
ZOOMING THROUGH A NEW AGE
ETHICAL DUTIES OF LAWYERS WORKING REMOTELY
Hon. Stephen M. Moloney, Ret.
Hon. Mark V. Mooney, Ret.
Hon. Patricia Schnegg, Ret.

Lawyers Working Remotely – The ABA Model Rules of Professional Conduct

ABA Formal Opinion 498, issued March 10, 2021

- The ABA Model Rules of Professional Conduct permit "**virtual practice**", which is technologically-enabled law practice beyond the traditional brick-and-mortar law firm.
- When practicing virtually, ABA's model rules state lawyers must . . .
  - particularly consider ethical duties regarding **competence**, **diligence**, and **communication**, especially when using technology. (Model Rules 1.1, 1.3, 1.4)
  - protect **confidentiality** by making reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. (Model Rule 1.6)
  - adhere to their **duties of supervision** by making reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

California Guidance

- State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-184 (issued long before the pandemic) addressed whether an attorney can maintain a virtual law office practice.
- General duties of **competence**, **diligence**, and **communication** are stated in the State Bar's Rules of Professional Conduct, Rules 1.1, 1.3, and 1.4.
- Cal. Rule of Professional Conduct 1.6 generally relates to a California attorney's **duty of confidentiality**. (*See also* Cal. Bus. & Prof. Code 6068(e).)
- **Supervision duties** are covered by Cal. Rule of Professional Conduct 5.1.

Q&A

- Do you find that there is a change in an attorney's client advocacy when the attorney makes a remote court appearance?
- Is there a change in advocacy in settlement conferences? Private mediation?

Settlement Discussions

- **State Bar Rules of Professional Conduct, Rule 4.1**: Truthfulness in Statements to Others
  - In the course of representing a client, a lawyer shall not knowingly:
    - (a) Make a false statement of material fact or law to a third person; or
    - (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client (absent specific exceptions).
  - Comments:
    - A lawyer has no affirmative duty to inform an opposing party of relevant facts.
    - A misrepresentation can occur if the lawyer affirms a statement of another person that the lawyer knows is false.
    - A partially true but misleading statement or omission can be the equivalent of an affirmative false statement.

Drawing the Line in Virtual Mediation

Puffing or a False Statement?

- My bottom line is . . .
- I don’t have authority . . .
- My client is not available to participate by Zoom (telephone only) . . .
- I have an expert that will support this . . .
- I’ll never accept/pay . . .

Confidentiality

- **Cal. Bus. & Prof. Code 6068(e)(1):** lawyers must "maintain inviolate the confidence, at every peril to himself or herself to preserve the secrets, of his or her client" (absent a specific exception for criminal conduct likely to result in death or bodily harm or informed consent). *See also* State Bar Rules of Professional Conduct, Rule 1.6.

- **Formal Opinion No. 2012-184**: "while Attorney is not required to become a technology expert in order to comply with her duty of confidentiality and competence, Attorney does owe her clients a duty to have a basic understanding of the protections afforded by the technology she uses in her practice."

- Are there any specific ground rules that you set in court and for mediation and arbitration?

Possible Pitfalls in Virtual Mediation

- Informality of the environment
- Multi-tasking
- Readiness
- Getting “eyes on” the parties
- Text/written communication not clear
- Hybrid mediations
- Multi-party challenges
- Walking away too quickly
- Skin in the game

Grabowski v. Kaiser Foundation Health Plan, Inc. (2021) 64 Cal. App. 5th 67

- Virtual arbitration with pro se plaintiff and counsel for defense.
- Ex parte communication during proceedings between arbitrator and defense counsel about pro se plaintiff's advocacy, overheard by pro se plaintiff's mother.
- Arbitration Award vacated

JW's Virtual Arbitration Guidelines:

Participation in Proceedings, Recordings, and Access to Evidence

- No person may have access to the live video proceeding other than the disclosed participants (Names of all participants are to be provided 30 days before the hearing unless otherwise ordered by the arbitrator)
- No participant may record, broadcast, take screenshots, or copy any part of the proceeding (without advance written authorization of the arbitrator)
- Parties must report any documentary or demonstrative exhibits and how they propose to enable the virtual participants to see and review documents at least 30 days in advance of the hearing

JW's Virtual Arbitration Guidelines:
Suggested Best Practices for Participation

APPEARING ON-SCREEN

- Well-lit, non-distracting background required
- Virtual witnesses giving testimony should ensure their hands are visible on the table
- Cell phones should be visible and face-down on the table
- All other participants should sit so that only head and shoulders are visible
- All participants must be adequately connected to the virtual platform for the proceeding to begin

JW's Virtual Arbitration Guidelines:

Witness Appearances

- Counsel are responsible for ensuring that virtual witnesses (called by the Party whom counsel represents) are familiar with the virtual platform employed
- Counsel are responsible for ensuring that virtual witnesses have suitable equipment to participate
- Counsel must provide a test session with virtual witnesses in advance of the virtual proceeding
- Counsel are responsible for ensuring that all witnesses have full access to any exhibits used
- Virtual witnesses should be alone in the room from which they are testifying – coaching or consultation is considered unlawful
- Telephone testimony must be approved by the arbitrator and disclosed 30 days in advance of the hearing

QUESTIONS?

THANK YOU!

HON. STEPHEN M. MOLONEY, RET.

Judge Moloney has earned a stellar reputation for his judicial and legal career spanning 47 years. As a judge for the Los Angeles County Superior Court, he sat briefly in criminal (one year) and family law (four years) with the remainder of his time in a civil trial court. While in civil, he conducted law and motion hearings and trials in many areas of the law. Being a trial lawyer and judge, he appreciates the unpredictability of jury verdicts and values the importance of settlement discussions, which is why he made it a priority to be available for settlement conferences while on the bench.

Before his appointment, he was a partner at a civil litigation firm and tried personal injury and insurance matters for 34 years. He also helped build the firm's employment department and practiced in this area for several years. Judge Moloney's entire litigation career was spent as a trial lawyer, earning him the position of Past President of the Southern California Defense Counsel. He is also an ABOTA member and received the Judicial Civility Award from the Los Angeles Chapter in 2016 and the Trial Judge of the Year award from both plaintiff and defense organizations.

Judge Moloney is known and admired by lawyers throughout California for his experience, work ethic, and hospitability to all who entered his courtroom. Many describe him as one of the most respectful, practical, and amiable judges they have been before.

LEGAL CAREER & PRIOR EXPERIENCE

- Full-time Neutral, Judicate West (2023-Present)
- Judge, Los Angeles County Superior Court (2009-2022)
- Los Angeles County Superior Court Executive Committee (2021)
- Partner, Gilbert, Kelly, Crowley & Jennett; Specialized primarily in personal injury defense (1975-2000) as well as helped build and lead the firm's employment litigation practice (2000-2009)

EDUCATION & PROFESSIONAL AFFILIATIONS

- J.D., Santa Clara University School of Law (1975)
- B.S., Santa Clara University (1971)
- Mediating the Litigated Case, Straus Institute of Dispute Resolution at Pepperdine (2022)
- Association of Southern California Defense Counsel, President (1992)
- American Board of Trial Advocates (ABOTA), (1989-Present)
- Judge/Advisor for The Civil Jury Project at New York University

ADR EXPERIENCE & SPECIALTIES

All types of Personal Injury including Sexual Assault and Wrongful Death, Business/Contractual, Employment, FEHA, Insurance Bad Faith, Landlord-Tenant (Habitability), Medical Malpractice

ACHIEVEMENTS & AWARDS

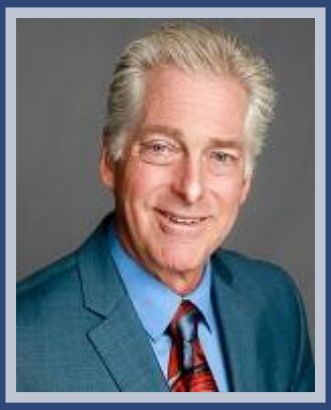
- Trial Judge of the Year, CAALA (2021)
- Judge of the Year Award, ASCDC (2019)
- Judicial Civility Award, ABOTA Los Angeles Chapter (2016)

HOBBIES & INTERESTS

Judge Moloney is passionate about history and traveling. He also enjoys playing golf and pickleball in his spare time.

