Are Your Ethics in Jeopardy?

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WHERE HAVE YOU BEEN?

There is not a long history when it comes to technology and legal ethics. The ABA’s Standing Committee on Ethics and Professional Responsibility’s Formal Opinion 95-398, issued October 27, 1995, “Access of Nonlawyers to a Lawyer’s Data Base” appears to be one of the earliest ethics opinions touching on the intersection of legal ethics and technology. The earliest opinion on a list of ethics opinions related to technology maintained by the State Bar of California is Florida Bar Ethics Opinion 00-4 “Legal Services over the Internet” issued in 2000.

Not on the California Bar list is the 1999 ABA Formal Opinion 99-413 “Protecting the Confidentiality of Unencrypted E-Mail”, which is worth looking at. The opinion focused on Model Rule 1.6(a) and its prohibition against unauthorized disclosure of information relating to the representation of a client. The determination was that a lawyer may transmit information relating to the representation of a client by unencrypted email without violating the Model Rules of Professional Responsibility “because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint”.

The Committee believed that e-mail communications posed no greater risk of interception than other forms of communications, that there was a reasonable expectation of privacy for unencrypted emails, and compared e-mails favorably to U.S. and commercial mail, land-line telephones, “cordless” and cellular phones and facsimile. The discussion in the opinion on e-mail technology is interesting, if dated. There is mention of the danger of “hackers” intercepting e-mails, but the suggestion is that because the practice is a crime and may result in civil liability this danger “should not render the expectation of privacy…any less reasonable.”
In 2012 the ABA issued its so-called “technology amendments” to the Model Rules. For the most part the amendments consisted of adding terms like “technology,” “electronically stored information,” “email” and “internet.” The most significant change was the addition of just a few words to the Comment to Model Rule 1.1 Competence. The Comment noted a lawyer now needed to keep abreast of not only changes in the law but also “the benefits and risks associated with relevant technology.”

It would be another 5 years before the Standing Committee on Ethics and Professional Responsibility got around to addressing a lawyer’s obligation to keep up on advances in technology that impact the practice of law. And a lot happened in those ensuing years, not the least of which was the growing concern about what became to be known as “cyber security.”

In a March 2012 speech, Robert S. Mueller, III, at the time the Director of the FBI, noted that rapid advances in technology were also bringing new challenges in combating cybercrime. Traditional crime was migrating online and terrorists were using the internet “as a recruiting tool, moneymaker, a training ground, and a virtual town square, all in one.” Director Muller predicted that cyber threats would soon replace terrorism as the number one threat to the country. In a message to business Mr. Mueller said:

“I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again.”

That same year the ABA established a Cybersecurity Legal Task Force, which in 2013 published the ABA Cybersecurity Handbook.
Which brings us to Formal Opinion 477R “Securing Communication of Protected Client Communication.” The Opinion, issued in 2017, starts by noting the need to update Opinion 99-413 due to the evolution of technology and its impact on the practice of law. Opinion 99-413 discussed a lawyer’s obligation to maintain client confidentiality in the context of e-mail. By 2017 electronic methods had become the prevalent means by which lawyers communicated and exchanged documents with their clients, other lawyers and the courts.

Much as former FBI Director Robert Mueller predicted about businesses in 2012, law firms are a prime target of cyber-criminals because they obtain, use and store highly sensitive information. Law firms may also be of more interest to a hacker because law firm may lack the security safeguards employed by their clients. Recall the “Panama Papers” incident, in which 11.5 million documents from the Mossack Fonseca law firm were hacked and leaked to journalists. The documents related to the firm’s work creating shell companies, alleged to have been created for tax evasion purposes. This and other significant law firm hackings are described in a March 2017 article in the ABA Journal.

Against this backdrop, and adopting language from the ABA Cybersecurity Handbook, Opinion 477 R suggests lawyers, on a case-by-case basis, analyze how they communicate electronically and determine what would be reasonable efforts to protect client confidences. The Opinion offers the following considerations as guidance:

1. Understand the Nature of the Threat
2. Understand How Client Confidential Information is Transmitted and Where It Is Stored
3. Understand and Use Reasonable Electronic Security Measures
4. Determine How Electronic Communications About Client Matters Should Be Protected
5. Label Client Confidential Information
6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security

Formal Opinion 483 “Lawyers’ Obligations After an Electronic Breach or Cyberattack”\textsuperscript{18} picks up where Formal Opinion 477R left off. In this Opinion, which like Opinion 477R relies heavily on the Cybersecurity Handbook, the Committee concludes lawyers have an ethical obligation to (1) monitor for a data breach (2) act reasonably to stop the data breach and mitigate the damage and (3) determine what occurred. The Committee also concludes that a lawyer has an obligation to communicate with current clients about a data breach. The Committee was not willing to require notice to former clients “in the absence of a black letter provision requiring such notice”. However, the Committee does encourage lawyers to reduce the amount of client information they retain after a representation ends, and to be aware of data privacy laws, common law duties or contractual obligations that relate to the records of former clients.

It is not a question of whether your client files will be hacked. It is a question of when. Lawyers not only have an obligation to take reasonable steps to prevent that from happening, they would be foolish not to.

**IT’S ALRIGHT, WE KNOW WHERE YOU’VE BEEN.**

For better or worse\textsuperscript{19}, Twitter has forever changed the political landscape in the US. All forms of social media\textsuperscript{20} have had a similar impact on the practice of law. Social media is a powerful tool, but like all tools can easily be misused with unintended consequences.\textsuperscript{21}

Social media, which was not addressed in the 21012 technology amendments\textsuperscript{22} to the Model Rules, is communication. And when lawyers communicate with and about clients they are
subject to rules of professional responsibility which may conflict with the reality of the social media world. Lawyers need to understand those conflicts, the biggest of which is that social media is not private and certainly not confidential. Why any right thinking lawyer would post about difficult clients, adversaries and judges is beyond comprehension. But it happens frequently. What was the lawyer, who asked for an adjournment because of the need to appear in another court, but then posted pictures from an island vacation, thinking?

The issue of whether a judge being a “friend” of an attorney appearing before the judge warrants disqualification was the subject of a recent decision from the Supreme Court of Florida. In *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto Ass’n* one of the attorneys in the matter moved to disqualify the trial judge on the basis the judge was a “Facebook friend” of another attorney appearing in the matter. Refusing to follow a Florida Judicial Ethics Advisory Committee Opinion and an appellate court decision holding otherwise, the Supreme Court held an allegation a trial judge is a Facebook friend with an attorney appearing before the judge, standing alone, does not warrant the judge’s disqualification.

The decision has a good survey of the law on Facebook friendships in Florida and beyond. The Court notes the majority of state ethics committees are of the opinion Facebook friendships do not reasonably convey to others that a judge’s Facebook friends are in a special position to influence the judge. The minority position, which had included Florida, is that a Facebook friendship, standing alone, is a basis to disqualify a judge.

*Law Offices of Herssein & Herssein, P.A.* was a 4-3 decision and the contrasting descriptions of the characteristics of Facebook friendships is interesting. To the majority, traditional friendships vary from intimacy to casual acquaintance, while Facebook friendships
vary from intimacy to total stranger. The dissent argues Facebook friendships cannot be equated with traditional friendships. The dissent notes Facebook friends may know much more about each other, including all the information on each other’s profile page, not to mention having access to personal photos, activities, “likes” and “dislikes”, than casual friends. The dissent believes that by participating in Facebook a judge “conveys or permits others to convey the impression” the judge’s Facebook friends are in a special position to influence the judge. The dissent would adopt a strict rule requiring recusal whenever a Facebook friend appears before a judge.

Arbitrators and mediators also need to avoid conflicts of interest and have an obligation to disclose relationships that may create the appearance of a conflict. Does that mean that if asked to be an arbitrator you need to disclose everyone you have friended on Facebook or connected to on LinkedIn who may have some involvement in the matter? Probably not, and a disclosure like that below may be sufficient.

‘I maintain postings on LinkedIn and Facebook and generally accept requests of those involved in the construction industry or construction law to connect with them. Those connections are available on the public pages of those sites.’

Some other things lawyers need to think about when using social media are:

- Does your communication with a non-client create the danger of an inadvertent attorney-client relationship?
- In writing about your cases are you properly protecting client confidences?
- In describing your practice and skills are you inadvertently creating a false or misleading impression?
- While your social media posts may comply with the rules governing the practice of law in your jurisdiction, do they comply with the rules in other jurisdictions where your “friends” or contacts who get your posts reside?
Finally, use common sense. When you “friend” a witness to gather information to use in their cross examination you are not their friend. You are using them.

Technology’s impact on the practice of law has been no less dramatic than its overall impact on the way we live and interact with each other. But technological advances will continue. Not all will have a lasting impact. For example, vinyl records are making a comeback for the simple reason they sound better than an .mp3. But things are changing and changing fast and lawyers need to think about how it may impact their practice before it does.

