

No. S232946

SUPREME COURT COPY

IN THE SUPREME COURT OF CALIFORNIA

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

Plaintiff and Respondent,

v.

J-M MANUFACTURING CO., INC.,

Defendant and Appellant.

SUPREME COURT
FILED

MAY 18 2018

Jorge Navarrete Clerk

Deputy

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division Four, Case No. B256314

The Superior Court of Los Angeles County, Case No. YC067332
The Honorable Stuart M. Rice, Presiding

SUPPLEMENTAL BRIEF ON NEW AUTHORITY

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Pursuant to California Rules of Court, rule 8.520(d)(1), Sheppard Mullin respectfully directs the Court's attention to the administrative order filed on May 10, 2018 in S240991, a copy of which is attached as Exhibit A. In that order, the Court granted in part and denied in part a request from the State Bar for approval of comprehensive amendments to the California Rules of Professional Conduct. As relevant to this case, the Court approved without modification Comment [9] to Rule 1.7 (Conflict of Interest: Current Clients), which provides:

[9] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. (See rule 1.8.8.)

(Ex. A at p. 25.)

In its Answering Brief on the Merits, J-M contended that the “California State Bar’s currently-pending proposed advance-waiver rule further illuminates that the current California Rule prohibits open-ended advanced waivers” because “the State Bar proposal *rejects* the ABA’s decision to recognize generalized, open-ended advance waivers for sophisticated clients.” (ABOM at p. 34, original italics; see also *ibid.* [“Notably, while the Bar’s proposal is otherwise based on the ABA Model Rule, the redline prepared by the Commission shows it explicitly *rejected* the ABA language permitting open-ended advance waivers by sophisticated, independently-represented clients.”].)

As explained in Sheppard Mullin’s Reply Brief on the Merits, the relevant comment to proposed Rule 1.7 was subsequently revised to state that the “experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent.” (RBOM at p. 20, citation omitted.) This language has now been adopted by this Court without modification. (Ex. A at p. 25.)

Accordingly, there can no longer be any doubt that California—like the ABA, other leading bar associations, the Restatement, scholars, and numerous courts—recognizes that it matters whether a client is experienced, sophisticated, and independently represented by counsel when assessing whether its consent to a waiver of conflicts was sufficiently informed. (See OBOM at pp. 27–31; RBOM at pp. 16–20.)

DATED: May 17, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: Kevin S. Rosen
Kevin S. Rosen

Attorneys for Plaintiff and Respondent
Sheppard, Mullin, Richter & Hampton LLP

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned certifies that this Supplemental Brief on New Authority contains 519 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the cover information, the signature block, and this certificate.

DATED: May 17, 2018

By: Kevin S. Rosen
Kevin S. Rosen

Exhibit A

S240991

ADMINISTRATIVE ORDER 2018-05-09

MAY 10 2018

Jorge Navarrete Cle

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

**ORDER RE REQUEST FOR APPROVAL OF PROPOSED AMENDMENTS
TO THE RULES OF PROFESSIONAL CONDUCT OF
THE STATE BAR OF CALIFORNIA.**

On March 30, 2017, the Board of Trustees of the State Bar of California filed a request for approval of comprehensive amendments to the California Rules of Professional Conduct. (Bus. & Prof. Code, § 6076.) The submission included 70 new or amended rules. The request is granted in part and denied in part.

Twenty-seven rules are approved as submitted by the State Bar:

- Rule 1.1 Competence
- Rule 1.3 Diligence
- Rule 1.4.1 Communication of Settlement Offers
- Rule 1.4.2 Disclosure of Professional Liability
- Rule 1.5 Fees for Legal Services
- Rule 1.6 Confidential Information of Client
- Rule 1.8.2 Use of Current Client's Information
- Rule 1.8.3 Gifts from Clients
- Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client
- Rule 1.8.7 Aggregate Settlements
- Rule 1.8.8 Limiting Liability to Client
- Rule 1.8.10 Sexual Relations with Client
- Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
- Rule 1.10 Imputation of Conflicts of Interest: General Rule
- Rule 2.1 Advisor
- Rule 2.4 Lawyer as Third-Party Neutral
- Rule 3.2 Delay of Litigation

- Rule 3.7 Lawyer as Witness
- Rule 3.8 Special Responsibilities of a Prosecutor¹
- Rule 3.9 Advocate in Nonadjudicative Proceedings
- Rule 4.1 Truthfulness in Statements to Others
- Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
- Rule 6.5 Limited Legal Services Programs
- Rule 7.1 Communications Concerning the Availability of Legal Services
- Rule 7.3 Solicitation of Clients
- Rule 7.4 Communication of Fields of Practice and Specialization
- Rule 7.5 Firm* Names and Letterheads

