

## ***The California Rules of Professional Conduct: The Good, the Bad and the Utterly Confusing©***

By David B. Parker and Nicholle Noyes

All California lawyers are obligated to abide by the California Rules of Professional Conduct (“CRPC”). Violations of these rules can lead to a wide range of State Bar discipline, disbarment, not to mention other serious repercussions such as civil liability,<sup>1</sup> non-insurability and damage to reputation. With so much at stake, one might reasonably expect the CRPC to provide clear guidance. Instead, all too often, they are a vexing source of controversy even for savvy ethicists, not to mention traps for neophytes and the unwary.

The CRPC are unique. California is one of the few jurisdictions that eschews the ABA Model Rules, opting for its own unique set of rules, most notably in the area of confidentiality (*CAL. BUS. & PROF. CODE* §6068(e)). These rules are based on a “one size fits all” philosophy. They rarely speak to the conduct of lawyers practicing in a particular field, or for certain kinds of representation or certain classes of clients. They apply to all lawyers, no matter the nature of one’s practice. Like American Express, one doesn’t leave them behind when they are performing services in another state. (Rule 1-100(D)). And the CRPC are ever-changing, whether buffeted by the political winds calling for lawyer whistle blowing (e.g., last year’s expedited amendment to §6068(e) to permit lawyers to blow the whistle on clients who threaten to cause death or serious physical injury to another, leading to the adoption of new Rule 3-100) or simply by the vagaries of the Supreme Court’s interpretation of them. One need only compare last

year's *Huskinson & Brown v. Wolf*, 32 Cal. 4<sup>th</sup> 453 (2004), with *Chambers v. Kay* 29 Cal. 4<sup>th</sup> 142 (2002) (violations of Rule 2-200, governing fee splitting without client written consent); or compare last year's *Fletcher v. Davis*, 33 Cal. 4<sup>th</sup> 61 (2004) with *Hawk v. State Bar*, 45 Cal. 3d 589 (1988) (dealing with what is an "adverse" interest under Rule 3-300) to understand how even the high court struggles with the meaning and non-disciplinary impact of the CPRC.

Imagine the Ten Commandments with footnotes. California's CPRC are accompanied by an "Official Discussion", supposedly offered not as an independent basis for discipline but rather to provide guidance<sup>2</sup> but which are at times unhelpful<sup>3</sup> and other times contradictory.<sup>4</sup>

These ethical tenets are not exclusive. The CRPC must be understood against the backdrop of (1) the State Bar Act (*CAL. BUS. & PROF. CODE* §6000, *et seq.*) which provides its own set of 15 commandments in §6068, and addresses, among other things, written fee agreements (§§6147-48) and arbitration standards for lawyer-client fee disputes (§6200-6206) and (2) a host of other statutes, e.g., the *Code of Civil Procedure* (which makes clear that lawyers cannot shield work product in a State Bar proceeding or a legal malpractice action, §2018(e), (f)), and governs the authority of litigation attorneys, substitutions and motions to withdraw (§283 *et seq.*), the *Evidence*

---

<sup>1</sup> While a violation of the Rules is not *per se* actionable, the Rules can form the basis for tort liability, for malpractice or breach of fiduciary duty. See *Stanley v. Richmond*, 35 Cal. App. 4<sup>th</sup> 1070, 1086 (1995); *Mirabito v. Liccardo*, 4 Cal. App. 4<sup>th</sup> 41 (1992).

<sup>2</sup> See Rule 1-100.

<sup>3</sup> Rule 3-600's Official Discussion sagely observes: "When a change in [a client organization's] control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty." No kidding.

<sup>4</sup> Rule 3-310(B) requires written disclosure when a "Member" has various kinds of relationships with other parties and witnesses. Yet the Official Discussion assures us that the drafters of the rule shouldn't be taken literally. "[The Rule] is intended to apply only to a member's own relationships or interests, *unless*

*Code* (which codifies the attorney-client privilege, §§950 et seq., and even the *Probate Code* (§16000, et seq., deals with the fiduciary duties of trustees and has been held to apply to attorney-client relationships, including the presumption of undue influence in §16004).<sup>5</sup> There are even judicially crafted rules, such as the duty to return inadvertently turned over privileged documents or the concept of imputed conflicts for disqualification purposes.<sup>6</sup>

Still, it's not enough to know the ethical scriptures. California lawyers also have to keep up with the commentary of latter day scribes, some with black robes,<sup>7</sup> some with white hats,<sup>8</sup> and last but not least, colleagues whose influence comes purely from their expertise and commitment to professionalism.<sup>9</sup> These commentaries are critical because the Rules are not exactly models of clarity.<sup>10</sup> Sadly, however, even strict

---

*the member knows* that a partner or associate in the same firm has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.”