So welcome to the machine.
COORDINATION OF INTERESTS IN THE TRIPARTITE SURETY RELATIONSHIP

We have it on the highest authority that conflicts of interest are to be abjured: No man can serve two masters; for either he will hate the one, and love the other, or else he will hold to the one, and despise the other. Matthew 6:24 A similar but more worldly and less lustrous proscription against conflicts is found in the Model Rules. The purpose of this paper is to put some flesh on the theoretical principle and explore an often overlooked conflict of interest that can arise for attorneys when a surety tenders its defense and indemnity of a claim to its principal.

The standard general agreement of indemnity between a surety and its principal requires the principal to defend and indemnify the surety against claims asserted against the surety’s payment or performance bond. When the surety receives a claim on one of its bonds, the surety usually requests the principal to provide defense and indemnity for the surety. The principal often has its own attorney engaged by the time a surety bond claim is made, so the principal often hires its attorney also to defend the surety for two reasons: 1) to avoid paying for two separate attorneys, and 2) to maintain a defense of the surety that is consistent with the principal’s defense. Is this a sound, ethical practice? To use a standard attorney’s answer, it depends on the facts.

It is often assumed that the principal’s and surety’s interests are perfectly aligned. If they were, then appointing the same attorney to represent both should not be a problem, but whether or not this alignment actually exists depends on the language of the bond in question and the particular state’s law governing the conduct of sureties.
The language of the standard AIA A312 performance bond highlights the question. When a performance bond claim is received, the surety has promised the obligee in the A312 to perform many independent duties. These duties are separate from and may conflict with any obligations or interests of the bond principal. For instance, rather than rely on the investigation that the principal or its attorneys may have done regarding the existence of a contractor default, the surety has an independent duty to investigate the claim and determine whether to either render the performance requested, pay the claim, or deny the claim and provide reasons for the denial. It must obtain information from the claimant about the claim and ‘promptly” reply to the obligee about the surety’s intended course of action. It must take certain actions identified in the bond in response to the claim, and if the surety does not reply promptly pursuant to Section 5 of the bond, then “without further notice the Owner shall be entitled to enforce any remedy available to the Owner”. The phrase “any remedy available” is quite broad, and it is not necessarily limited to whatever remedy the owner may have against the contractor. “Any remedy” could entail a claim by the owner against the surety for breach of its independent obligation to perform its promised investigation and determine and convey its chosen response under the bond. Such a claim for breach of the surety’s bond obligations would not necessarily be limited by the contractual defenses that may be available to the contractor such as any waiver of consequential damages or liquidated damages.

Of course, the principal is under no obligation to perform the surety’s independent obligations, and if the surety allows the principal’s attorneys to respond to the bond claim on behalf of the surety, the attorneys may find themselves in the ethical dilemma of serving two masters with different needs. Should the principal’s attorneys make an independent investigation
of the claim as required by the bond, or should they respond in the manner that best suits the needs of their other client, the principal? If the principal wants to deny a contract default when, in fact, the surety should admit a default has occurred, then the attorney appointed by the principal to defend both faces an ethical dilemma that entails severe risk to the surety.

If the surety does not respond promptly and independently to a claim, it may also be found liable for violating the common law duty of good faith and fair dealing. In many jurisdictions, a duty of good faith and fair dealing is generally imputed into all contracts, including contracts related to suretyship.\textsuperscript{32} That duty can be complicated for surety professionals and their counsel given the surety’s sometimes conflicting relationships and resultant potential obligations to the obligee, the bond principal, and the indemnitors. Such an implied contractual duty should be kept in mind throughout the handling of the complex surety case to guard against assertions that this less-than-clearly-delineated obligation has been somehow violated.

\textit{PSE Consulting, Inc. v. Frank Mercede & Sons}\textsuperscript{33} is illustrative. PSE was a sub-subcontractor (via an oral contract) to Mercede, the general contractor. Mercede’s indemnity agreement with the surety required it to indemnify the surety against all claims and losses and reserved for the surety the right to settle or defend claims. The payment bond required the surety to pay undisputed claims and to explain to the claimant the basis for any dispute within forty-five days.\textsuperscript{34}

The subcontractor with whom PSE contracted declared bankruptcy before making final payment to PSE. When Mercede refused to pay, PSE made claim on the bond. The surety’s consultant advised that there were genuine issues and defenses available to Mercede, but the surety failed to take any action for over three months. PSE then notified the surety and the state
insurance commissioner that the surety had breached the bond’s forty-five day response period. Although Mercede continued to dispute the claim, the surety attempted (unsuccessfully) to settle with PSE. PSE then sued Mercede for breach of contract and the surety on the bond and for bad faith and unfair claims practices. The surety ultimately settled—without Mercede’s authorization—for almost twice the value of PSE’s work according to the surety’s own consultant and without a release of PSE’s claims against Mercede.  

The surety sought indemnification from Mercede, who counterclaimed for breach of contract and breach of the implied covenant of good faith and fair dealing. A jury found a breach of the covenant of good faith and fair dealing and that finding was affirmed by the Connecticut Supreme Court based upon the surety’s failure to timely investigate, evidence that the settlement was motivated by threatened insurance commissioner action, and apparent overpayment that did not include a release of claims against the surety’s principal. 

In short, even in the absence of specific statutes, regulations, or rules governing particular aspects of the surety professional’s handling of complex surety cases, the surety professional should be aware of a general, if ill-defined, obligation to act and deal in good faith that, depending on the jurisdiction, may also apply to the surety’s communications and actions or the absence of surety communications and actions. 

If the principal’s attorneys are asked to conduct the initial investigation required of the surety under a payment or performance bond, those attorneys must be cognizant of complying with the ethical rules dealing with non-clients – e. g., the claimants or obligees under that bond. Consistent with the Model Rules, the attorneys must be truthful in their statements to others, be sure they are not dealing with persons they know to be represented by counsel, not imply a
disinterested status or give legal advice to unrepresented parties, and not embarrass or harass third persons or obtain information that violates the legal rights of that person. An attorney representing the surety cannot represent herself or himself to be disinterested when communicating with an unrepresented person (e.g., a payment bond claimant), and communications with non-represented third parties should not veer into what may be construed as volunteering legal advice. Among other things, the issue is not what the attorney may have intended in any such communication but, rather, what the individual may reasonably have heard and understood. Any advice beyond a suggestion that the unrepresented individual or entity consider engaging its own counsel could potentially be problematic in subsequent proceedings.

The issue of conflicts of interest also arises when the surety relies on the principal’s defense counsel to preserve the surety’s unique defenses to a claim. For instance, in *AgGrow Oils, LLC v. National Union Fire Insurance Co.*, counsel for the principal (at a time when the surety had not yet hired independent counsel) sent correspondence to the obligee (on which the surety was copied) in which counsel stated on behalf of the principal and (at least purportedly) on behalf of the surety that the obligee’s performance claims were entirely meritless and unworthy of any further consideration. After suit was filed by the obligee, the surety attempted to rely upon various bond defenses, including a defense that the claim was barred because the obligee failed to comply with certain conditions precedent in the bond. The obligee defended—not by claiming compliance with the bond—but by asserting that the surety had waived compliance by making clear that any further obligee efforts under the bond would have been fruitless given the statements of counsel categorically denying the obligee’s claims. The trial court agreed and the Eighth Circuit Court of Appeals affirmed summary dismissal of the surety
defenses. It therefore behooves the surety (and all co-parties) to be clear regarding instructions/limitations on the representations that counsel is authorized to make on its behalf, and similarly behooves counsel to confirm that she or he has authorization from all represented parties before making any representation or communication purportedly on behalf of them all. The lesson to be learned from this case is that before the principal’s attorney purports to speak for the surety, there should be clear guidelines, understandings, and consent between the surety and principal about the dual representation.

Notwithstanding the preceding cautions about joint representation of the surety and the principal, it often makes sense for the surety to tender its defense to its principal when presented with a payment or performance bond claim if their interests are aligned. Tendering of defense can avoid (or at least reduce) incurrence of surety attorney and expert expenses, assist in avoiding or minimizing inconsistencies between the positions of the surety and principal, and assist in avoiding or minimizing subsequent disputes when the surety seeks to recover its fees. The difficulty remains in determining whether or not the surety’s and principal’s interests are truly the same regarding all of the claims and potential defenses involved and foreseeably involved or whether their interests are adverse or may in the future become adverse regarding any of those claims or defenses. For instance, Model Rule 1.7 provides:

**Model Rule 1.7: Conflict Of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or
(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing. 46

Unless the “tendered” attorney reasonably believes that she or he will not be limited in the ability to fully and adequately represent all material interests of each client, that duties owed to one client will not materially impede representation of the other, and that the two parties do not have claims against each other in the proceeding or any other proceeding, Rule 1.7 weighs against making or accepting the tender.

One area of possible conflict is the defenses available to the principal and the surety. While it is true that the surety “steps into the shoes” of the principal and, as such, is generally able to assert any defenses available to the principal, the opposite is not the case. There are unique surety defenses that the principal cannot independently raise, and some of these defenses can be contrary to the principal’s interests. As one example, the surety may have an overpayment defense (i.e., a claim that the obligee overpaid the principal to the detriment of the surety). Often the principal will not agree that it was overpaid and may be claiming the opposite, i.e., that it was underpaid. As such, the principal likely will not want an overpayment allegation asserted by its counsel during the course of the case or at trial. The same would be true of other surety defenses, such as claims of material alteration of contract risk, owner mismanagement (particularly claims
that the owner should have terminated the principal or at least contacted the surety earlier with performance concerns), and fraudulent inducement to enter into the bond. Unique claims against the surety may also weigh against joint representation. If, for example, there is a bad faith claim against the surety, that claim may well present an unwaivable conflict and the surety will in all likelihood want counsel of its choosing to vigorously defend against that claim.