LOCATIONS

All of California



HON. MARK V. MOONEY, RET.

During Judge Mooney's 27 years on the Los Angeles Courts, he has earned a reputation for his pleasant judicial temperament and fair and respectful treatment of counsel. Having been a civil trial lawyer, specializing in medical negligence, products liability, insurance, and federal torts, he appreciates applying the law and zealous advocacy.

He sat in several departments for the Superior Court with most of his time serving in an independent calendar department. He presided over discovery proceedings and civil trials and conducted many settlement conferences in employment, civil rights, construction defect, products liability, professional malpractice, lemon law, mass tort, real estate, and personal injury cases. As a trial lawyer and judge, he has been involved in several bar groups such as Los Angeles County Bar Association, ABTL, and ABOTA, served on panels, and authored articles.

One attorney said, "I always enjoyed trying cases in Judge Mooney's court. He is a trial lawyer's judge. He understands the law, is extremely prepared and quick-witted, and allows counsel to try their cases. He is going to make an excellent private judge."

LEGAL CAREER & PRIOR EXPERIENCE

- Full-time Neutral, Judicate West (Present)
- Judge, Los Angeles Superior Court (1998-2022)
- Judge, Los Angeles Municipal Court (1995-1998)
- Assistant U.S Attorney, U.S Attorney's Office - Central District of California; Specializing in Federal Tort Claims (1991-1995)
- Associate Attorney, Lafollette, Johnson, DeHaas, Fesler & Ames; Specializing in Medical Malpractice, Products Liability and Public Entity Defense (1988-1991)
- Associate Attorney, Torres & Brenner; Specializing in Medical Malpractice and Public Entity Defense (1987)
- Associate Attorney, Hillsinger & Costanzo, PC; Specializing in Medical Malpractice, Products Liability and Public Entity Defense (1982-1987)

EDUCATION & PROFESSIONAL AFFILIATIONS

- J.D., Southern Methodist University School of Law (1981)
- B.A., University of Southern California (1978)
- Mediating the Litigated Case, Caruso School of Law at Pepperdine University

ADR EXPERIENCE & SPECIALTIES

Employment Law, Lemon Law, Medical Negligence, Personal Injury, Products Liability and Professional Malpractice

ACHIEVEMENTS & AWARDS

- Judge of the Year Award, American Board of Trial Advocates, Los Angeles Chapter (2019)
- Trial Judge of the Year Award, Consumer Attorneys Association of Los Angeles (2010)

HOBBIES & INTERESTS

Judge Mooney loves music and plays multiple instruments including the banjo, mandolin, guitar, and ukulele. He also enjoys outdoor sports such as bicycling and skiing, and recently completed a solo bike ride across the United States.

LOCATIONS

All of California

HON. PATRICIA SCHNEGG, RET.

After 15 years of distinguished service for the Los Angeles Superior Court, Judge Schnegg is available to serve as a mediator, arbitrator and private judge. During her last 2 ½ years on the bench, she sat in a dedicated settlement department in Santa Monica where she mediated over 2,000 cases involving almost every type of civil dispute. During this time, she also mediated in the Court's CRASH Personal Injury, Business and Employment Programs.

Prior to becoming a judge, she represented plaintiffs and defendants for over 23 years in a general civil litigation firm. While in practice she was involved with many bar associations and was President of the Los Angeles County Bar Association and the Women Lawyers Association of Los Angeles (WLALA). As a judge she remained active in these bar groups and more while serving on many court committees.

Judge Schnegg is praised for her dedication to settling cases. She is known for her unwavering work ethic, often suggesting to the parties to come back for another session of mediation on her personal time whether it is at night or over the weekend. One attorney said, "I have settled several cases with Judge Schnegg and each time she has been very enjoyable to work with, sharp with the legal issues and reasonable and warm with me and my clients."

LEGAL CAREER & PRIOR EXPERIENCE

- Judge, Los Angeles County Superior Court (2000-15)
- Settlement Judge, Santa Monica Superior Court (2013-15)
- CRASH Personal Injury, Business & Employment Settlement Program (2013-14)
- CRASH Business Settlement Program (2014)
- CRASH Employment Settlement Program (2014)
- Supervising Judge of the Northwest District & Criminal Division (2008-12)
- Chair of the Grand Jury Committee (2011-13)
- Chair of the Criminal Court & Court Services Committee (2011-13)
- Member of the Operations & Personnel & Budget Committee (2011-13)
- Member Court Contraction Committee/Criminal Court Contraction Plan (2011-12)
- Member of the Judicial Council Crim. Advisory Committee (2011-13)
- Member of the Executive Committee (2008-13)
- Chair of the Trial Jurors Committee (2006-11)
- Presided over Teen Court at Venice High School (2005-15)
- Member, California Judge's Assn. Board of Directors (2009-11)
- Knapp, Marsh, Jones & Doran (1977-00)

EDUCATION & PROFESSIONAL AFFILIATIONS

- J.D., Loyola University of Los Angeles: St. Thomas More Honor Society, Dean's List All Semesters, Treasurer of the Student Bar Association (1977)
- B.A., Loyola Marymount University, Los Angeles: Summa Cum Laude, President, Student Body Judicial Council, Member, Gryphon's Circle Campus Service Organization, Recipient, University President's Citation at Graduation, Member, Alpha Sigma nu Honor Society (1974)
- Former President, Los Angeles County Bar Association (1999)
- Member, Board of Directors, Public Counsel (1996-00)
- Vice President, Board of Airport Commissioners (1993-00)
- Former President, Women Lawyers Association of Los Angeles & Women Lawyers Public Action Grant Committee
- Former President, Women Lawyers Public Action Grant Committee
- Member, Los Angeles Superior Court (LASC) Ad Hoc Committee on Informal Compliant Policy
- Board of Governors, California Women Lawyers (1990-91)

HON. PATRICIA SCHNEGG, RET. CONTINUED

EDUCATION & PROFESSIONAL AFFILIATIONS Cont.

- Board of Directors, National Conference of Women's Bar Associations (1987-90)
- Member, Standing Committee on Legal Assistants, American Bar Association (1985-88)
- Membership Committee, Business Trial Lawyers Association (1992-93)
- Faculty Member, National Institute of Trial Advocacy (NITA) Southern California Deposition Program, Los Angeles
- Loyola Marymount University, Alumni Board of Directors & Member, Board of Regents (1996-11)
- Ramona Convent, Member Board of Trustees (1994-08)
- Harriett Buhai Center for Family Law, Board of Directors (1994-95)
- Downtown Women's Center, Board of Directors (1993-96)
- Ramona Convent Alumnae of the Year & Alumnae Association, Director (1980-82)
- Lecturer, Judge's Guide to Difficult Attorneys, Center for Judiciary Education and Research (CJER)
- Lecturer, Bail & Arraignments, Judicial College
- Lecturer, Jury Issues, Los Angeles Superior Court (LASC)

ADR EXPERIENCE & SPECIALTIES

All Types of Personal Injury and Wrongful Death, Employment, Business Contractual, HOA and Probate

ACHIEVEMENTS & AWARDS

- Judge Schnegg was acknowledged as the Judge of the Year by the Los Angeles County Bar Association (LACBA) Criminal Justice Section in 2012
- Los Angeles County Bar Association (LACBA), Criminal Justice Section, Judge of The Year (2012)
- The Mexican American Bar Association (MABA) awarded her Judge of the Year Benjamin Aranda III Lifetime Achievement Award in 2011
- Loyola Law School Alumnae Association, Advancement of Women Award (2002)
- Loyola Law School Distinguished Alumnae of the Year Award in (2001)
- Recipient of the American Board of Trial Advocates Award (1977)

HOBBIES & INTERESTS

Judge Schnegg is an Aviation aficionado. She has logged over 700 navigator hours in Cessna 172 RG and P210 model planes. While serving as Vice President of the Los Angeles World Airports (LAWA) she oversaw the revamping of airport concessions and renovation of airport facilities, supervised ligation (Airlines vs. LAWA) over the increase landing fees and oversaw the construction of the new Ontario Airport. In her spare time, she enjoys spending time with her husband, Dr. William Oppenheim and her daughter Jennifer.