<sup>5</sup> *Walton v. Broglio*, 52 Cal. App. 3d 400 (1975) (applying predecessor statute, CAL. CIV. CODE § 2235). There are also special provisions relating to independent counsel advising “dependent adults” who request that counsel draft testamentary instruments in favor of a “care custodian,” CAL. PROB. CODE § 21350, et seq.; *Osornio V. Weingarten*, 124 Cal. App. 4<sup>th</sup> 304 (2004).

<sup>6</sup> *State Compensation Insurance Fund v. WPS*, 70 Cal. App. 4<sup>th</sup> 644, 656 (1999); *People v. Speedee Oil Change*, 20 Cal. 4<sup>th</sup> 1135 (1999), respectively.

<sup>7</sup> The Supreme Court promulgates the rules, interprets them and metes out discipline. There is also a growing body of ethics law in the published opinions of the State Bar Court.

<sup>8</sup> State Bar prosecutors, like their criminal counterparts, are the gatekeepers, deciding whether to bring charges or not.

<sup>9</sup> Some of the finest ethics scholarship is found in the ethics opinions issued by the State Bar's Standing Committee on Professional Responsibility and Conduct and LACBA's own Professional Responsibility and Ethics Committee, both of which are often relied upon by the Courts.

<sup>10</sup> Three examples: **Rule 3-310**, governing conflicts and waivers, uses the phrase “written informed consent”, which is defined as “client’s written agreement... following written disclosure.” “Disclosure” is defined to require informing client of the “relevant circumstances and of the actual and reasonably foreseeable adverse consequences...” It appears the “disclosure” of risk factors must be in writing, but, must the client *sign* the “written agreement” or otherwise deliver the consent or is it enough if the lawyer sends a confirming letter memorializing a verbal expression of consent? Clearly, the former is the better, safer practice. But note the contrast in **Rule 3-300** (“Avoiding Interests Adverse to Client”) which speaks of “fully disclosing” the terms of the transaction and requires the client “consent in writing,” but it does not use the phrase “written informed consent” and does not provide definitions as does Rule 3-310. Also, neither rule deals with modern communication via e-mail. Does the “written consent” requirement differ between the two conflicts related rules? **Rule 2-100** (“Communication with a Represented Party”) prohibits direct or indirect communications with a represented party, but fails to define what “indirectly” means. How does one square the right of the client to communicate with her counterpart and the right of

{00012327.DOC}

adherence to California's ethics rules may imperil lawyers who practice in federally regulated areas, such as securities practitioners who face the prospect that Sarbanes-Oxley whistle blowing regulations may pre-empt the Rules.<sup>11</sup>

Here's hoping that the State Bar's Revision Commission<sup>12</sup> will solve some of the problems and in the meantime lawyers steer a defensive course around the pitfalls. So, in short, be careful out there!

---

an attorney to advise the client as to that right (both recognized in the Rule's Official Discussion) with the notion that the attorney cannot use his client to "indirectly" communicate with an adverse party?

<sup>11</sup> The precise issue is an open question, but the 9<sup>th</sup> Circuit's ruling in *Credit Suisse First Boston Corp. v Grunwald*, \_\_\_ F.3d \_\_\_ (2005), holding that federal law regulating NASD arbitration pre-empts California's ethics standards for arbitrators, suggests that Sarbanes-Oxley may well trump California's ethical standards governing confidentiality.

<sup>12</sup> The Revision Commission, comprised of the some of the Bar's best and brightest ethicists, is actively involved in a complete overhaul of the Rules. To follow the Commission's work, see

[www.calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10129](http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129).

{00012327.DOC}