Forty-two rules are approved as modified by the court:

- Rule 1.0 Purpose and Function of the Rules of Professional Conduct — The court revises the citation in Comment [1] to conform to the California Style Guide. The court amends Comment [5].
- Rule 1.0.1 Terminology — The court revises the definition of “person” under paragraph (g-1). The court adds an asterisk after the term “person” or “person’s” in paragraphs (a), (e), (f), (m), and (n), after the term “writing” in paragraphs (e-1), after the term “firm” in paragraph (g) and (k), and after “screen” or “screening” in Comments [5] and [6].
- Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer — The court revises Comment [4] to conform to the California Style Guide.
- Rule 1.2.1 Assisting, Soliciting, or Inducing Violations — The court amends current rule 1-120 and adopts it as rule 1.2.1 pending the State Bar’s submission of additional revisions to proposed rule 1.2.1.
- Rule 1.4 Communication with Clients — The court removes an unnecessary comma from subparagraph (a)(1).
- Rule 1.5.1 Fee Divisions Among Lawyers — The court substitutes semicolons for commas at the end of each item in the list in subparagraph (a)(2).

¹ On December 6, 2017, the State Bar filed a supplemental request to withdraw the original version of proposed rule 3.8 that it had submitted on March 30, 2017 and to approve a subsequent version approved by the State Bar’s Board of Trustees on November 3, 2017. The court grants the State Bar’s supplemental request.

- Rule 1.7 Conflict of Interest: Current Clients — The court deletes Comment [2], moves the definition of “matter” to the text of the rule as paragraph (e), and renumbers the subsequent Comments. The court deletes “or organization” and adds an asterisk next to “person” in Comment [1].
- Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client — The court modifies paragraph (a) and makes additional revisions to the citations in Comments [1] and [4] to comply with the California Style Manual.
- Rule 1.8.6 Compensation from One Other Than Client — The court adds Comment [5].
- Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review — The court adds paragraph (c) and a Comment.
- Rule 1.9 Duties to Former Clients — The court adds an asterisk next to “person’s” in paragraph (a) and “person” in subparagraph (b)(1). The court modifies citations in Comment [1] to comply with the California Style Manual and corrects internal citations in Comments [2] and [6].
- Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees — The court amends an internal citation in Comment [2] and substitutes the words “personally prohibited from participating” in place of “disqualified” in Comment [7]. The court revises the citations in Comments [6] and [10] to comply with the California Style Manual.
- Rule 1.12 Former Judge, Arbitrator, Mediator, Or Other Third-Party Neutral — The court substitutes the phrase “seek employment from” for “participate in discussions regarding prospective employment with” where it appears in paragraph (b). The court deletes the asterisk after “third” in paragraph (b). The court adds the terms “personally and” before “substantially” in paragraph (b). The court substitutes the words “personally prohibited from participating” in place of “disqualified” in Comment [3].
- Rule 1.13 Organization as Client — The court adds the term “resignation,” before “or withdrawal” in paragraph (e).
- Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons — The court corrects copyediting errors in paragraph (a) and Standard (1)(a)(i) through (iii), and (1)(b)(i) through (ii). The court adds an asterisk after “person” in Standard (1)(a)(i), (ii) and (iv). The court revises the citation in Comment [1] to comply with the California Style Manual.