LOCATIONS

All of Southern California

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 498 **March 10, 2021**

Virtual Practice

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.[1] When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

I. Introduction

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.[2]

II. Virtual Practice: Commonly Implicated Model Rules

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.[3] A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

[3] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,[4] virtual practice commonly implicates the key ethics rules discussed below.

A. Commonly Implicated Model Rules of Professional Conduct

1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (*Emphasis added*). Comment [1] to Rule 1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . ."[5] Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.[6]

2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[7] The following non-

[4] For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

[5] MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

[6] Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."[8] As ABA Formal Op. 477R notes, lawyers must employ a "fact-based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation.[9] At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[10] However, depending on the circumstances, lawyers may need to take special precautions.[11] Factors to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."[12] As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.[13] Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."[14] Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

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[8] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].
[9] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[10] *Id.*
[11] The opinion cautions, however, that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).
[12] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[13] MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. *See, e.g.,* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).
[14] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision*."[15] The duty to supervise nonlawyers extends to those both within and outside of the law firm.[16]

B. Particular Virtual Practice Technologies and Considerations

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.[17] To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

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[15] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

[16] As noted in Comment [3] to Model Rule 5.3:

> When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

[17] For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such "files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer."[18] Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.[19]

3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer's ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.[20] Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,[21] to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers' virtual document and data exchange platforms should ensure that

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[18] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018).

[19] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) ("Even lawyers who, (i) under Model Rule 1.6(c), make 'reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,' (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation.'").

[20] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

[21] Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).[22]

5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.[23] Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.[24] This duty requires regular interaction and communication with, for example,

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[22] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

[23] As ABA Formal Op. 477R noted:

> In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

[24] The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.

associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.[25]

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.[26]

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,[27] and should ensure that all client-related information is secure, indexed, and readily retrievable.

7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.[28] The

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- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

[25] *See* ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

[26] For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

[27] *See, e.g.*, Mo. Bar Informal Advisory Op. 20070008 & 20050068.

[28] *See* MODEL RULES OF PROF'L CONDUCT R. 1.15; *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.").

Comment

Firm or Law Firm**

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

[2] The term "of counsel" implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as "of counsel" or by a similar term should be deemed a member of a law firm* for purposes of these rules will also depend on the specific facts. (Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].)

*Fraud**

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

Informed Consent and Informed Written Consent**

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

*Screened**

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

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

CHAPTER 1.
LAWYER-CLIENT RELATIONSHIP

Rule 1.1 Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

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

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

[***Publisher's Note:*** *Comment [1] was added by order of the Supreme Court, effective March 22, 2021.*]

Rule 1.2 Scope of Representation and Allocation of Authority

(a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*

Comment

Allocation of Authority between Client and Lawyer

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

matters generally], 5.425 [limited scope rule applicable in family law matters].)

Rule 1.2.1 Advising or Assisting the Violation of Law

(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.*

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

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(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.*

Comment

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.

[5] If a lawyer comes to know* or reasonably should know* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

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

responsibility for supervising subordinate lawyers and nonlawyers.

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

Rule 1.4 Communication with Clients

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

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

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

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. For example, a lawyer's receipt of funds on behalf of a client requires communication with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding. For example, a lawyer's receipt of funds on behalf of a client requires communication with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1).)

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

[***Publisher's Note:*** *Comment [1] was amended by order of the Supreme Court, effective January 1, 2023.*]

Rule 1.4.1 Communication of Settlement Offers

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

(1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and

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

(b) As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Comment

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under rule 1.4.

Rule 1.4.2 Disclosure of Professional Liability Insurance

(a) A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.

(b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.

(c) This rule does not apply to:

(1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);

(2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;

(3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;

(4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

Comment

[1] The disclosure obligation imposed by paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written* fee agreement with the client or in a separate writing:

> "*Pursuant to rule 1.4.2 of the California Rules of Professional Conduct, I am informing you in writing that I do not have professional liability insurance.*"

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

> "*Pursuant to rule 1.4.2 of the California Rules of Professional Conduct, I am informing you in writing that I no longer have professional liability insurance.*"

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know* whether the lawyer is or is not covered by professional liability insurance.

Rule 1.5 Fees for Legal Services

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

(b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:

(1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;

(2) whether the lawyer has failed to disclose material facts;

(3) the amount of the fee in proportion to the value of the services performed;

(4) the relative sophistication of the lawyer and the client;

(5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

Comment

The writing* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.*

Rule 1.6 Confidential Information of a Client

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Comment

Duty of confidentiality

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know* that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent,* a lawyer must not reveal information protected by Business and Professions Code section 6068, subdivision (e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in

which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent* of the client or as authorized or required by the State Bar Act, these rules, or other law.

Narrow exception to duty of confidentiality under this rule

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code section 6068, subdivision (e)(1). Paragraph (b) is based on Business and Professions Code section 6068, subdivision (e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068, subdivision (e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by section 6068, subdivision (e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

Lawyer not subject to discipline for revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes* is likely to result in death or substantial* bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[5] Neither Business and Professions Code section 6068, subdivision (e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by section 6068, subdivision (e)(1) as permitted under this rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this rule.

Whether to reveal information protected by Business and Professions Code section 6068, subdivision (e) as permitted under paragraph (b)

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by paragraph (b), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by section 6068, subdivision (e)(1) are the following:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the client or a third-party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the lawyer believes* the lawyer's efforts to persuade the client or a third person* not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article I of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by section 6068, subdivision (e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by section 6068, subdivision (e)(1) without waiting until immediately before the harm is likely to occur.

Whether to counsel client or third person not to commit a criminal act reasonably* likely to result in death or substantial* bodily harm*

[7] Paragraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code section 6068, subdivision (e)(1), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial* bodily harm, including persuading the client to take action to prevent a third person* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by section 6068, subdivision (e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action—such as by ceasing the client's own criminal act or by dissuading a third person* from committing or continuing a criminal act before harm is caused—the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable* under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable* under the circumstances, efforts to persuade the client or third person* to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by section 6068, subdivision (e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

Disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) must be no more than is reasonably necessary to prevent the criminal act*

[8] Paragraph (d) requires that disclosure of information protected by Business and Professions Code section 6068, subdivision (e) as permitted by paragraph (b), when made, must be no more extensive than is necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons* who the lawyer reasonably believes* can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Informing client pursuant to paragraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[9] A lawyer is required to keep a client reasonably* informed about significant developments regarding the representation. (See rule 1.4; Bus. & Prof. Code, § 6068, subd. (m).) Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's

family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) only if it is reasonable* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the lawyer's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (b);

(6) the lawyer's belief,* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial* bodily harm to, an individual; and

(7) the lawyer's belief,* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Avoiding a chilling effect on the lawyer-client relationship

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by section 6068, subdivision (e)(1) as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing client that disclosure has been made; termination of the lawyer-client relationship

[11] When a lawyer has revealed information protected by Business and Professions Code section 6068, subdivision (e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, unless the client has given informed consent* to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person* from the risk of death or substantial* bodily harm, the lawyer must withdraw from the representation. (See rule 1.16.)

Other consequences of the lawyer's disclosure

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by this rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law

[13] This rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code section 6068, subdivision (e)(1) recognized under California law.

shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's* interests is so great that the rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's* signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*

Where it is reasonably* apparent to a lawyer who receives a writing* relating to a lawyer's representation of a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, the lawyer shall:

(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

(b) promptly notify the sender.