The proposed-to-be-tendered attorney must make a clear-eyed examination of the matters at issue or reasonably foreseeable to become issues during the dispute to determine whether she or he will be able to simultaneously and diligently represent and protect the separate interests of the surety and the principal. If the attorney cannot represent and protect the separate interests of the surety and the principal simultaneously, the attorney must decline the proposed joint representation. It is important to note that having the surety and principal acknowledge the existence of actual or foreseeable conflicts and waive the same in writing does not provide prophylactic protection to the attorney. A written waiver cannot be sought unless “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation of each affected client.” In other words, a written consent form cannot overcome a conflict that objectively compromises the attorney’s ability to represent each client.

If the surety does decide to engage separate counsel from its principal, the issue of whether that cost is recoverable in a subsequent indemnity action may, depending on the jurisdiction, be contingent on a number of factors. For instance, one Tennessee court analyzed whether the separate representation was in good faith and reasonably necessary to protect the surety’s interests. The court laid out the following list of factors to be considered in
determining “whether, under all the facts of the case, it was reasonably necessary for the surety to so act in its own defense, and whether the surety acted in good faith toward the principal.”

- The amount of risk to which the surety was exposed;
- Whether the principal was solvent;
- Whether the surety has called on the principal to deposit with it funds to cover the potential liability;
- Whether the principal on demand by the surety to deposit with it the amount of the claim has refused to do so;
- Whether the principal was notified of the action and given opportunity to defend for itself and the surety;
- Whether the principal hired the attorney for both himself and the surety;
- Whether the principal notified the surety of the hiring of the attorney;
- The competency of the attorney hired by the principal;
- The diligence displayed by the principal and his attorney in the defense;
- Whether there is a conflict of interest between the parties;
- The attitude and cooperativeness of the surety; and
- The amount charged and diligence of the attorney hired by the surety.

Language in indemnity agreements to the effect that the surety’s incurrence of costs, such as separate attorneys’ fees, is prima facie evidence of reasonableness has been held to place the burden on the indemnitor to establish that the fees were not reasonable.

The principal’s failure or refusal to post collateral, upon demand by the surety, can support the surety’s decision not to tender its defense to that same principal. However, in some jurisdictions, vague references to conflicts of interest, standing alone, may be insufficient to support recovery by the surety of separate attorneys’ fees.

Counsel representing sureties in complex matters are sometimes asked to undertake multiple representations (e.g., surety, principal and/or indemnitors; multiple sureties; surety and
insurer). There may be occasions, however, in which multiple representations should not be undertaken even with the consent of all the clients. One concern militating against multiple representations is the preservation of confidential client information which, if shared, could benefit one client but harm another.\textsuperscript{55}

An attorney may not be able to represent multiple clients with adverse interests because of the potentially conflicting obligations to represent each zealously \textit{and} preserve client confidences.\textsuperscript{56} Moreover, after undertaking joint representation, an attorney may not be able to “save” the representation of one client by dismissing the other(s).\textsuperscript{57} The attorney may already be privy to confidential information from the dismissed client(s). To allow attorneys to “save” the representation of one client by dismissing the other(s) would result in little incentive to comply with the Rule from the outset.\textsuperscript{58}

Conflicting attorney obligations may arise if, for example, one client requests or demands that the attorney keep certain information from another client that could be of assistance in representing that client’s interests but detrimental to the interests of the first client (or, at least, disclosing the information would require the attorney to disregard the directive of that first client).\textsuperscript{59} Such a situation is particularly possible in a joint representation of the surety, principal, and/or indemnitors. The principal and indemnitors may not want their attorney to inform the surety about evidence demonstrating performance issues that the surety would find relevant to its investigation, analysis, defense, and ultimate resolution of a performance bond claim. The indemnitors may not want their attorney to disclose to the surety certain financial information. The surety, on the other hand, may not want its attorney to disclose potential deficiencies in the surety’s investigation or claims handling that may assist in obtaining a resolution that includes
the contribution of independent surety settlement dollars. The attorney representing multiple sureties may be privy to information from one that would be of significant benefit to another. The attorney representing the surety and an insurer may be privy to information that could tilt the analysis of whether a claim or claim element is or is not covered by insurance. The potentially applicable hypotheticals are legion.

So what are the obligations and options of the attorney providing or considering undertaking joint representation? Under the Model Rules, the attorney is obligated, among other things, to (1) zealously represent the interests of each client; (2) maintain client confidences; (3) maintain confidentiality of information relating to a client’s representation absent informed consent; (4) promptly inform clients of any circumstance requiring that informed consent; (5) keep clients reasonably informed; and (6) consult with clients about any relevant limitation on the attorney’s ability to undertake actions on the clients’ behalf.

Informed consent will ordinarily “require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client’s or other person’s options and alternatives.” Full disclosure may need to include information regarding the relationship of the attorney to the principal and the surety and any self-interests of the attorney. Any limitations on representation must be disclosed. If the limitation is reasonable under the circumstances, and there is informed consent, joint representation may remain viable. If the attorney intends to proceed at the direction of the surety in accordance with the terms of the bond that needs to be explained to the other potentially represented parties to obtain their informed consent. The attorney cannot
allow billing or service instructions, requirements, or guidelines from one client to materially impair the attorney’s independent judgment and ability to represent another client.\textsuperscript{65}

Model Rule 1.8(g) addresses settlements on behalf of multiple current clients, an issue which is likely to arise in any complex surety case in which an attorney undertakes joint representation.\textsuperscript{66} The Model Rule prohibits the attorney from participating in an aggregate settlement absent separate consultation with and the informed consent of each client. To avoid that prohibition, the attorney must disclose all claims involved in the settlement and the participation of each party in the settlement.\textsuperscript{67} The informed consent must also be in writing.\textsuperscript{68} The disclosure requirement may be problematic if a party wishes its participation to be confidential. The failure to satisfactorily resolve conflicts can open the attorney to possible malpractice claims.

In \textit{Scognamillo v. Olsen}, a non-surety case, counsel represented three defendants during settlement negotiations and at trial. Two clients wanted to settle before trial by accepting the plaintiff’s offer of $54,000.\textsuperscript{69} The third client did not want to settle. The matter went to trial and the jury awarded actual damages of over $200,000, plus punitive damages of nearly $850,000. Based on evidence that the original action would have settled if each defendant had been separately represented, the malpractice verdict against the attorney was upheld. There was sufficient evidence that the attorney’s failure to address and reconcile the conflicting interests materially contributed to the failed settlement.\textsuperscript{70}

\textbf{CONCLUSION}

The determination of whether, under what circumstances, and how to undertake multiple representation in a complex surety matter is itself complex. The attorney must carefully consider
multiple issues and concerns of all of the potential clients and take great care not to lose sight of all of the implicated—and sometimes conflicting—professional and ethical duties. In this regard, a comment to Model Rule 1.7 provides a good place to start the inquiry:

Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients’ interests can be adequately served by common representation is not very good.71

If the parties are working together well and the prospects for continuing cooperation are strong, the benefits of joint representation may be well worth the cumbersome exercise of ensuring compliance with all of the above-listed professional and ethical obligations. However, if there is antagonism even before the proposed joint representation, the odds that joint representation will be successful decrease significantly.
**THE ETHICS AND STRATEGY REGARDING THE USE OF AN ADVERSE PARTY’S FORMER EMPLOYEES AS WITNESSES OR FOR INFORMATION.**

Former employees of an adverse party can be a rich source of information. The construction industry, with the high rates of both business turnover and labor turnover, can be an ethical minefield for the unwary construction litigator. In any construction litigation or arbitration of any significant size, it is likely that counsel for the parties will be faced head-to-head with the issues surrounding contacts with former employees. Courts clearly hold that employee-counsel communications that occur during employment remain privileged after the employment relationship is severed. See, e.g., *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (“[P]rivileged communications which occur during the period of employment do not lose their protection when the employee leaves the client corporation.”). Other lines are not so clear. The means by which counsel handles contact with former employees of an adverse party can dictate whether counsel can continue with the representation, whether a party will be sanctioned and evidence excluded or suppressed, or whether a party’s attorney can be subject to proceedings before the disciplinary committee of the state bar.

What, you ask, can an attorney do to help avoid such risks? In sum:

- Be aware of the applicable rules which may govern your conduct;
- Follow a basic script with any contact with any former employee of opposing an opposing party where you ask some key questions and if the wrong answer is given, the interview is terminated;
- Maintain a list of those contacted and maintain and preserve the notes taken from any interviews or meetings with former employees;
- Endeavor NOT to inquire into corporate communications protected by the attorney client privilege as such privilege may be waived only by the corporation.
• If necessary, confer with opposing counsel, where possible, regarding a possible agreement on such contacts or on applicable rules;\textsuperscript{81}

• If necessary, obtain relief or guidance from the court by a motion for protective order or “Motion for Discovery Guidance”\textsuperscript{82} to avoid later disqualification or other sanction.