- Rule 1.16 Declining Or Terminating Representation — The court adds an asterisk after “person” in subparagraph (a)(1) and after “tribunal’s” in Comment [4].
- Rule 1.17 Sale of a Law Practice — The court corrects an error at the end of the second sentence of Comment [2].
- Rule 1.18 Duties to Prospective Clients — The court adds an asterisk after “person’s” in Comment [1]. The court deletes an unnecessary comma in Comment [2] and revises the citation in Comment [4] to comply with the California Style Manual.
- Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator — The court revises to citation in the rule and Comment [1] to the California Code of Judicial Ethics to comply with the California Style Manual.
- Rule 3.1 Meritorious Claims and Contentions — The court adds an asterisk after the word “person” in subparagraph (a)(1).
- Rule 3.3 Candor Toward The Tribunal* — The court amends paragraph (c) and Comment [6]. The court revises the citation in Comment [5] to comply with the California Style Manual. The court adds the heading “Ex Parte Communications” before Comment [7]. The court adds an asterisk after “tribunal’s” in Comment [1] and after “tribunal” in Comment [7].
- Rule 3.4 Fairness to Opposing Party and Counsel — The court amends Comment [2].
- Rule 3.5 Contact With Judges, Officials, Employees, and Jurors — The court adds the terms “rule or” before “ruling” in the introductory phrase to paragraph (b). The court deletes the word “or” at the end of subparagraphs (b)(1) through (b)(3). The court adds the word “or” at the end of subparagraph (g)(2). The court amends Comment [1].
- Rule 3.6 Trial Publicity — The court amends the internal rule citation in Comment [2]. The court adds an asterisk after “person” in subparagraph (b)(7)(ii).
- Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges — The court revises the citation in Comment [3] to comply with the California Style Manual. The court adds a pinpoint citation to rule 3.8(a) in Comment [4].
- Rule 4.2 Communicating with a Unrepresented Person* — The court adds an asterisk next to “Person” in the rule title, next to “person’s” in Comment [5], and next to “person” at the end of Comment [9]. The court revises the citation in Comment [4] to comply with the California Style Manual.

- Rule 4.3 Dealing with Unrepresented Person* — The court adds an asterisk after “Person” in the rule title and after “person’s” in Comment [2].
- Rule 4.4 Duties Concerning Inadvertently Transmitted Writings* — The court adds an asterisk next to “person” in Comment [2].
- Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers — The court removes Comment [6] and renumbers the subsequent Comments accordingly.
- Rule 5.2 Responsibilities of a Subordinate Lawyer — The court adds an asterisk after “person” in paragraph (a).
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistants — The court adds an asterisk after “person’s” in paragraph (b).
- Rule 5.4 Financial and Similar Arrangements with Nonlawyers — The court adds an asterisk after “persons” in subparagraph (a)(1). The court deletes “or organization” and “organization or group” from paragraph (f). The court revises the citation in Comment [3] to conform with the California Style Manual. The court adds Comment [5].
- Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law — The court adds the word “or” at the end of subparagraph (a)(1) and adds the phrase “in that jurisdiction” to the end of subparagraph (a)(2). The court deletes the words “or entity” in paragraph (a)(2). The court revises the citations in the Comment to conform with the California Style Manual.
- Rule 5.6 Restrictions on a Lawyer’s Right to Practice — The court corrects a copyediting error in subparagraph (a)(1).
- Rule 6.3 Membership In Legal Services Organization — The court adds references to rules 1.6(a) and 1.18 in paragraph (a).
- Rule 7.2 Advertising — The court deletes the terms “or entity” from paragraph (b) and subparagraph (b)(5).
- Rule 8.1 False Statements Regarding Application for Admission to Practice Law — The court adds an asterisk after the term “person’s” in paragraphs (a) and (b) and Comment [1].
- Rule 8.1.1 Compliance with Conditions of Discipline and Agreement in Lieu of Discipline — The court revises the citation in the Comment to conform with the California Style Manual.
- Rule 8.2 Judicial and Legal Officers — The court revises the references to the California Code of Judicial Ethics in paragraphs (b) and (c) to comply with the California Style Manual.
- Rule 8.4 Misconduct — The court adds the word “those” before “activities” and “particular” before “lawyer” in Comment [6].

- Rule 8.4.1 Prohibited Discrimination, Harassment, and Retaliation — The court adds asterisk after “persons” in subparagraphs (a)(2) and (b)(2). The court revises the citation in Comment [2] to conform with the California Style Manual.
- Rule 8.5 Disciplinary Authority; Choice of Law — The court revises the citation in the Comment to conform with the California Style Manual.

The approved versions of all 69 rules are set forth in Attachment 1, and are effective November 1, 2018.

The request to approve proposed rule 1.14, regarding a lawyer’s obligations in representation of clients with diminished capacity, is denied.

It is so ordered.

Cantil-Sakauye

Chief Justice

Chin

Associate Justice

Corrigan

Associate Justice

Liu

Associate Justice

Cuéllar

Associate Justice

Kruger

Associate Justice

Associate Justice

ATTACHMENT 1

CLIENT-LAWYER RELATIONSHIP

Rule 1.0 Purpose and Function of the Rules of Professional Conduct

(a) Purpose.

The following rules are intended to regulate professional conduct of lawyers through discipline. They have been adopted by the Board of Trustees 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, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These rules together with any standards adopted by the Board of Trustees pursuant to these rules shall be binding upon all lawyers.

(b) Function.