Comment

[1] If a lawyer determines this rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* (See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].) In providing notice required by this rule, the lawyer shall comply with rule 4.2.

[2] This rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person.* (See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].)

CHAPTER 5.
LAW FIRMS* AND ASSOCIATIONS

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

(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.

(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.

(c) A lawyer shall be responsible for another lawyer's violation of these rules and the State Bar Act 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 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.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably Assure Compliance with the Rules*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these rules and the State Bar Act. This rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. (See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).)

Paragraph (b) – Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these rules.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(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.*

(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.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOANNA G. GRABOWSKI, Plaintiff and Appellant, v. KAISER FOUNDATION HEALTH PLAN, INC., et al., Defendants and Respondents.	D076968 (Super. Ct. No. 37-2019-00013115-CU-PA-CTL)

APPEAL from an order of the Superior Court of San Diego County, David M. Rubin, Judge. Reversed with directions.

Joanna G. Grabowski, in pro. per., for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Alysia B. Carroll; Davis, Grass, Goldstein & Finlay and Vincent J. Iuliano, for Defendants and Respondents.

Joanna G. Grabowski brought claims for medical malpractice against Kaiser Foundation Health Plan, Inc., Southern California Permanente Medical Group, and various associated physicians (collectively, Kaiser).[1] The

1 The physicians are Barbie Lynn Norman, Walter D. Vasquez, John Stewart Kennedy, and Diana Cantu.

claims were heard by an arbitrator, Byron Berry, pursuant to a contractual arbitration agreement. After a contested hearing, the arbitrator awarded judgment in favor of Kaiser.

Grabowski petitioned the trial court to vacate the arbitration award. (Code Civ. Proc., § 1285; further statutory references are to the Code of Civil Procedure.) She alleged (1) the arbitrator committed misconduct, and revealed disqualifying bias, by engaging in an ex parte communication with Kaiser's counsel about Grabowski's self-represented status; (2) the arbitrator failed to disclose two matters involving Kaiser where he was selected as an arbitrator; and (3) the arbitrator improperly denied Grabowski's request for a continuance of the arbitration hearing. The trial court found that "the arbitrator's conduct did not rise to a level that substantially prejudiced [Grabowski's] rights" and therefore dismissed her petition.

Grabowski appeals the trial court's order dismissing her petition. She reasserts all three grounds for vacating the arbitration award. We agree the award should be vacated. The ex parte communication between the arbitrator and Kaiser's counsel was recorded by Grabowski's mother as part of her effort to document the arbitration hearing. The audio recording reveals comments by the arbitrator making light of Grabowski's self-representation and her inability, in the arbitrator's view, to effectively represent herself. The arbitrator volunteered these comments to Kaiser's counsel, ex parte, and they shared a hearty laugh about Grabowski's perceived shortcomings as an advocate.

The arbitrator committed misconduct on several levels. At least one requires vacating the arbitration award. A neutral arbitrator has a continuing duty to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the neutral arbitrator would be

able to be impartial. The arbitrator's ex parte communication with Kaiser's counsel certainly qualifies. Because the arbitrator was aware of this communication and did not disclose it to Grabowski, the award must be vacated. (§ 1286.2, subd. (a)(6)(A).) We therefore reverse the order dismissing the petition with directions to grant the petition and vacate the arbitration award. In light of our conclusion, we need not consider the other grounds for vacating the award asserted by Grabowski.

FACTUAL AND PROCEDURAL BACKGROUND

In the underlying arbitration, Grabowski alleged that Kaiser negligently failed to diagnose a large, benign ovarian tumor. A Kaiser physician noted abnormalities in an early radiological scan and recommended follow-up, but this recommendation was not followed by Kaiser. Over the ensuing years, Grabowski suffered severe pain and discomfort, which she attributed to the growing tumor. The tumor was discovered when Grabowski was a teenager, after it had grown close to the size of a melon. Kaiser performed surgery to remove it. After the surgery, Grabowski continued to suffer severe pain. A different medical provider discovered that a portion of Grabowski's small intestine had become trapped when her surgical incision was closed.

Kaiser disputed that it should have diagnosed the tumor or that the tumor caused Grabowski's years-long symptoms. It contended Grabowski's pain was caused by other conditions.

The arbitration hearing was held over five days. The arbitrator heard percipient and expert testimony from both sides. Grabowski, now college-aged, represented herself. She was assisted by her mother. Kaiser was represented by an attorney, Vincent Iuliano, who is also co-counsel of record in this appeal.

In his award, the arbitrator found that Grabowski's tumor could not have been diagnosed until it became approximately the size of a melon. He understood Grabowski's expert to testify that Kaiser's physicians had individually met the requisite standard of care, but that Kaiser as a whole "breached its standard of care for not diagnosing the tumor earlier." The arbitrator rejected this theory, which he characterized as "an attempt to impose liability on Kaiser without finding fault or blame on any of the doctors" who treated Grabowski. The arbitrator noted that Grabowski had suffered severe pain for many years and continued to experience pain. He theorized that her pain was caused by "her intense engagement in athletics as a pitcher on her college softball teams."

The arbitrator concluded that Grabowski "failed to establish through expert testimony that the legal cause of her injuries was the failure of her Kaiser doctors to exercise the care and skill required under the circumstances." He therefore awarded judgment in favor of Kaiser.

Grabowski, represented by counsel, petitioned the trial court to vacate the award based on three primary grounds. She supported her petition with several declarations, documentary exhibits, and the audio recording of the arbitrator's ex parte communication with Kaiser's counsel.

First, Grabowski contended that the arbitrator committed misconduct during an early break in the arbitration proceedings by joking with Kaiser's counsel, ex parte, about Grabowski's self-representation. Grabowski's mother was recording the proceedings on her cell phone and had inadvertently left it going while she and Grabowski left the room. The unofficial transcript of the audio record submitted by Grabowski is reproduced below, with minor punctuation changes. Kaiser does not contest its general accuracy.

THE ARBITRATOR: "I've been doing this for a long time. This has been one of the bigger—bigger challenges, uh, because she doesn't have an attorney. It makes it just kinda awkward."

KAISER'S COUNSEL: "First time in 30 years in my practice . . . ."

THE ARBITRATOR: "For you?"

KAISER'S COUNSEL: " . . . I've never seen this before."

THE ARBITRATOR: "He'd, uh, everybody had representatives before?"

KAISER'S COUNSEL: "Absolutely."

THE ARBITRATOR: "And this is the wrong case. This is the wrong case. How can you not have an attorney? Even in some union cases and stuff that I deal with quite a bit. (Laughs.) Private cases, uh, or what have you, 'cause even with, uh, in union cases, uh, they have representatives who are not attorneys, but they know this stuff so well, they might, uh, you know, they're just as qualified as an attorney. So, she must have a representative that you can rely on, you know, to make sure that everything's done correctly. You know, but this is . . . . (Laughs.) [She] picked one of the toughest, factual cases I've ever dealt with to have somebody in [pro. per.] (Laughs.)"

Grabowski asserted that the arbitrator was " 'yukking it up' " with Kaiser's counsel and that his comments, especially his tone and laughter, showed his disrespect and disregard for Grabowski. She contended that the

ex parte communication showed bias, which was grounds for disqualification. (See §§ 170.1, subd. (a)(6), 1281.91, subd. (d).) She also argued that the communication showed corruption, fraud, or other undue means that required vacating the award. (See § 1286.2, subd. (a)(1)-(3).)

Second, Grabowski contended the arbitrator failed to disclose two matters involving Kaiser where he accepted appointment as an arbitrator. Grabowski maintained that she would have sought to disqualify the arbitrator if these two matters had been disclosed. She argued that the arbitrator's failure to disclose the two matters breached his ethical obligations and constituted a further ground for vacating the award. (See § 1286.2, subd. (a)(6)(A).)