\textbf{KNOWING THE RULES: NOT AS EASY AS IT SOUNDS DUE TO CONFLICTS OF LAW ...}

An attorney licensed in Missouri and Kansas is engaged by a Michigan contractor concerning a Project dispute in Illinois. The opposing party is an owner with offices in many states, but whose principal place of business is in California. The contract between the client contractor and opposing party owner states that California law applies, but that venue for any dispute shall be in the county in which the Project is located, in Illinois. No suit or arbitration proceeding is filed, so the attorney has not yet been admitted \textit{pro hac vice} in Illinois. Attorney locates a former project engineer for the owner in Texas and flies to Texas to interview and meet with this former employee of an opposing party. What states’ applicable ethical rules or canons govern this contact and evidence arising from it?\textsuperscript{83}

ABA Model Rule 8.5 attempts to resolve this issue. It states, with emphasis added:

\textbf{Rule 8.5 Disciplinary Authority; Choice of Law}

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
(1) For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) For any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

As noted by the rule and by more than one court, “the lawyer is always subject to the ethical obligations of the state that licensed him, regardless of where the conduct occurs.”84 The Model Rule, and its conflicts provision, is designed to prevent a lawyer from being subject to different rules for the same conduct. As one state Supreme Court noted:

The goal of [Rule 8.5] is to insure that any particular conduct of a lawyer should be subject to only one set of rules. Both jurisdictions may impose discipline, but they should both be using the same set of rules against which they measure the conduct. Disciplinary authorities should avoid proceeding against a lawyer on the basis of two inconsistent rules. The choice of law issue is: which jurisdiction’s ethics should apply to a lawyer admitted in more than one jurisdiction?

*** In an example assuming misconduct by a lawyer admitted in state a but committed before a court in state B, Professor Rotunda concludes: ”Under the Model Rules, if that lawyer then violates the rules of the court in state B, state A should apply the ethics rules of state B, which are the rules applicable to that case.” Id. (emphasis added).85

Accordingly, in the example provided, if Missouri’s or Kansas’ ethical rules86 concerning ex parte contacts with former employees conflict with the rules of Illinois (where the case will likely be heard and as such the state where the attorney reasonably believes his conduct will have the predominate effect), the rules in Illinois should govern. Illinois arguably has the most significant relationship to the dispute. The court in Anas v. Blecker, 141 F.R.D. 530, 533 (M.D. Fla. 1992) provides a clear example of how the “most significant relationship” test is applied in practice. A defendant real estate appraiser filed a motion for protective order to prevent the plaintiff investors from deposing a representative of a non-party peer review institute in Illinois.
The institute had brought disciplinary action against the defendant appraiser. The defendant cited the Illinois peer-review privilege in support of his protective order. The plaintiffs argued that the Florida privilege should apply. Applying Section 139, the Florida court held that the Illinois privilege applied because the entirety of the communications regarding the defendant’s disciplinary proceedings took place in Illinois, and thus Illinois had the most significant relationship with the privilege at issue. Id. at 532.

**THE RULES GOVERNING CONTRACTS WITH FORMER EMPLOYEES OF AN OPPOSING PARTY.**

Save one exception, there is no blanket rule recognized by any court barring all contact between the attorney for one party and the former employees of an opposing party. To the contrary, courts have recognized that there are valid policy reasons for allowing one party’s attorney to contact and interview the former employees of an opposing party:

First, if all ex parte communications with an opposing party's former employees are prohibited, counsel's attempts at engaging in formal discovery will be sharply curtailed. In most cases, counsel will not have informal access to witnesses with important knowledge of critical facts. Counsel will be unable to assess the merits of a case inexpensively and quickly by contacting these witnesses. Instead, counsel will be forced to file a lawsuit and engage in time-consuming and expensive formal discovery. Indeed, prohibiting ex parte communications with an opposing party's former employees could result in nonmeritorious cases being filed that otherwise would not have been filed, in order to learn information through formal discovery whether to prosecute the particular case. Formal discovery, in turn, can create protracted and quarrelsome discovery disputes which consume finite judicial resources.

Experienced construction litigators recognize the numerous advantages in interviewing former employees of an opposing party. Some advantages secured by the contacting attorney include:
In order to ethically and safely conduct *ex parte* interviews of former employees of the opposing party, an attorney must first know the rules of engagement in the jurisdiction where the litigation is proceeding and how such rules compare to the rules of the state or states in which the attorney is licensed. In order to facilitate that review, we have included in this paper a survey of states and how each state approaches the ethical issue of *ex parte* contacts with former employees of an opposing party.\(^91\)

Aside from this paper, at least two excellent sources exist for a review of this issue. The first is an American Law Reports annotation entitled “Right of Attorney to Conduct Ex Parte Interviews with Former Corporate Employees.”\(^92\) The second reference source is online and is maintained by the Cornell Law School at:

[http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM# Rule 4.2](http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM# Rule 4.2).

The matter of *ex parte* contacts was first regulated under Canon 9 of the American Bar Association (ABA) Canons of Professional Ethics, then by Disciplinary Rule 7-104(a)(1) of the ABA Model Code of Professional Responsibility, and then again in Rule 4.2 of the ABA Model Rules of Professional Conduct. Model Rule 4.1 is “substantially the same as its predecessors in the Code of Professional Responsibility (DR 7-104 (A) (1), and the earlier Canons of Professional Ethics (Canon 9).”\(^93\) Nearly all commentators upon Model Rule 4.2 agree that neither the current Rule nor its predecessors expressly addresses the issue of whether a former employee of an organization can fall under the protection of the Rule.\(^94\)
DR 7-104(A) (1) states:

During the course of his representation of a client a lawyer shall not ... [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Similarly, the Model Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The current Model Rule and its predecessor versions, including DR7-104(A) (1) requires “actual knowledge” before an attorney can be held to have violated the Rule. Attorneys “should not be at risk of disciplinary action for violating the [Model] Rule, because they ‘should have known’ that an opposing party was represented or would be represented at some time in the future. [The Rule] does not provide for constructive knowledge. It provides only for actual knowledge.” That stated, as the Commentary to Model Rule 4.2 makes clear: “the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.”

In reviewing the Model Rule and its terms, one court opined: “Organizations such as corporations, of course, can only communicate or be communicated with by and through their agents and employees. Application of [the Model Rule] to organizational parties, therefore, requires some additional interpretation of the term ‘party.’ The Official Comment to the Rule[ in 2002] provides guidance: ‘In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with person having managerial
responsibility on behalf of the organization, and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statements may constitute an admission on the part of the organization.”

In 2004, the Comments Model Rule 4.2 were amended to provide more than just suggested guidance. The Comments were amended to state: “Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).” (emphasis added). The changes in 2004 to the relevant section of the comment are tracked here:

In the case of a represented organization, this Rule prohibits communications a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

**How Courts and Ethics Panels Apply the Rules.**

Clarity with ethical rules is critical, as “unclear rules risk blunting an advocate’s zealous representation of a client.” Courts must interpret ethical rules narrowly “because a rule whose
violation could result in disqualification and possible disciplinary action should be narrowly construed when it impinges upon a lawyer’s duty of zealous representation.”

While a majority of courts and disciplinary committees considering the application of Canon 9, DR 7-104(a)(1), or Rule 4.2 to former employees have held broadly that these rules generally do not apply to prohibit communications with former employees, two other approaches to the issues exist. Some courts and panels have permitted such contacts in certain circumstances, depending on the position the former employee held with the opposing party company and the subjects broached by the contacting attorney. These authorities have adopted various flexible approaches in attempting to resolve the issue. Finally, a small body of authority has concluded that such ex parte contacts violate Rule 4.2 or DR 7-104(A)(1) and therefore are prohibited in all circumstances. Each of these will be briefly discussed.

**THE “HAVE AT ‘EM” APPROACH – THE MAJORITY RULE**

Courts and ethics panels which concluded that ex parte contacts with former employees, even managers, is not prohibited have been guided by the conclusion that a former employee simply cannot speak for a corporation and therefore its admissions cannot impute liability to the corporation. As the Washington Supreme Court stated in its decision in *Wright v. Group Health Hospital*, 

> "[s]ince former employees cannot possibly speak for the corporation, we hold that CPR DR 7-104(A)(1) does not apply to them."