- (1) A willful violation of any of these rules is a basis for discipline.
- (2) The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts.
- (3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these rules or the Comments to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Purpose of Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the rules.

- (d) These rules may be cited and referred to as the “California Rules of Professional Conduct.”

Comment

[1] The Rules of Professional Conduct are intended to establish the standards for lawyers for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

ATTACHMENT 1

Cal.Rptr. 489].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768].) Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. (*Ibid.*; see also *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of a rule may have other non-disciplinary consequences. (See, e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] [enforcement of attorney's lien]; *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] [enforcement of fee sharing agreement].)

[2] While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Bus. & Prof. Code, § 6077.)

[4] In addition to the authorities identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons* who are not poor cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility of the profession, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. The lawyer should aim to provide a substantial* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. Lawyers may also provide financial support to organizations providing free legal services. (See Bus. & Prof. Code, § 6073.)

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

ATTACHMENT 1

Rule 1.0.1 Terminology

- (a) “Belief” or “believes” means that the person* involved actually supposes the fact in question to be true. A person’s* belief may be inferred from circumstances.
- (b) [Reserved]
- (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” means a person’s* agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably* foreseeable adverse consequences of the proposed course of conduct.
- (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e) must be in writing.*
- (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s* knowledge may be inferred from circumstances.
- (g) “Partner” means a member of a partnership, a shareholder in a law firm* organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) “Person” has the meaning stated in Evidence Code section 175.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

ATTACHMENT 1

- (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm* that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these rules or other law; and (ii) to protect against other law firm* lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.
- (l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.
- (m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code section 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person* with the intent to sign the writing.

Comment

Firm or Law Firm**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm.* However, if they present themselves to the public in a way that suggests that they are a law firm* or conduct themselves as a law firm,* they may be regarded as a law firm* for purposes of these rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm,* as is the fact that they have mutual access to information concerning the clients they serve.

[2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as “of counsel”

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

ATTACHMENT 1

or by a similar term should be deemed a member of a law firm* for purposes of these rules will also depend on the specific facts. (Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].)

*Fraud**

[3] When the terms “fraud”* or “fraudulent”* are used in these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud* would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term “fraud”* or “fraudulent”* when used in these rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Informed Consent and Informed Written Consent**

[4] The communication necessary to obtain informed consent* or informed written consent* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

*Screened**

[5] The purpose of screening* is to assure the affected client, former client, or prospective client that confidential information known* by the personally prohibited lawyer is neither disclosed to other law firm* lawyers or nonlawyer personnel nor used to the detriment of the person* to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and nonlawyer personnel in the law firm* with respect to the matter. Similarly, other lawyers and nonlawyer personnel in the law firm* who are working on the matter promptly shall be informed that the screening* is in place and that they may not communicate with the personally prohibited lawyer with respect to the matter. Additional screening* measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm* personnel of the presence of the screening,* it may be appropriate for the law firm* to undertake such procedures as a written* undertaking by the personally prohibited lawyer to avoid any communication with other law firm* personnel and any contact with any law firm* files or other materials relating to the matter, written* notice and instructions to all other law firm* personnel forbidding any communication with the personally prohibited lawyer relating to the matter,

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

ATTACHMENT 1

denial of access by that lawyer to law firm* files or other materials relating to the matter, and periodic reminders of the screen* to the personally prohibited lawyer and all other law firm* personnel.

[6] In order to be effective, screening* measures must be implemented as soon as practical after a lawyer or law firm* knows* or reasonably should know* that there is a need for screening.*

Rule 1.1 Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, 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 (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] This rule addresses only a lawyer's responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

ATTACHMENT 1

Rule 1.2 Scope of Representation and Allocation of Authority

- (a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. (See, e.g., Cal. Const., art. I, § 16; Pen. Code, § 1018.) A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].)

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

ATTACHMENT 1

Independence from Client's Views or Activities

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Agreements Limiting Scope of Representation

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. (See, e.g., rules 1.1, 1.8.1, 5.6; see also Cal. Rules of Court, rules 3.35-3.37 [limited scope rules applicable in civil matters generally], 5.425 [limited scope rule applicable in family law matters].)

Rule 1.2.1 Assisting, Soliciting, or Inducing Violations

A lawyer shall not knowingly* assist in, solicit, or induce any violation of these rules or the State Bar Act.

Rule 1.3 Diligence

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.
- (b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This rule addresses only a lawyer's responsibility for his or her own professional diligence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

Rule 1.4 Communication with Clients

- (a) A lawyer shall:

An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.