Third, Grabowski contended the arbitrator failed to grant a continuance of the arbitration hearing, despite her showing of good cause to do so. Grabowski wanted more time to speak with her surgeon about treatment for spine conditions she believed were caused by Kaiser's negligence. Grabowski argued the arbitrator's failure to grant a continuance substantially prejudiced her rights and was therefore grounds for vacating the award as well. (See § 1286.2, subd. (a)(5).)

Kaiser opposed the petition to vacate. It contended that the recorded ex parte communication was not improper because it did not involve the merits of the arbitration. It maintained that the communication was not derogatory, did not reveal any bias, and did not constitute misconduct. Kaiser also contended that the arbitrator had served notice of the two additional matters involving Kaiser on Grabowski's prior attorney, while he was still representing Grabowski. Regarding the continuance, Kaiser argued that Grabowski did not show good cause for a continuance because she did not link her spine treatment to Kaiser's alleged negligence with competent

evidence. And, in any event, Grabowski had not shown that the arbitrator's failure to grant a continuance prejudiced her.

After hearing argument, the trial court issued a written statement of decision. It found that the ex parte communication was improper and unethical. The court wrote, "Though very short, this was not a general discussion about scheduling or administration. Rather, the conversation centered on [Grabowski]: Her pro per status, that the case is factually complicated and the potential for an adverse result as a consequence of lacking an attorney to assist her." However, the court found that Grabowski did not show how the communication "substantially prejudiced her rights" and she did not establish "a nexus between the communication and the award." The court also found that Grabowski had not shown the arbitrator failed to provide notice of the two additional Kaiser matters to her prior counsel. Finally, it found that Grabowski did not adequately justify her request for a continuance and the arbitrator did not abuse his discretion by denying it. Overall, Grabowski "fail[ed] to demonstrate 'substantial prejudice' or a nexus between the arbitrator's conduct and the arbitration award." The court therefore dismissed her petition. Grabowski appeals.[2]

DISCUSSION

As noted, Grabowski contends the trial court erred by not vacating the arbitration award based on the arbitrator's ex parte communication with Kaiser's counsel. Among other things, Grabowski argues that the award must be vacated because the arbitrator failed to disclose the communication

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2 Grabowski represents herself in this appeal. "Under the law, a party may choose to act as his or her own attorney. [Citations.] '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys.' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

as required by statute and ethical rules. (§ 1286.2, subd. (a)(6)(A).) We agree.[3]

"The California Arbitration Act (§ 1280 et seq.) 'represents a comprehensive statutory scheme regulating private arbitration in this state.' [Citation.] The statutory scheme reflects a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citation.] '[I]t is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final.' [Citation.] [¶] Generally, in the absence of a specific agreement by the parties to the contrary, a court may not review the merits of an arbitration award. [Citation.] Although the parties to an arbitration agreement accept some risk of an erroneous decision by the arbitrator, 'the Legislature has reduced the risk to the parties of such a decision by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process.' " (*Haworth*, *supra*, 50 Cal.4th at p. 380.)

"The statutory scheme, in seeking to ensure that a neutral arbitrator serves as an impartial decision maker, requires the arbitrator to disclose to the parties any grounds for disqualification." (*Haworth*, *supra*, 50 Cal.4th at

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3 In the trial court, Grabowski framed her contention somewhat differently, focusing on the misconduct of the arbitrator, rather than the failure to disclose. To the extent this reframing constitutes a new theory presented for the first time on appeal, Kaiser has not objected to it and we exercise our discretion to allow it. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709.) The material facts are undisputed. And, as we explain, the disclosure requirement presents a mixed question of fact and law that is predominantly legal and subject to de novo review. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385-386 (*Haworth*).)

p. 381, fn. omitted.) If the arbitrator "failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware," the trial court *must* vacate the arbitration award. (§ 1286.2, subd. (a)(6)(A).) "Under the applicable California statute, an arbitrator's failure to make a required disclosure requires vacation of the award, without a showing of prejudice." (*Haworth*, at p. 394.) The statute "leaves no room for discretion." (*Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 845; accord, *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 73 (*Benjamin*).)

"The arbitrator disclosure rules are strict and unforgiving. And for good reason. Although dispute resolution provider organizations may be in the business of justice, they are still in business. The public deserves and needs to know that the system of private justice that has taken over large portions of California law produces fair and just results from neutral decision makers." (*Honeycutt v. JPMorgan Chase Bank, N.A.* (2018) 25 Cal.App.5th 909, 931 (*Honeycutt*).)

Section 1281.9 requires that, "when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial," including certain enumerated matters. (§ 1281.9, subd. (a).) Among the enumerated matters is "[t]he existence of any ground specified in Section 170.1 for disqualification of a judge." (§ 1281.9, subd. (a)(1).) Section 170.1, in turn, states that a judge "shall be disqualified" if, for any reason, "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (§ 170.1, subd. (a)(6)(A)(iii).) "Bias or prejudice toward a

lawyer in the proceeding may be grounds for disqualification." (§ 170.1, subd. (a)(6)(B).)

Section 1281.85 imposes additional disclosure requirements. It states, "a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for arbitrators adopted by the Judicial Council pursuant to this section. . . . The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships." (§ 1281.85, subd. (a).)

The Judicial Council subsequently adopted the Ethics Standards of Neutral Arbitrators in Contractual Arbitration. (*Honeycutt*, *supra*, 25 Cal.App.5th at p. 921.) California Rules of Court, Ethics Standard 7 addresses disclosure. Like its statutory counterpart, Ethics Standard 7 requires disclosure of "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial," including various enumerated matters. (Ethics Standards, std. 7(d).) Among the enumerated matters is any other matter that "[m]ight cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial[.]" (Ethics Standards, std. 7(d)(15)(A).)

The Ethics Standards impose a continuing duty of disclosure, "applying from service of the notice of the arbitrator's proposed nomination or appointment until the conclusion of the arbitration proceeding." (Ethics Standards, std. 7(f); see *Honeycutt*, *supra*, 25 Cal.App.5th at pp. 922-923.) If, after the time for initial disclosures has passed, "an arbitrator subsequently

becomes aware of a matter that must be disclosed . . . , the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter." (Ethics Standards, std. 7(c)(2).)

A federal appellate court has interpreted these statutes as imposing an *initial* duty of disclosure under section 1281.9 and a *continuing* duty of disclosure under section 1281.85 and the Ethics Standards. (See *Johnson v. Gruma Corp.* (9th Cir. 2010) 614 F.3d 1062, 1067-1068.) As relevant here, regardless of its source, the substantive duty to disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial" remains the same. (§ 1281.9, subd. (a); Ethics Standards, std. 7(d).)

" 'The "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather is a "well-informed, thoughtful observer." ' [Citation.] '[T]he partisan litigant emotionally involved in the controversy underlying the lawsuit is not the *disinterested objective observer* whose doubts concerning the judge's impartiality provide the governing standard.' " (*Haworth*, *supra*, 50 Cal.4th at p. 389.)

" 'Impartiality' entails the 'absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind.' [Citation.] In the context of judicial recusal, '[p]otential bias and prejudice must clearly be established by an objective standard.' " (*Haworth*, *supra*, 50 Cal.4th at p. 389.) " 'An impression of possible bias in the arbitration context means that one could reasonably form a belief that an arbitrator was biased *for or against a party for a particular reason*.' " (*Ibid.*) " 'Bias is defined as a mental [predilection] or prejudice; a leaning of the mind; "a predisposition to decide a cause or an issue in a certain way, which

does not leave the mind perfectly open to conviction." ' " (*Baxter v. Bock* (2016) 247 Cal.App.4th 775, 791.)

As noted, in order to prevail, Grabowski "is not required to prove that [the arbitrator] actually was influenced by bias." (*Haworth*, *supra*, 50 Cal.4th at p. 384.) Instead, the "sole issue" is whether the information was required to be disclosed. (*Ibid*.) Whether disclosure was required "is a mixed question of fact and law that should be reviewed de novo. The applicable rule provides an objective test by focusing on a hypothetical reasonable person's perception of bias. The question is not whether [the arbitrator] actually was biased or even whether he was likely to be impartial; those questions involve a subjective test that appropriately could be characterized as primarily factual. The question here is how an objective, reasonable person would view [the arbitrator's] ability to be impartial." (*Id*. at pp. 385-386.) Where, as here, there are no underlying material facts in dispute, our review of the court's order denying Grabowski's petition to vacate is de novo. (*Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299, 1312.)