As the Florida Bar’s Ethics Commission similarly stated:

> A former manager or employee is no longer in a position to speak for the corporation. Further, under both the federal and the Florida rules of evidence, statements that might be made by a former manager or other former employee during an ex parte interview would
not be admissible against the corporation. Both Rule 801(d)(2)(D), Federal Rules of Evidence, and Section 90.803(18)(e), Florida Evidence Code, provide that a statement by an agent or servant of a party is admissible against the party if it concerns a matter within the scope of the agency or employment and is made during the existence of the agency or employment relationship.\textsuperscript{106}

Despite the bright-line rule allowing such contacts, there are naturally certain undeniable and well-recognized limits on an attorney’s contacts with an opposing party’s former employees. First, \textit{ex parte} contacts are forbidden when the attorney knows that the former employee is represented by counsel. “Former employees who are in fact represented by the former employer’s counsel or any counsel, are plainly off limits under the language of the rules.”\textsuperscript{107}

The second limitation on the “wide open” approach is that the contacting party cannot inquire into areas protected by attorney client privilege. As the Ethics Opinion issued by the Florida Bar states: “But as indicated by some of the ethics committees cited above, the attorney should not inquire into matters that are within the corporation's attorney-client privilege (e.g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation.”\textsuperscript{108} In a 1991 Formal Ethics Opinion on Model Rule 4.2, the American Bar Association Standing Committee on Ethics and Professional Responsibility reinforced this basic premise and cautioned that contacting attorneys must be careful not to induce unrepresented former employees to disclose information protected by the opposing party’s attorney-client privilege.\textsuperscript{109}

**The Middle-of-the-Road, or “Depends on Who It is” Approach.**

The flexible approach evaluates whether the contacted former employee is capable of imputing liability to the former employer and therefore a “party” under the language of the Rules. For example, in \textit{E.E.O.C. v. G.M. Corp}, the Eastern District of Missouri, the Court
reaffirmed prior decisions allowing contact with former employees, but also discussed whether the former employee could impute liability to the organization. The Eastern District restated that Rule 4.2 does not apply to communication with former employees of an organization who no longer have a relationship with the organization, but the Court went a step further to determine whether the former employee could impute liability to the organization. When the court determined that the former employee was not a “decision-maker” and could not impute liability to the organization, it found the *ex parte* contact permissible.

Likewise, the Arizona Court of Appeals in *Lang v. Superior Court of Arizona* interpreted the Rule broadly to include former employees as "parties" in certain situations, and held that *ex parte* contacts are permissible, but only under certain conditions. In *Lang*, the Court found that, in certain cases, the acts or omissions of an employee could bind the organization even after the employment ceased. In light of this possibility, the court determined that former employees could, in particular situations, be considered a party under the Rule. The court consequently held that the Rule does not bar an attorney from having *ex parte* contacts with a former employee of an opposing party where the former employer is represented by counsel "unless the acts or omissions of the former employee gave rise to the underlying litigation or the former employee has an ongoing relationship with the former employer in connection with the litigation." Other courts have also focused on whether the former employee is to be questioned about the employee's own action at issue is the dispute, and if so, the contact is prohibited without consent of organization counsel.

Courts relying on the “Depends Who It Is” approach may base their decisions on whether the former employee maintains ties to the organization, was privy to confidential information
concerning the litigation when they were formerly employed, or whether while employed with
the organization the former employee was in a position to offer opinions that formed the basis of
any final decision regarding the litigation matter which gave rise to the current representation. Courts may also prohibit contact with the former employee when the former employee maintains
his or her status as an opposing party due to their status as a director as a member of a company’s
“control group.”

**The “No-Contact” Approach.**

The authors of this paper are aware of only one court that has ruled that *ex parte* contacts
with former employees are prohibited in *all* circumstances. The court in *Public Service Electric & Gas Service v. Associated Electric & Gas Insurance Services* defined the dispositive inquiry under Model Rule 4.2 as "whether, in this case, a former employee's acts or omissions could be imputed, under *any* factual scenario, to the organization." (emphasis added). Because the court believed that making such a determination of imputed liability was burdensome, it simply announced a bright line rule prohibiting all *ex parte* contacts with former employees. In the court's opinion, a bright line rule would protect the interests of the organization while, at the same time, providing an approach which was easy to apply and that efficiency concerns weighed in favor of such a rule stating that “prompt use of the deposition process will ultimately produce less procedural haggling and thus may be, in the long run, more cost efficient.”

This Court’s test has not been adopted by any court to date and this Court’s holding in 1990 is arguably not even good law in New Jersey. In 1995, the New Jersey Supreme Court’s Special Committee on Rule 4.2 issued its report. After the Committee rendered its report, Rule 4.2 was amended. “The current rules prohibit communication only with employees who are
members of the organization's litigation control group, or are represented by another lawyer in the matter. *R.P.C.* 4.2. This is in accord with the Committee's recommendation that the prohibition against *ex parte* communication should not extend to employees who were only fact witnesses or involved with the subject matter of the litigation. Moreover, in its comment on proposed *R.P.C.* 1:13, the Committee specifically noted that the bar “does not include persons whose actions bind the organization or are imputable to the organization or who are responsible for other aspects of organizational policy unless they meet the 'legal position' test.” Committee Rep., *supra*, 139 *N.J.L.J.* at 1196.”

**IF YOU, AS THE ATTORNEY, CANNOT CONTACT A PARTICULAR FORMER EMPLOYEE, CAN YOUR CLIENT?**

As a general ethical rule, it is well-settled that an attorney cannot encourage, assist, or induce a client or any other person (private investigator, law student, paralegal) to perform a task or undertake a venture that the attorney is ethically barred from doing. Model Rule 8.1 states: “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.”

That stated, it is equally well-settled that parties to a matter may voluntarily speak to each other and deal with each other prior to and during the course of any litigation or arbitration proceeding. Lawyers are not obligated to dissuade their clients from doing so. As the current comments to Model Rule 4.2 state: “Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” If you know your client is speaking with an opposing party
that is represented, you have a duty to encourage your client to be civil and fair. – “A lawyer who advises a client with respect to communications with a represented person should also advise the client against engaging in abusive, harassing or unfair conduct.”123

**Practice Tips to Avoid Ethical Pitfalls and Sanctions**

Follow a basic script.

(1) “Are you represented by counsel or any attorney concerning this Project?” – As an IRS Field Service Advisory on this issue states: “We suggest that before they are interviewed, former employees should be asked if they are represented by counsel in this matter. See *In re Environmental Ins. Declaratory Judgment Actions*, 600 A.2d 165, 172 (N.J. Super. 1991). If so, there should be no further contacts with them unless their counsel consents to the interview.”124 This advice should be religiously followed. As a California court has noted: “once actual contact is made, and attorney should first ask questions that would establish the employee’s status within an organization before moving to substantive questions.”125 It is a “no-no” in every jurisdiction surveyed.

(2) “Let me tell you who I am, who I represent, and why I am calling” – Assuming the former employee is not represented and you can proceed, you should be mindful that in dealing with this unrepresented person that you should follow the dictates of Model Rule 4.3, which addresses communications with unrepresented persons.126 The Comments to Model Rule 4.3 should be adhered to: “In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.”127

(3) Stay Away From Questions that Suggest an Inquiry Into Privileged Areas -- As the ABA's Formal Opinion states, and as many courts and as all ethics committees will require, an attorney should avoid any inquiry into matters which may involve privileged communications between the former employee and the opposing party’s attorney or claim team. This is true regardless of the position the former employee held at the organization.

**Keep a detailed and accurate record of your contacts with the former employee.**

Maintaining a clean and accurate record of contacts with an opposing party’s former employees is not only efficient case management, it also may be of help in facing a charge that the attorney acted unethically. By maintaining accurate notes of any conversations, the attorney
can best respond to such a charge. Additionally, in some jurisdictions, the court may require it.

For example, in *O'Keefe v. McDonnell Douglas Corp.*, the Eighth Circuit Court of Appeals affirmed another Eastern District's decision that prevented attorney access to former employees whose statements may subject a defendant to liability. *O'Keefe* involved a suit brought by the government under the False Claims Act. When the government sent questionnaires to former employees questioning the conduct of the employer, the defendant filed a motion for a protective order preventing the government's actions. The district court held that while the government attorneys did not have to obtain consent from the defendant prior to initiating ex parte contacts with former employees, because some of the former employees' statements may subject the defendant to liability, some limits should be placed on the government attorneys’ contact.

First, the court ordered the government attorneys to keep a list of the names of the persons interviewed and the dates that the interviews took place. Second, the government attorneys were ordered to preserve all statements, notes and answers to questions that they obtained as a result of the contacts. Finally, the court ordered the government attorneys to make these records available to the defendant for review upon request, subject to the work-product limitations. The Eighth Circuit found that the conditions placed on the government attorneys was not a gross abuse of discretion and affirmed the judgment of the district court.

In sum, contacting former employees of an opposing party can be an important part of the development of a case and an analysis of the strengths and weaknesses of the respective parties’ positions.
Pertinent Updates to the California Rules of Professional Conduct

For the first time in almost 29 years, California adopted comprehensive changes to the Rules of Professional Conduct. Last revised in September 1992, the new rules became effective on November 1, 2018. Among other things, the rules now more closely align with the numbering of the ABA Model Rules. This article highlights ten changes to the rules that are particularly pertinent to a construction law practice.

California lawyers continue to be licensed and disciplined by the California Supreme Court and are also subject to the control of the California legislature through the Business & Professions Code. Many of the new and modified rules make reference to the Business and Professions Code. Many of the new and modified rules also reflect codification of case law, which are discussed in the comprehensive comments following each rule.

The current rules, along with the previous rules and charts discussing the changes to the rules, can be found on the State Bar’s website: http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct.

