispose of the usual number of cases within the speedy trial time limits is not excused, the standard does recognize congestion as justifying added delay when 'attributable to exceptional circumstances.' Although it is fair to expect the state to provide the machinery needed to dispose of the usual business of the courts promptly, it does not appear feasible to impose the same requirements when certain unique, nonrecurring events have produced an inordinate number of cases for court disposition."

Judge Charles W. McCoy Jr., *We Need A Creative Solution To The Superior Court Funding Crisis*, L.A. LAWYER, Nov. 2009, at 76 (discussing the impacts of the budget crisis on the Los Angeles Superior Court and solutions to the problem).

Retired Judge as Mediator

MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD III: Conflict of Interest

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

MODEL CODE OF JUDICIAL CONDUCT R. 1.3.

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge.

ACT 2

Rules of Professional Conduct of the State Bar of California

Rule 3-500: Communication

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Rule 3-510: Communication of Settlement Offer

(A) A member shall promptly communicate to the member's client:

> (1) All terms and conditions of any offer made to the client in a criminal matter; and

(2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

(B) As used in this 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.

Rule 3-700(B)(3) & (C)(3): Mandatory and Permissive Withdrawal

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

[. . .]

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

[. . .]

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; . . .

Rule 4-200: Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be 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. 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.

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

[. . .]

(5) The amount involved and the results obtained.

[…]

(8) The experience, reputation, and ability of the member or members performing the services.

[. . .]

(10) The time and labor required.

(11) The informed consent of the client to the fee.

Rule 5-200: Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

California Business and Professions Code

Section 6067: Oath

Every person on his admission shall 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. A certificate of the oath shall be indorsed upon his license.

Section § 6103.5: Written offers of settlement; required communication to client; discovery

(a) A member of the State Bar shall promptly communicate to the member's client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party. As used in this section, "client" includes any person employing the member of the State Bar who possesses the authority to accept an offer of settlement, or in a class action, who is a representative of the class.

(b) Any written offer of settlement or any required communication of a settlement offer, as described in subdivision (a), shall be discoverable by either party in any action in which the existence or communication of the offer of settlement is an issue before the trier of fact.

California Evidence Code

Section 958: Exception: Breach of Duty Arising out of Lawyer-Client Relationship

There is no privilege under this article 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.

Section 1115: Definitions.

For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

See also *Cassel v. Sup. Ct*. 51 Cal.4th 113 (2011); *Elder v. Schwan Food Co*., No. B223911, 2011 WL 1797254 (Cal.Ct.App. May 12, 2011); *Espinoza v. Hewlett-Packard Co*., 6000–VCP 2011, WL 941464 (Del.Ch. March 17, 2011).

Section 1119: Written or Oral Communications During Mediation Process; Admissibility.

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

See also *Cassel v. Sup. Ct.* 51 Cal.4th 113 (2011); *Elder v. Schwan Food Co*., No. B223911, 2011 WL 1797254 (Cal.Ct.App. May 12, 2011); *Espinoza v. Hewlett-Packard Co.*, No. 6000–VCP 2011, WL 941464 (Del.Ch. March 17, 2011); *Hall v. Curan*, No. A127542, 2011 WL 1793305 (Cal Ct App. May 11, 2011); *Porter v. Wyner*, No. B211398, 2011 WL 3189783 (Cal.Ct.App. July 27, 2011); *Gossett v. St. John*, No. B222502, 2011 WL 1797249 (Cal. Ct. App. May 12, 2011).

Section 1120: Evidence Otherwise Admissible.

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

See also *Cassel v. Sup. Ct*. 51 Cal.4th 113 (2011); *Espinoza v. Hewlett-Packard Co*., No. 6000–VCP 2011, WL 941464 (Del.Ch. March 17, 2011).

Section 1121: Mediator's Reports and Findings.

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

See also *Cassel v. Sup. Ct*. 51 Cal.4th 113 (2011); *Elder v. Schwan Food Co*., No. B223911, 2011 WL 1797254 (Cal.Ct.App. May 12, 2011).

Section 1122: Communications or Writings; Conditions to Admissibility.

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

See also *Cassel v. Sup. Ct*. 51 Cal.4th 113 (2011); *Porter v. Wyner*, No. B211398, 2011 WL 3189783 (Cal.Ct.App. July 27, 2011).

Section 1123: Written Settlement Agreements; Conditions to Admissibility.

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

See also *Cassel v. Sup. Ct*. 51 Cal.4th 113 (2011); *Elder v. Schwan Food Co*., No. B223911, 2011 WL 1797254 (Cal.Ct.App. May 12, 2011); *Hall v. Curan*, No. A127542, 2011 WL 1793305 (Cal.Ct.App. May 11, 2011).