Initially, we note that the arbitrator's ex parte communication with Kaiser's counsel was not ethical. Kaiser does not dispute this conclusion. California Rules of Court, Ethics Standard 14, subdivision (a) provides, "An arbitrator must not initiate, permit, or consider any ex parte communications or consider other communications made to the arbitrator outside the presence of all of the parties concerning a pending or impending arbitration, except as permitted by this standard, by agreement of the parties, or by applicable law." Even where an ex parte communication is permitted, as for example about administrative matters, "the arbitrator must promptly inform the other parties of the communication and must give the other parties an opportunity

to respond before making any final determination concerning the matter discussed." (Ethics Standards, std. 14(b).) The ex parte communication here was not about "administrative matters" and was therefore prohibited by Ethics Standard 14.

Beyond its prohibited nature, we conclude a person aware of the ex parte communication could reasonably entertain a doubt that the arbitrator would be able to be impartial. The communication showed that the arbitrator had concluded that Grabowski could not be an effective advocate for herself. While this conclusion may not necessarily evince bias in and of itself, the arbitrator's decision to share his conclusion with Kaiser's counsel certainly does. The arbitrator plainly felt a connection to Kaiser's counsel, which made him comfortable enough to violate ethical rules and comment on Kaiser's opponent.

Moreover, the arbitrator's comments went far beyond the bare conclusion that Grabowski was ineffective. The audio recording, which reveals the arbitrator's tone and attitude, is striking. The arbitrator commiserated with Kaiser's counsel about their shared predicament (in his view) and shared a hearty laugh at Grabowski's expense. The arbitrator vividly expressed his incredulity that Grabowski was representing herself. The arbitrator also commented on the nature of the case itself, stating that Grabowski "picked one of the toughest, factual cases [the arbitrator had] ever dealt with to have somebody in [pro. per.]" His emotional response is apparent. The exact reason for the laughter is somewhat unclear, but it was clearly improper. Whether it was nervous laughter at the ethical transgression that had just occurred, disbelieving laughter that Grabowski was so unable to represent herself, or derisive laughter about Grabowski's

perceived incompetence, it highlights the reasons why the ex parte communication was improper.

A person aware of the ex parte communication could reasonably believe that the arbitrator did not take Grabowski seriously and could not maintain an open mind about her claims. He was biased against her for a particular reason, i.e., her self-represented status. A person aware of the ex parte communication could also reasonably believe that the arbitrator was partial to Kaiser's counsel, again for a specific reason. He was a fellow professional at the mercy (in the arbitrator's view) of Grabowski's lack of legal training and perceived incompetence.

Again, we emphasize that an arbitrator's private conclusion that an advocate is ineffective or incompetent does not necessarily create grounds for disqualification. The dispositive circumstances here are the arbitrator's decision to share this conclusion with Kaiser's counsel and the arbitrator's obviously emotional response to Grabowski's self-representation. A reasonable person could conclude that these were not the actions and statements of an impartial decision maker.

Because a reasonable person aware of the ex parte communication could reasonably entertain a doubt that the arbitrator would be able to be impartial, the arbitrator was required to disclose the communication within 10 calendar days. (Ethics Standards, std. 7(c)(2).) Grabowski would then have had the opportunity to disqualify the arbitrator. (See § 1281.91, subd. (d); Ethics Standards, std. 10(a)(3).) The arbitrator did not make the required disclosure. The statute therefore requires that the arbitration award be vacated, without any further showing. (§ 1286.2, subd. (a)(6)(A); see *Haworth*, *supra*, 50 Cal.4th at p. 394.)

In its appellate briefing, Kaiser did not address whether the arbitrator should have disclosed the ex parte communication or whether the arbitration award must be vacated based on his failure to do so. Instead, it argued only that the ex parte communication did not constitute corruption, fraud, or the use of undue means to obtain an arbitration award. At oral argument, Kaiser conceded the ex parte communication should have been disclosed, but it maintained that a further showing was required to vacate the award. In its briefing, Kaiser asserted that Grabowski must show " 'substantial prejudice or a nexus between the award and the alleged undue means used to attain it.' " Although this phrase appears in quotation marks in Kaiser's briefing, it does not appear in either of the authorities Kaiser cites: section 1286.2, subdivision (a), and *Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 834 (*Pour Le Bebe*).

In any event, Kaiser does little to explain the basis for this legal standard or why it should be applied here. *Pour Le Bebe* references a "nexus" requirement in discussing a federal appellate decision: "As the Ninth Circuit said in *A.G. Edwards*, a court should not presume that perjured evidence or evidence procured by undue means had an impact on the arbitrators. Since 'arbitrators are not required to state the reasons for their decisions'; we 'presume[] the arbitrators took a permissible route to the award where one exists'; and the applicable statute provides for vacation of an award ' "procured by corruption, fraud, or undue means" ' [citation], the moving party needs to demonstrate a nexus between the award and the alleged undue means used to attain it." (*Pour Le Bebe*, *supra*, 112 Cal.App.4th at pp. 833-834, quoting *A.G. Edwards & Sons, Inc. v. McCollough* (9th Cir. 1992) 967 F.2d 1401, 1403.) Perjured evidence or evidence procured by undue means—through no fault of the arbitrator—is not at issue here.

Pour Le Bebe itself considered "whether 'other undue means' includes representation of the prevailing party by an attorney with a potential conflict of interest[.]" (*Pour Le Bebe*, *supra*, 112 Cal.App.4th at p. 826.) The losing party criticized the arbitration panel "for its limited inquiry into the conflict issue, but [it] highlight[ed] no aspect of the arbitrators' award that might have been impacted by any confidential information allegedly obtained" by the conflicted attorneys. (*Id*. at p. 835.) Because the losing party "failed to show by clear and convincing evidence that a conflict existed and that it had a substantial impact on the panel's decision," the court affirmed an order denying a petition to vacate. (*Id*. at p. 837.) A conflicted attorney—likewise not due to any fault of the arbitrator—is also not at issue here.

Kaiser also relies on *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.* (1946) 29 Cal.2d 228, but it does not explain how that 70-year-old opinion relates to the current statutory scheme governing arbitration. *Pacific Vegetable* held that, in order to justify vacating an arbitration award, "the misconduct or error complained of, to whatever class it might belong, must be of such character that the rights of the party complaining were prejudiced thereby." (*Id*. at p. 240.) Here, to the extent this standard is relevant, Grabowski's rights *were* substantially prejudiced because she was unable to exercise her statutory right to disqualify an arbitrator that a reasonable person could doubt would be impartial. (See *Benjamin*, *supra*, 195 Cal.App.4th at p. 73.) We disagree with Kaiser's suggestion that her rights were not prejudiced because she was able to present her evidence to the arbitrator and the arbitrator allegedly "paid careful consideration to Grabowski's argument and evidence." Grabowski was entitled to the safeguards set out in the statutory scheme to ensure that she was informed of any potential for bias in the neutral arbitrator, so that her evidence and argument would be heard by an

impartial decision maker (or at least one whose potential biases were known). Because those safeguards were disregarded here, the entire arbitration is suspect.[4]

Kaiser asserts that the award should not be vacated because "even if the ex parte communication did not occur, the result would have been the same." Kaiser does not offer any support for such a legal standard in this context or any cogent argument why we should adopt it. Moreover, as evidence that the result would have been the same, Kaiser cites *the arbitrator's* factual findings. In a situation where the arbitrator's impartiality is at issue, such reliance is unpersuasive.