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<tr>
<th>ROLE AS AN ADVISOR</th>
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<tr>
<td>DISCUSSION: The new Rule 2.1 Advisor addresses the role of a lawyer and states in the rule and the comments that, in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but may do so when it appears to be in the client's interest. A lawyer can consider moral, economic, social, and political factors that may be relevant to the client's situation.</td>
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<tr>
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<td>Rule 2.1 Advisor</td>
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<td>In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.</td>
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### IMPUTATION OF PROHIBITIONS

**DISCUSSION:** The new Rule 1.8.11 Imputation of Prohibitions Under rules 1.8.1 to 1.8.9 makes it clear that, while lawyers are associated in a law firm, the conflict rules of 1.8 (excluding the sexual relations rule) apply to all if they apply to any. The conflict rules of 1.8 address the following: business transactions with clients; use of protected client information; gifts from client; payment of client expenses; compensation from a third party; aggregate settlements; and purchasing foreclosed property. As discussed in the rules’ comments, Rules 1.8.1 to 1.8.11 reflect case law, the Business and Professions Code, the Family Code, and the Probate Code.

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<td>Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9</td>
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<td>While lawyers are associated in a law firm,* a prohibition in rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.</td>
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### ADVISING OR ASSISTING THE VIOLATION OF LAW

**DISCUSSION:** The new Rule 1.2.1 Advising or Assisting the Violation of Law clarifies that a lawyer may discuss legal consequences of any proposed course of conduct with the client. The drafters hope that this will make it clearer that lawyers may attempt to dissuade clients from pursuing conduct that violates the law. Comment 6 to the rule also guides lawyers on advising clients on state laws that may conflict with federal or tribal laws, which is a likely reference to California's legalization of marijuana. As discussed in the rule’s comments, along with other rules of professional conduct, Rule 1.2.1 reflects the Business and Professions Code.

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<tr>
<td>Rule 3-210 Advising the Violation of Law</td>
<td>Rule 1.2.1 Advising or Assisting the Violation of Law</td>
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<tr>
<td>A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.</td>
<td>(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*</td>
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<td>(b) Notwithstanding paragraph (a), a lawyer may:</td>
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<td>(1) discuss the legal consequences of any proposed course of conduct with a client; and</td>
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<td>(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*</td>
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## SCOPE OF REPRESENTATION

**DISCUSSION:** The new Rule 1.2 Scope of Representation and Allocation of Authority makes it clear that the client decides the purposes and objectives of the legal representation. The lawyer can make tactical decisions, but reasonable consultation with the client is required. Additionally, the lawyer cannot impair the client's substantive rights, and the client decides whether to settle. As discussed in the rule’s comments, along with other Rules of Professional Conduct, Rule 1.2 reflects case law, the California Constitution, the California Penal Code, and California Rules of Court.

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<td>N/A - Reflects case law, the California Constitution, the California Penal Code, and California Rules of Court</td>
<td><strong>Rule 1.2 Scope of Representation and Allocation of Authority</strong></td>
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<tr>
<td>(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.</td>
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<td>(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.*</td>
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## DELAY OF LITIGATION

**DISCUSSION:** The new Rule 3.2 Delay of Litigation states that a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense. The rule's commentary references rule 1.3 with respect to a lawyer's duty to act with reasonable diligence and Business and Professions Code section 6128, subdivision (b) ("Every attorney is guilty of a misdemeanor who either: ... (b) Willfully delays his client's suit with a view to his own gain.")

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<td><strong>Rule 3.2 Delay of Litigation</strong></td>
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<td>In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense.</td>
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### INADVERTENTLY TRANSMITTED WRITINGS

**DISCUSSION:** The new Rule 4.4 Duties Concerning Inadvertently Transmitted Writings codifies case law. Where it is *reasonably apparent* to a lawyer who receives a writing that it was inadvertently sent or produced and the lawyer knows or reasonably should know that the writing is privileged, the lawyer must refrain from further examination and promptly notify the sender. The rule modifies case law that says the obligation only applies if the “materials [] *obviously appear* to be subject to an attorney-client privilege or *otherwise clearly appear* to be confidential and privileged.” (*Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817.)

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<td><strong>Rule 4.4 Duties Concerning Inadvertently Transmitted Writings</strong>*</td>
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<td>Where it is <em>reasonably</em> apparent to a lawyer who receives a writing* relating to a lawyer’s representation of a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, the lawyer shall:</td>
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<td>(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and</td>
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<td>(b) promptly notify the sender.</td>
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### SUPERVISORY DUTIES

**DISCUSSION:** The new supervision rules (5.1 to 5.3) upgrade the duty of managerial and supervisory lawyers to its own rule rather than an element of the duty of competence. The new rules overall assert that lawyers with managerial authority must ensure that subordinate lawyers and non-lawyers comply with the Rules of Professional Conduct. And as to the responsibilities of a subordinate lawyer, there is no rule violation if the lawyer acts in accordance with the supervisor’s reasonable resolution of an arguable question of professional duty.

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<tr>
<td>Rule 3-110 Failing to Act Competently (Discussion ¶. 1)</td>
<td><strong>Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers</strong></td>
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<td><strong>Rule 5.2 Responsibilities of a Subordinate Lawyer</strong></td>
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<td><strong>Rule 5.3 Responsibilities Regarding Nonlawyer Assistants</strong></td>
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### SUPERVISORY DUTIES

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<td>(a) A lawyer who individually or together with other lawyers possesses 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* comply with these rules and the State Bar Act.</td>
</tr>
<tr>
<td>(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.</td>
</tr>
<tr>
<td>(c) A lawyer shall be responsible for another lawyer’s violation of these rules and the State Bar Act if:</td>
</tr>
<tr>
<td>(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or</td>
</tr>
<tr>
<td>(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.</td>
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<tr>
<th>Rule 5.2 Responsibilities of a Subordinate Lawyer</th>
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<tbody>
<tr>
<td>(a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.*</td>
</tr>
<tr>
<td>(b) A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s reasonable* resolution of an arguable question of professional duty.</td>
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<tr>
<th>Rule 5.3 Responsibilities Regarding Nonlawyer Assistants</th>
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<tr>
<td>With respect to a nonlawyer employed or retained by or associated with a lawyer:</td>
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<tr>
<td>(a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer;</td>
</tr>
<tr>
<td>(b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person’s* conduct is compatible with the professional obligations of the lawyer; and</td>
</tr>
<tr>
<td>(c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these rules or the State Bar Act if engaged in</td>
</tr>
</tbody>
</table>
**SUPERVISORY DUTIES**

by a lawyer if:

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

(2) the lawyer, individually or together with other lawyers,
possesses managerial authority in the law firm* in which the
person* is employed, or has direct supervisory authority over
the person,* whether or not an employee of the same law
firm,* and knows* of the conduct at a time when its
consequences can be avoided or mitigated but fails to take
reasonable* remedial action.

**ANTI-HARASSMENT**

**DISCUSSION:** The new Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation expands the former discriminatory conduct rule. Under Rule 8.4.1, the State Bar may investigate and take disciplinary action even without a final civil determination of wrongful conduct. A lawyer may not discriminate in representing a client, or in terminating or refusing to accept representation, on the basis of any protected characteristic. The rule also expands retaliation rules when a person takes action to oppose unlawful discrimination or harassment. As discussed in the rule’s comments, rule 8.4.1 reflects the Code of Judicial Ethics and the Business and Professions Code.

<table>
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<tr>
<th>FORMER RULE</th>
<th>NEW RULE</th>
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<tbody>
<tr>
<td><strong>Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice</strong></td>
<td><strong>Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation</strong></td>
</tr>
<tr>
<td>(A) For purposes of this rule: (1) “law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law; (2) “knowingly permit” means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public. (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or</td>
<td>(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not: (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.* (b) In relation to a law firm’s operations, a lawyer shall not: (1) on the basis of any protected characteristic, (i) unlawfully discriminate or knowingly* permit unlawful discrimination; (ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or (iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to</td>
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knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.*

(c) For purposes of this rule:

(1) “protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) “retaliate” means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or

(2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.
### ANTI-HARASSMENT

(f) This rule shall not preclude a lawyer from:

1. representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
2. declining or withdrawing from a representation as required or permitted by rule 1.16; or
3. providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.

### MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS

**DISCUSSION:** The new Rule 6.3 Membership in Legal Services Organization states that, as long as there is no direct adversity, a lawyer may serve in such an organization even if it serves clients with interests adverse to the lawyer's clients. The rule references the Business and Professions Code.

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<th>FORMER RULE</th>
<th>NEW RULE</th>
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<tr>
<td>N/A</td>
<td>Rule 6.3 Membership in Legal Services Organization</td>
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A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer’s obligations to a client under Business and Professions Code section 6068, subdivision (e)(1) or rules 1.6(a), 1.7, 1.9, or 1.18; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

### FORMER CLIENTS

**DISCUSSION:** The new Rule 1.9 Duties to Former Clients mirrors the Model Rules and breaks out the duties into three categories: 1). A lawyer shall not represent a client in a substantially related matter where the client’s interests are materially adverse to the interests of a former client; 2). A lawyer shall not represent a client in a matter in which the lawyer’s former firm represented an adverse client, and the lawyer acquired confidential information (unless informed written consent); and 3). A lawyer shall not use confidential information gleaned in representation (or former firm’s representation) of a former
client against that former client. As discussed in the rule’s comments, Rule 1.9 reflects case law and the Business and Professions Code.