Section 1124: Oral agreements; conditions to admissibility.

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

See also *Cassel v. Sup. Ct*. 51 Cal.4th 113 (2011).

Other California Statutes

California Welfare and Institutions Code

Section 356.5: Duties and Training of Child Advocates

A child advocate appointed by the court to represent the interests of a dependent child in a proceeding under this chapter shall have the same duties and responsibilities as a guardian ad litem and shall be trained by and function under the auspices of a court appointed special advocate guardian ad litem program, formed and operating under the guidelines established by the National Court Appointed Special Advocate Association.

California Family Code

Section 3177: Confidentiality of Proceedings

Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All communications, verbal or written, from the parties to the mediator made in the proceeding are official information within the meaning of Section 1040 of the Evidence Code.

ABA Model Rules of Professional Conduct

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

See also MODEL RULES OF PROF'S CONDUCT R. 1.1 cmt.

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

See also MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt.

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Rule 1.4: Communication

(a) A lawyer shall:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

[…]

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;
[…]

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services….

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(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;

(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 furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(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; or

(6) to comply with other law or a court order.

See also MODEL RULES OF PROF'S CONDUCT R. 1.6 cmt.

[5] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Rule 1.16(a)(2): Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

[. . .]

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; . . .

Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.4: Lawyer Serving as a Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 5.1: Responsibilities of Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2: Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3(b): Responsibilities Regarding Nonlawyer Assistants

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Rule 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Rule 8:4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Other/Supplementary Materials

Mediation and Privilege

Cassel v. Superior Court 51 Cal.4th 113 (2011).

> Client brought action against attorneys who represented him in mediation for malpractice, breach of fiduciary duty, fraud, and breach of contract. Attorneys moved in limine under the mediation confidentiality statutes to exclude all evidence of communications between attorneys and client that were related to the mediation, including matters discussed at the premediation meetings and private communications among client and attorneys while the mediation was under way. Trial court granted motion. Client sought mandate. The Court of Appeal granted mandamus relief. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court held: (1) attorneys' mediation-related discussions with client were confidential and therefore were neither discoverable nor admissible for purposes of proving claim of legal malpractice, and (2) application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds.

Elder v. Schwan Food Co., No. B223911, 2011 WL 1797254 (Cal.Ct.App. May 12, 2011).

> One of the issues examined was a motion for sanctions against the appellant for failing to attend a court ordered mediation. The court merely mentions *Cassel* and other cases to support the proposition that the mediation confidentiality statutes may not be narrowed and are not subject to exceptions.

Espinoza v. Hewlett-Packard Co., 6000–VCP 2011, WL 941464 (Del.Ch. March 17, 2011).

> The CEO of HP received a letter from a woman's attorney regarding allegations of an inappropriate relation between the woman and the CEO. The CEO resigned and a third party demanded access to the letter under 8 Del. C. § 220, "seeking to inspect books, records, and documents of HP for the stated purpose of "investigat[ing] corporate mismanagement, wrongdoing, and waste by [the HP Board and Hurd]" relating to Hurd's relationship with Fisher and the circumstances of his resignation (the "Demand Letter")." The CEO argued that the letter included language evidencing the intent to enter mediation. Specifically, he pointed to the language inviting him to contact the attorney if he was "'interested in resolving' Fisher's claims through an 'out-of-court settlement.'" The CEO also argued the letter "was

prepared for the purpose of attempting to arrange a private mediation." The court invited counsel to submit briefs on this case of first impression in light of *Cassel* "(i.e., a party seeking to invoke the mediation privilege to protect its opening letter notifying the opposing party of claims against him, which makes no mention of a desire to mediate or § 1119(b) and precedes any discussions of mediation with the opposing party)."

Held: The letter was not protected by the privilege because it was not "prepared for the purpose of, in the course of, or pursuant to a mediation or mediation consultation." Specifically, the court found no mention of mediation, a mediator or Evidence Code § 1119. The court then focused on the timing of the letter. In other words, the court asked *when* the letter was prepared (in relation to an agreement or order to mediate) and how does that help the court evaluate whether it was prepared for the purpose of mediation. The court then distinguished *Cassel* by pointing out that the communications in that case clearly took place during and in preparation of a scheduled mediation. Here, the letter was simply a notice of a claim before any discussion regarding mediation had taken place.

Hall v. Curan, No. A127542, 2011 WL 1793305 (Cal.Ct.App. May 11, 2011).