Although Kaiser did not raise them in its briefing, the trial court relied on several authorities that considered ex parte communications in other contexts. They are not applicable because they did not consider—and apparently did not involve—communications that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial, thereby imposing the requirement of disclosure. The focus in these authorities was whether the arbitrator's *receipt* of the communication exposed him to new evidence or arguments, to which the opposing party could not respond. (See *Baker Marquart LLP v. Kantor* (2018) 22 Cal.App.5th 729, 740-741 [reversing an order confirming an arbitration award, based on ex parte confidential brief submitted to the arbitrator without notice to the opposing party; "Under the facts of this case, we conclude Baker Marquart had no meaningful or adequate opportunity to respond to the new claims

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[4] For this reason, it could be argued that the arbitration award must be vacated for the additional reason that Grabowski's rights "were substantially prejudiced by [the] misconduct of a neutral arbitrator." (§ 1286.2, subd. (a)(3).)

Kantor raised for the first time in its confidential brief. This is neither fair nor proper."]; *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 372 [affirming an order vacating an arbitration award, based on an ex parte letter brief submitted by a party arbitrator to the neutral arbitrator; "While it may be true that Maaso had an opportunity to present all of his evidence during the arbitration hearing, Maaso was prevented from presenting all of his *arguments* to the neutral arbitrator. As the plaintiff with the burden of proof on the issue of causation, Maaso did not have the last word because he did not have an opportunity to rebut the arguments made in Hammond's ex parte letter brief."]; *A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, 1476 [affirming an order denying a petition to vacate, based on an ex parte communication informing the arbitrator that he had inadvertently failed to resolve one claim; "In the absence of a showing that the arbitrator was improperly influenced or actually considered evidence outside the original arbitration proceedings such that appellants needed a further opportunity to be heard on the stop notice claim, appellants cannot demonstrate that the amended award was procured by corruption, fraud, undue means, or misconduct of the arbitrator within the meaning of section 1286.2, subdivisions (a), (b) or (c)."].)

Unlike these cases, the issue here is not a party's (or a party arbitrator's) attempt to influence the neutral arbitrator through an ex parte communication. Instead, the issue is the arbitrator's own decision to engage in an ex parte communication, revealing significant potential bias. It is not primarily a matter of Grabowski's inability to respond; it is the arbitrator's failure to disclose a potentially disqualifying matter.

The trial court also cited *Cox v. Bonni* (2018) 30 Cal.App.5th 287. In *Cox*, there were two ex parte communications at issue: (1) a short

conversation between the arbitrator and defense counsel, during a different arbitration, about scheduling for the next week; and (2) an ex parte email from defense counsel to the arbitrator declining to seek costs in the arbitration under section 998. (*Cox*, at pp. 296-297.) The plaintiff argued that the arbitration award should be vacated based on, among other things, the arbitrator's failure to disclose the communications. (*Id*. at pp. 309-310.) On the first ex parte communication, *Cox* noted that plaintiff's counsel was actually aware of the communication before the arbitration hearing began. (*Id*. at p. 310.) By not objecting at that time, the plaintiff forfeited any challenge to the resulting award. (*Id*. at p. 311.) On the second ex parte communication, *Cox* noted that " 'not every item of information that is required to be disclosed under section 1281.9 constitutes a "ground for disqualification" as the term is used in section 1286.2.' " (*Id*. at p. 310, quoting *Dornbirer v. Kaiser Foundation Health Plan, Inc.* (2008) 166 Cal.App.4th 831, 842 (*Dornbirer*).) *Cox* agreed that it would be "absurd" to vacate an arbitration award "based on minor omissions of details." (*Cox*, at p. 310.) It therefore concluded that "section 1286.2 cannot be read to require vacation of an award when an arbitrator fails to disclose an ex parte

communication waiving section 998 costs that did not prejudice the other party." (*Ibid.*)[5]

Here, unlike *Cox*, there is no issue of forfeiture. And the required disclosure, of a matter that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial, is a ground for disqualification. (See §§ 170.1, subd. (a)(6)(A)(iii), 1281.91, subd. (d).) The prejudice to Grabowski is apparent.

In sum, the arbitrator's ex parte communication with Kaiser's counsel could cause a person aware of the facts to reasonably entertain a doubt that

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[5] In *Dornbirer*, this court considered a neutral arbitrator's disclosure statement, which disclosed a number of prior arbitrations where the defendant was a party, but which did not include certain information required by statute for each arbitration, such as the dates, the prevailing parties, the names of the attorneys, and the amount of any monetary damages awarded. (*Dornbirer*, *supra*, 166 Cal.App.4th at p. 840; see § 1281.9, subd. (a)(3)-(4).) The plaintiff argued that "each and every item of information that is required to be disclosed pursuant to section 1281.9 constitutes a 'ground for disqualification' " under section 1286.2, subd. (a)(6)(A). (*Dornbirer*, at p. 842.) This court disagreed. We held that "section 1286.2 cannot be read to nullify every arbitration award that stems from an arbitration in which the arbitrator failed to disclose all of the details of prior arbitrations, particularly where neither party challenged the arbitrator despite being aware that this information was not contained in the arbitrator's disclosure." (*Ibid.*) We explained, "When a party has been informed of the existence of a prior relationship between the arbitrator and another party or an attorney, that party is aware of facts that would put the party on notice of the potential for bias. If the arbitrator does not include additional information regarding such a relationship in the disclosure, a party has sufficient information to inquire of the arbitrator concerning that information. It is only when the arbitrator fails to acknowledge the existence of such a relationship that a party is without sufficient information to question the impartiality of the arbitrator." (*Ibid.*) *Dornbirer* does not apply here. Among other things, Grabowski was completely unaware of the facts that could lead to doubts about the arbitrator's impartiality.

the arbitrator would be able to be impartial. The arbitrator was therefore required to disclose the communication to Grabowski, so she could decide whether to seek his disqualification. (§ 1281.85; Ethics Standards, std. 7(d).) The arbitrator did not disclose the communication, and Grabowski was unable to exercise her right. The arbitrator's failure to disclose a ground for disqualification requires that the arbitration award be vacated without any further showing of prejudice. (§ 1286.2, subd. (a)(6)(A); *Haworth*, *supra*, 50 Cal.4th at p. 394.) "While that rule seems harsh, it is necessary to preserve the integrity of the arbitration process." (*Gray v. Chiu* (2013) 212 Cal.App.4th 1355, 1366; accord, *Honeycutt*, *supra*, 25 Cal.App.5th at pp. 931-932.)

DISPOSITION

The order dismissing Grabowski's petition to vacate is reversed. On remand, the trial court is directed to grant Grabowski's petition, vacate the arbitration award, and proceed pursuant to Code of Civil Procedure section 1287. Grabowski is entitled to her costs on appeal.

GUERRERO, J.

WE CONCUR:

BENKE, Acting P. J.

DO, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

04/19/2021

KEVIN J. LANE, CLERK

By _____ Deputy Clerk

JUDICATE WEST
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GUIDELINES FOR VIRTUAL ARBITRATION PROCEEDINGS

These guidelines (last updated 8/18/2021) address circumstances that are unique to a virtual arbitration proceeding. They can be applied to both partially virtual ("hybrid") or fully virtual sessions of an arbitration proceeding, including the arbitration hearing itself. They are intended to assist the Arbitrator(s) and Parties in an arbitration by supplementing procedural terms that otherwise govern the conduct of the proceeding.

1. Videoconferencing Platform and Virtual Hearing Support Functions

1.1 **Platform.** Judicate West has selected the Zoom Pro platform for enabling virtual arbitration proceedings. This is not intended as, nor does it constitute, an endorsement of Zoom. Nor is it a warranty or guarantee that the Zoom Pro platform will perform as intended or provide adequate security, privacy, or functionality. However, if all counsel and the Arbitrator(s) agree, an alternative virtual platform may be used. Counsel will be required to sign a waiver document on behalf of themselves and their clients before they may move forward with hybrid or virtual management of a dispute.

1.2 **Download Zoom App.** In advance of any hybrid or virtual session in a matter, each virtual Participant must download the free Zoom app to the device(s) that will be used for the session.