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<tr>
<th>FORMER RULE</th>
<th>NEW RULE</th>
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<tr>
<td><strong>Rule 3-310 Avoiding the Representation of Adverse Interests</strong></td>
<td><strong>Rule 1.9 Duties to Former Clients</strong></td>
</tr>
<tr>
<td>(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.</td>
<td>(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person’s* interests are materially adverse to the interests of the former client unless the former client gives informed written consent.*</td>
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<td></td>
<td>(b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person;* and (2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.*</td>
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<tr>
<td></td>
<td>(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 protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;* or (2) reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.</td>
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</tbody>
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1 This section is authored by Robert J. MacPherson, Director of Commercial and Criminal Litigation at Gibbons Law in Newark, New Jersey.
3 Formal Opinion 99-413 was replaced by Formal Opinion 477R issued May 11, 2017 and revised May 22, 2017, which is on the list.
The Committee did note faxes can easily be misdirected by dialing a wrong number, or if the hard copy is mis-delivered.

Italics in original.

Formal Opinion 99-413.

https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf

Model Rule 1.1 Competence, Comment 8.


Id.

Interestingly, the speech does not mention cyber threats directed at the US election system, something that has had Mr. Mueller’s attention of late.

See note ix.


Formal Opinion 477 was first issued on May 11, 2017 but was revised and replaced by Formal Opinion 477R on May 22, 2107. Exactly what the revisions were is not noted.

Formal Opinion 477R, footnote 5.

http://www.abajournal.com/magazine/article/law_firm_hacking_history

October 17, 2018

The authors take no position.

If you need a definition, please review the discussion above as you may be in violation of Model Rule 1.6.

District of Columbia Bar Ethics Opinions 370 Social Media I: Marketing and Personal Use and 371 Social Media II: Use of Social media in Providing Legal Services provide valuable guidance on the use and misuse of social media.

See note 7.

2018 Fla. LEXIS 2209 (Nov. 15, 2018).


Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012).

One judge concurred with the majority, but wrote to urge judges not to participate in Facebook, and presumably other social media sites, agreeing with the dissent such participation is fraught with risk.

This section is authored by Dean Thomson and Tom Vollbrecht, shareholders in the Minneapolis, Minnesota firm of Fabyanske, Westra, Hart & Thomson.

AIA Document A312 (2010 ed.).

Id., §5.

Id., §6.

Id., § 7.1: “If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract…” Therefore, if the surety does not elect to act under Sections 5.1, 5.2, or 5.3, then the
surety’s obligations are not so limited. Similarly, under § 8, “If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety’s liability is limited to the amount of this Bond.” Presumably, if the surety fails to act or does not act pursuant to these three subsections of the bond, its liability is not limited by the bond.


33 838 A.2d 135 (Conn. 2004).

34 Id. at 142.

35 Id. at 143.

36 See also Avery Dennison Corp. v. Allendale Mut. Ins. Co., 310 F.3d 1114, 1117 (9th Cir. 2002) (under “highly extraordinary circumstances” a fidelity carrier could be subject to bad faith damages even if it had a good faith defense against coverage); Legg v. Certain Underwriters at Lloyd’s of London, 18 S.W.3d 379, 387 (Mo. Ct. App. 1999) (“the existence of a litigable issue does not preclude a vexatious penalty where there is evidence that the insurer’s attitude was vexatious and recalcitrant in refusing the claim.”). But see Auto-Owners Ins. Co. v. S.E. Floating Docks, Inc., 6:05-CV-334-ORL-31JGG, 2007 WL 676217, at *4 (M.D. Fla. Mar. 1, 2007) (insurer under no obligation contractually or otherwise to include insured in settlement negotiations or to reach a settlement that benefitted insured); Assoc. Indem. Corp. v. CAT Contr., 964 S.W.2d 276, 280 (Tex. 1998) (surety owes no common law duty of good faith to its principal but can violate contractual good faith duty found in indemnity agreement).


39 MODEL RULES OF PROF’L CONDUCT R. 4.2.

40 MODEL RULES OF PROF’L CONDUCT R. 4.3.

41 MODEL RULES OF PROF’L CONDUCT R. 4.4. See also In re: Amendments to Rules Regulating the Fla. Bar, 164 So.3d 1217, 1234 (Fla. 2015) (“Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that the lawyer may disregard the rights of third persons. It is impractical to catalogue all these rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.”).

42 MODEL RULES OF PROF’L CONDUCT R. 4.4.

43 See Attorney Q. v. Mississippi State Bar, 587 So.2d 228, 230 (Miss. 1991) (attorney violated rule by telling an unrepresented defendant “Don’t worry about it. Don’t do anything” when defendant asked if she should contact her insurer after being served with a summons).

44 420 F.3d 751 (8th Cir. 2005).

45 Id. at 753-54.
46 Model Rules of Prof’l Conduct R. 1.7.

Id. at 1.7(b)(1).

48 See, e.g., Or. State Bar Legal Ethics Comm., Op. 498394 (1984) (it is never appropriate to represent insurer and insured if there are conflicts of interest, even if the attorney obtains informed consent).


Id. at 800.

50 Id.

51 Id.


53 See United Riggers v. Marathon Steel Co., 725 F.2d 87, 90-91 (10th Cir. 1984) (surety entitled to reimbursement for separate attorneys fees where indemnitor failed to post collateral and there were separate surety defenses); Toporoff Engineers, P.C. v. Fireman’s Fund Ins. Co., 00-CIV-5963 (NT), 2006 WL 1539341, at *3 (S.D.N.Y. June 5, 2006) (upholding refusal to tender defense due to failure to respond to letter requesting collateral as a requirement for that tender); James Constr., Inc. v. Salt Lake City Corp., 888 P.2d 665, 671 (Utah Ct. App. 1994) (affirming trial court holding that separate surety counsel was necessary because of principal’s “stubborn refusal to post collateral or to provide other adequate and acceptable security.”).


55 See Model Rules of Prof’l Conduct R. 1.6.


57 See Margulies, 696 P.2d. at 1203; Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345 n.4 (9th Cir. 1981); Tone v. Smith, 621 F.2d 994, 998-999 (9th Cir. 1980).

58 See Margulies, 696 P.2d. at 1203.

59 See Model Rules of Prof’l Conduct R. 1.7, cmt. 31 (“[C]ontinued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests …”); but see Cornish v. Superior Court, 257 Cal. Rptr. 383, 387 (Cal. Ct. App. 1989) (contractor’s motion to disqualify joint counsel with surety denied because contractor had no reasonable expectation that confidences of contractor would not be shared with the surety which was counsel’s first and long-time client).

60 Model Rules of Prof’l Conduct R. 1.4; Canons of Prof’l Ethics Cannon 37 (1927).

61 See, e.g., Model Rules of Prof’l Conduct R. 1.6, 1.7, 4.1-4.4.


65 See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-421 (2001); Tenn. Bd. Of Prof’l Responsibility, Formal Op. 2000-F0145, 2000 WL 1687507, at *2-3 (Sept. 8, 2000) (“… an attorney may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope and extent of his or her representation of the insured in any manner, including the decision whether or not to appeal a judgment against the insured, whether
or not to demand a jury, or whether or not to participate in mediation on the insurer’s behalf, unless the client-insured has expressly agreed with any or all of the conditions limiting the nature or scope of the representation, and such agreement is confirmed in writing by the client-insured to the attorney. Counsel receiving a retention purporting to require undeviating compliance should inform the insurer that such compliance cannot be assured, but that counsel will comply to the extent permitted by counsel’s duties to the insured.”; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-403 (1996) (defense counsel may accept insurer instructions regarding settlement so long as insured acquiesces).

60 See MODEL RULES OF PROF’L CONDUCT R. 1.8(g).

61 See id.

62 See id.


64 Id. at 1358-59.

65 MODEL RULES OF PROF’L CONDUCT R. 1.7, cmt. 29; MODEL RULES OF PROF’L CONDUCT R. 1.7, cmt. 29.

66 This section authored by G. Edgar James of James | Sobba, LLC in Kansas City, Missouri.


69 Lang v. Superior Court, In and For County of Maricopa, 170 Ariz. 602, 826 P.2d 1228 (Ct. App. Div. 1 1992) (evidence suppressed); but see other cases holding such a sanction against a party improper. As the Missouri court of appeals opined in Terre Du Lac Prop. Owners’ Ass’n v. Shrum, 661 S.W.2d 45, 48 (Mo.App.1983), "[t]he purpose of the Canons of Ethics is to regulate the conduct of counsel, not a weapon to be used against the attorney's client." In Plan Committee in the Driggs Reorganization Case v. Driggs, 217 B.R. 67, 72, (D.Md.1998), the court stated that "the appropriate remedy for any ethical violation [of Rule 4.2] that occurred would be disciplinary action against [the attorney], not dismissal of the adversary proceeding, suppression of evidence, or disqualification of counsel." Id. Driggs.