Parties were involved in mediation proceedings in which a settlement was reached. However, the settlement was only signed in a memorandum by the attorneys stating in part "Settlement 12/20/07–17:17–[¶] (1) Owner to settle w/Coastside [¶] (2) $12,5000—60 days0—to get." The attorneys continued to negotiate revisions but they failed to execute a written settlement agreement. Appellant claimed the mediation privilege did not apply to the written document because the mediation had essentially concluded. However, the court noted that the document and evidence presented failed to meet the statutory requirements for a mediation to be considered complete/ "ended." Thus, the privilege rules apply to the memo and it was inadmissible.

Porter v. Wyner, No. B211398, 2011 WL 3189783 (Cal.Ct.App. July 27, 2011).

This case involved the same dispute of whether or not the mediation privilege applied to communications between a client and her counsel, or parties "on the same side" of a mediation. In addition to testimony, the "Porters introduced contemporaneous notes Mrs. Porter had made that tracked the course of mediation. Mrs. Porter also testified regarding various spreadsheets that were used during the mediation, which reflected the offers and counteroffers both sides made during the negotiations." The court cited *Cassel* as being identical to the claim in this case, finding that the privilege did apply to this evidence and that there had been no waiver under Evidence Code § 1122. Moreover, the court noted that the "absurd result scenario" mentioned in *Cassel* (where an attorney could protect himself from a malpractice claim by preventing disclosure) did not apply in this case because many of the other parties aside from the attorney did not sign the waiver. The Court of Appeal, in light of *Cassel*, granted a new trial and remanded the matter back to the trial court to rule on the JNOV.

Gossett v. St. John, B222502, 2011 WL 1797249 (Cal.Ct.App. May 12, 2011).

This case involved the same claim as in *Porter* (i.e., that the privilege doesn't apply to communications between parties "on the same side."). The court cited *Cassel* to reject this claim.

Uniform Mediation Act § 4(a) (2001), available at http://www.mediate.com/articles/ umafinalstyled.cfm ("Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.").

Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. REV. 715 (1997) (proposing "that legislatures address the conflict between confidentiality rules and obligations to report attorney misconduct by fashioning an exception to the principle of mediation confidentiality").

See also CAL. BUS. & PROF. CODE § 6070 (authorizing the State Bar to create a system of Continuing Legal Education).

See also CAL. R. COURT 9.31 (setting the standards for Continuing Legal Education).

See also CAL. R. COURT 4.117 (requiring specific attorney qualifications for appointed attorneys in state capital cases).

Other Ethics Issues

ABA MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard II, available at http://www.mediate.com/pdf/ModelStandardsofConductforMediatorsfinal05.pdf.

(A) A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
(B) A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

John W. Cooley, *Mediator & Advocates Ethics*, 55 DISP. RESOL. J. 73 (2000).

Harry Miller & Marvin Starr, California Real Estate, 12 CAL. REAL EST. § 35:7 (3d ed.) (2008) ("Under the court-adopted rules for court sponsored mediation programs, a mediator must maintain impartiality toward all participants in the mediation process at all times.").

Legal Outsourcing

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008), available at http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf (discussing lawyers' obligations when outsourcing legal and nonlegal support services).

Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006) (discussing confidentiality, conflicts of interest, and billing issues when outsourcing legal work).

> "A lawyer may ethically outsource legal support services overseas to a non-lawyer if the lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) under the circumstances described in this Opinion, avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) under the circumstances described in this Opinion, obtains the client's informed advance consent to outsourcing."

Florida State Bar Ass'n Comm. on Prof'l Ethics, Op. 07-2, 2008 WL 3556663 (2008) (concluding that "a lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as

long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing").

San Diego County Bar Ass'n Op. 2007-1 (2007) (concluding that outsourcing legal research to India is not assisting another in the unauthorized practice of law).

Darya V. Pollak, *"I'm Calling My Lawyer… In India!": Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99 (2006) (discussing confidentiality, conflicts of interest, supervision, and malpractice).

Mark Ross, *Ethics of Legal Outsourcing White Paper* (Feb. 14, 2010), available at http://www.llrx.com/features/ethicsoutsourcing.htm (briefly discussing malpractice insurance in relation to international outsourcing).

Ameet Sachdev, *Growth of Legal Outsourcing May Herald Era of Cheaper Lawyering*, L.A. TIMES, Jan. 1, 2011, available at http://articles.latimes.com/2011/jan/01/business/la-fi-legal-outsourcing-20110101 (describing growth of the legal-outsourcing industry).

Heather Timmons, *Outsourcing to India Draws Western Lawyers*, N.Y. TIMES, Aug. 4, 2010, available at http://www.nytimes.com/2010/08/05/business/global/05legal.html?pagewanted=all (discussing the growth of legal-outsourcing in India).

Use of Co-counsel to Assist in Unfamiliar Areas of Law

ABA Standards for the Operation of a Telephone Hotline (2001), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/delivery/hotlinestandards.authcheckdam.pdf.

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