71 See the state survey provided with May 18, 2006 Paper presented at the ABA Construction Forum Meeting. Use the Searchable Knowledge Database on the ABA Construction Forum website to locate that paper.


73 See, e.g., United States ex rel. O’Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1295 (E.D. Mo. 1997), which required the attorney interviewing the former employee to “maintain a list of all former employees contacted, the date(s) of the contact(s) and shall maintain and preserve statements, notes, or answers to questionnaires, obtained as a result of the contacts. Defendant may review the lists and notes upon request, subject to work product limitations.”
The O'Keefe decision, and the requirements set forth therein as to ex parte contacts with former employees, was upheld by the 8th Circuit Court of Appeals in United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8th Cir. 1998) under a “gross abuse of discretion” test as applied to review of discovery matters.

81 Snider v. Superior Court, 7 Cal. Rptr.3d 119, 139 (Cal. App. 2003) (if in doubt, the attorney would be “well-advised to either conduct discovery or communicate with opposing counsel before contacting the employee”).
82 Terra Intern., Inc. v. Mississippi Chem. Corp., 913 F. Supp. 1306 (N.D. Iowa 1996) (litigation surrounding explosion at fertilizer plant which killed four people and caused over $200 million in damages – defendant sought relief by a “Motion for Discovery Guidance”).
83 The ethical dilemmas arising from multi-jurisdictional practice have been the subject of scholarly work and intense debate. See, e.g., Ronald D. Rotunda, Professional Responsibility: A Student's Guide (2001 ed.) at 731-35; Moulton, Geoffery, Federalism and Choice of Law in the Regulation of Legal Ethics, 82 Minn. L. Rev. 73 (Nov. 1997).
84 Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.C., 178 F.Supp.2d 9, 19 (D. Mass. 2001) (finding in case pending in Massachusetts concerning tobacco case attorney-fee splitting agreement made in Illinois that New York lawyer’s conduct was subject to the “New York Code of Professional Responsibility and the South Carolina and Mississippi defendants are subject to their respective rules of professional conduct.”); see also In re Soulisak, 227 B.R. 77, 80 (Bankr.E.D.Va.1998) (citing 1 Collier on Bankruptcy ¶ 8.02[2]) (When appearing before the bankruptcy courts attorneys are bound by the state codes and rules imposed by the state bar associations and the highest courts of the states where they practice.).
86 Recall that the attorney is licensed in Kansas and Missouri.
87 To be discussed. See case cite in fn. 43.
88 Terra Intern., Inc. v. Mississippi Chem. Corp., 913 F. Supp. 1306, 1314, n.8; see also In Bobele v. Superior Court, 245 Cal. Rptr. 144, 147 (Ct. App. 1988), where the cost of formal discovery was an important factor in the court's decision. "Not every witness' testimony is worth the price of a deposition; in fact, many of the former employees which plaintiffs want to interview may not be able to provide any relevant information at all." Bobele, 245 Cal. Rptr. at 148.
“Yet, the American tradition of gamesmanship dies hard. Perhaps spurred on by images traditionally evoked by "Perry Mason" and, more recently, "Matlock," lawyers always delight in surprising their opponents. The ex parte contact holds the promise of a hidden document, an unknown witness, and the final piece of the puzzle to spring on an unsuspecting adversary.”

Iole, John E. & Goetz, John D., Ethics or Procedure? A Discovery-Based Approach to Ex Parte Contacts With Former Employees of a Corporate Adversary, 68 Notre Dame L. Rev. 81, 117 (1992).

The authors of this paper gratefully acknowledge the assistance provided by those attorneys from the various jurisdictions represented in the attached state survey.


Fl. Eth. Op. 88-14, 1989 WL 380139 (Fla. St. Bar Assn), stating that the Model Rule is “substantially identical” to DR 7-104 (A) (1).


The Model Rules define “knows” as follows: Rule 1.0 (f) “'Knowing,' ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.”

Snider v. Superior Court, 7 Cal. Rptr.3d 119, 139 (Cal. App. 2003).

See http://www.law.cornell.edu/ethics/aba/current/CRule_4.2.htm

Smith v. Kansas City Southern R.R. Co., 87 S.W.3d 266 (Mo. App. 2002); quoting the Comments to the Model Rule.

Model Rule 3.4 (f) states: A lawyer shall not: . . . f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:(1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

See: http://www.abanet.org/cpr/e2k-rule42.html ; Final Comment at: http://www.law.cornell.edu/ethics/aba/current/CRule_4.2.htm .


Snider, 7 Cal. Rptr.3d at 125.

Vernia, Benjamin J., 57 A.L.R. 5th 633 (rev. 2004); see also Continental Ins. Co. v. Superior Court (Commercial Bldg. Maintenance Co.), 32 Cal. App. 4th 94, 37 Cal. Rptr. 2d 843 (2d Dist. 1995); Patriarca v. Center for Living & Working, Inc., 438 Mass. 132, 135, 778 N.E.2d 877, 880 (Mass. 2002); Fl. Eth. Op. 88-14, 1989 WL 380139 (Fla. St. Bar Assn), citing Alaska Bar Opinion 88-3 (6/7/88) (Former employees are no longer part of corporate entity and no longer can act or speak on behalf of corporation; opposing lawyer therefore may contact former...
employees, including former members of corporation's control group who dealt with subject matter of litigation, but may not inquire into privileged communications); Colorado Bar Opinion 69 (Revised) (6/20/87) (Former employee cannot bind corporation as matter of law; lawyer may interview opposing party's former employees with regard to all matters except communications within corporation's attorney-client privilege); Illinois Bar Opinion 85-12 (4/4/86) (Former employees, including those who were part of corporation's control group, may be contacted without permission of corporate counsel; direct communications with former control group employees may elicit information adverse to corporation, but that direct contact no more deprives corporation of benefit of counsel than does direct communication with any potential witness); Los Angeles County, Calif., Bar Opinion 369 (11/23/77) (Although ethical dangers may be posed if rule prohibiting ex parte contacts is not extended to former controlling employees, no authority is found to support such extension); Maryland Bar Opinion 86-13 (8/30/85) (Lawyer may communicate with former employee of adverse corporate party if former employee is not represented by counsel); Massachusetts Bar Opinion 82-7 (6/23/82) (Lawyer may communicate with former employees of corporate defendant regarding matters within scope of their employment; former employees enjoy no current agency relationship that is being served by corporate counsel's representation); Michigan Bar Opinion CI-597 (12/22/80) (Plaintiff's attorney may communicate with prospective witness, who is former employee of corporate defendant, on subject matter of representation if employee is unrepresented); New York City Bar Opinion 80-46 (Former employees are no longer part of corporate entity and may be contacted ex parte); New York County Bar Opinion 528 (1965) (Although direct communication with any current manager or employee of defendant corporation is improper, restriction does not apply to communications with former employees); Virginia Bar Opinion 533 (12/16/83) (Lawyer may communicate directly with former officers, directors and employees of adversary corporation on subject of pending litigation unless lawyer has reason to know those witnesses are represented by counsel); Wisconsin Bar Opinion E-82-10 (12/82) (Lawyer may contact former employee of opposing party to obtain material information even though former employee was managing agent, if former employee has severed all ties with corporation and therefore is not in position to commit corporation).

111 Id.
113 826 P.2d at 1232.


121 In re Capper, 757 N.E.2d 138 (Ind. 2001) (attorney's using his own client to communicate with client's former wife, who was still represented by counsel, violated disciplinary rule prohibiting communication with a represented party and rule prohibiting conduct prejudicial to the administration of justice. Rules of Prof.Conduct, Rules 4.2, 8.4(d); In re Marietta, 569 P.2d 921 (Kan. 1977) (lawyer disciplined for encouraging client to communicate with an opposing party). Schantz v. Éyman, 418 F.2d 11 (9th Cir. 1969) (prosecutor responsible for post-indictment questioning of accused by state psychiatrist);

122 See http://www.law.cornell.edu/ethics/aba/current/CRule_4.2.htm; see also Lewis v. Baune, 534 F.2d 1115 (5th Cir. 1976).


124 IRS Field Service Announcement; 1993 WL 1469716 (IRS FSA).

125 Snide, 7 Cal. Rptr. at 139.

126 Model Rule 4.3 states: “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.” See http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM

127 See http://www.law.cornell.edu/ethics/aba/current/CRule_4.3.htm

128 See, for example, United States ex rel. O’Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1295 (E.D. Mo. 1997), which required the attorney interviewing the former employee to “maintain a list of all former employees contacted, the date(s) of the contact(s) and shall maintain and preserve statements, notes, or answers to questionnaires, obtained as a result of the contacts. Defendant may review the lists and notes upon request, subject to work product
limitations.” The O’Keefe decision, and the requirements set forth therein as to *ex parte* contacts with former employees, was upheld by the 8th Circuit Court of Appeals in *United States ex rel. O’Keefe v. McDonell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998) under a “gross abuse of discretion” test as applied to review of discovery matters.

129 132 F.3d 1252 (8th Cir. 1998).
130 *Id* at 1253.
131 *Id*.
132 *Id.* at 1257.
133 This section is authored by Jessica R. Bogo and Andrew M. Argyris of Pillsbury Winthrop Shaw Pittman, LLP in San Francisco, California.