1.3 **Assistance of Hearing Support Provider.** A Judicate West Moderator who is trained in Zoom will be available at all times during virtual sessions to assist with technical issues that may come up. All counsel will provide Judicate West with contact information in advance that can be provided to the Moderator, preferably cell phone numbers for all virtual Participants.

1.4 **Venue.** Although virtual Participants may be located in different places, the venue for this proceeding shall be deemed to be the venue specified in the agreement between the Parties. If no venue is specified for a fully virtual proceeding, the venue shall be the Arbitrator(s)' primary Judicate West office location in California. If no venue is specified for a hybrid proceeding, the venue shall be the Judicate West office location in California where the Arbitrator(s) and some of the Participants have gathered for the session.

2. Preparation by Virtual Participants

2.1 **Equipment.** Each virtual Participant in the proceeding – Arbitrator(s), counsel, party witnesses, party representatives, and, if applicable, court reporters and interpreters – must test the compatibility of their equipment (*e.g.,* laptop, desktop computer, webcam, headphones) with the video conference platform. Each virtual Participant is responsible for ensuring the compatibility and functioning of their equipment.

2.1.1 **Screen Size.** No virtual Participant may use a device with a screen size measured diagonally of less than 11 inches (such as a smartphone) except with the advance approval of the Arbitrator(s).

2.1.2 **Number of Screens.** Ideally, each virtual Participant should have two screens available. The virtual Participant may use one screen to display and participate in the proceeding and the other screen to display electronic exhibits, if any. See Virtual Guideline § 7 for more information regarding exhibit management.

2.1.3 **Bandwidth.** Each virtual Participant must be in a physical location for the proceeding that has adequate internet bandwidth to support the use of the virtual platform. Virtual Participants should instruct other users of their LAN to avoid computer processes that will use substantial bandwidth while the virtual Participant is involved in the proceeding.

2.1.4 **Camera.** Virtual Participants must situate their webcams so as to appear well lit against a not-distracting background. Virtual witnesses giving testimony should sit back from the camera so that their hands are visible on the table in front of them. Their cell phones should also be face-down on the table and visible. All other virtual Participants should sit so that only their head and shoulders are visible.

2.2 **Orientation Program.** Any virtual Participant who does not have substantial and successful experience with the Zoom platform should participate in one or more online orientation or training programs offered by Zoom (www.support.zoom.us) to become familiar with the Zoom platform's features and operation. If another virtual platform is being used, the virtual Participant should participate in a similar orientation program for that platform.

2.3 **Witness Familiarity.** Counsel is responsible for ensuring that all non-adverse virtual witnesses called by the Party whom counsel represents are familiar with the virtual platform being employed. Counsel are also responsible for ensuring that each of these virtual witnesses has suitable equipment to participate in the proceeding. Counsel must conduct a test session with each of these virtual witnesses in advance of the proceeding and direct them to practice use of both the virtual platform and the process to view any electronic exhibits.

3. Platform Test Session

3.1 **Process.** At the discretion of the Arbitrator(s), a non-substantive test session devoted solely to the operation of the virtual platform may be ordered with Participants (not including non-party witnesses or experts) and either the Arbitrator(s), the Judicate West Moderator, a Judicate West Client Experience Specialist, or a Judicate West Case Manager. The test session should take place at least two days before the scheduled start of the proceeding. The test session should enable each virtual Participant to practice the activities the virtual Participant will likely need to employ during the proceeding. No substantive argument should be presented during the test session unless otherwise permitted in advance by the Arbitrator(s).

3.2 **Equipment.** The test session should enable review of the camera angle, background, and lighting that each virtual Participant will use during the proceeding.

3.3 **Exhibit Management.** If electronic exhibits will be used during the proceeding, they should be downloaded by virtual Participants in advance of the test session. Each Party should include at least one non-substantive "test" document in the electronic document files that will be available to Participants for use in the proceeding. The test session should permit each virtual Participant to practice accessing the electronic exhibit files, including accessing and reviewing the "test" document.

4. Oaths

The Arbitrator(s) are satisfied that they have the legal authority to administer the Oath in connection with hybrid and virtual proceedings, and that the Oath will be fully binding upon all who take it. The Arbitrator(s) may also seek to employ an expanded Oath addressing considerations specific to virtual proceedings. If any Party wishes to challenge the Arbitrator(s)' authority to administer the Oath, they must do so within 10 calendar days of receiving these Guidelines by advising the Arbitrator(s) and all Parties thereof. The Arbitrator(s) will schedule briefing and a hearing, as appropriate, to resolve any issues well ahead of the hearing.

5. Interpreters

If any witness or other Participant requires the use of an interpreter, the Parties must notify the Arbitrator(s) and create a plan for the interpreter's participation in the proceedings.

6. Requirements During the Proceeding

6.1 **Advance Log-On.** All virtual Participants other than witnesses must log on to the virtual platform at least 10 minutes in advance of the proceeding start time. The proceeding will not begin until all necessary Participants are adequately connected to the virtual platform.

6.2 **Emergencies During Hearing.** Virtual Participants should notify the Arbitrator(s) by phone of any emergency arising out of technical difficulties during the hearing. Logging off and back on again will often solve a problem. In the event the problem cannot be resolved in a reasonable time, the Arbitrator(s) will confer with the Parties via conference call to provide a reasonable solution to the problem in terms of scheduling, format, timing, etc. consistent with the interests of justice and practicality. Other emergencies will be managed in a similar manner.

6.3 **No Multi-Tasking.** All Participants must devote their full attention to the proceeding. Multi-tasking is not permitted, except to the extent the Arbitrator(s) give advance permission for counsel to work as appropriate on matters related to the proceeding. See also Virtual Guideline § 7.7 ("No Coaching or Consultation of Witnesses").

6.4 **Disclosure of Other Persons.** At the beginning of the proceeding, the Arbitrator(s) will ask each virtual Participant under oath to identify any other persons present at the Participant's location. Each virtual Participant has an ongoing obligation to alert the Arbitrator(s) and other Parties if any additional person joins the Participant. At the beginning and end of each session, each virtual Participant must disclose any persons who have or had access to any portion of the proceeding.

6.5 **Confidentiality.** The Parties must take all steps necessary to ensure the confidentiality of the conduct of the proceedings. No person may have access to the live video and/or audio feed of the proceeding other than disclosed Participants. Recording and chat features will be disabled unless authorized under Virtual Guideline § 6.6.

6.6 **Recording and Transcription.** Without the advance written authorization of the Arbitrator(s), no Participant may record, broadcast, take screen shots of, or copy any part of the proceeding. Zoom and other virtual platforms may offer a recording and transcription functionality to the Arbitrator(s) in appropriate cases. The Parties must confer with the Arbitrator(s) in advance of the hearing to determine whether recording, transcription, or both, will be utilized in the proceeding. It is counsel's responsibility to ensure the virtual proceeding is actually recorded as desired. JW is not responsible for any failure to record and JW cannot guarantee that any recording made by means other than through a certified court reporter will be considered admissible in other proceedings. Any issues regarding the accuracy of a transcript will be resolved by the Arbitrator(s).

7. Documents and Witness Examinations

7.1 **Advance Disclosure of Participants.** Arbitrators have an obligation to disclose any work history or other past or current relationship with Participants. To avoid a delay in commencing the hearing, it is imperative that the names of ALL Participants, particularly counsel, are provided to Judicate West at least 30 days before the hearing, unless otherwise ordered by the Arbitrator(s). Judicate West will request information regarding parties and counsel well ahead of time, but this duty of counsel to provide the names of all arbitration Participants is a continuing responsibility until the proceeding is concluded.

7.2 **Advance Distribution of Exhibits.** For any proceeding where documentary or demonstrative exhibits will be used, the Parties must confer and report to the Arbitrator(s). Absent exigent circumstances and unless another timeline is ordered by the Arbitrator(s), the Parties must provide their report to the Arbitrator(s) at least 30 days in advance of the hearing, including by stating how they propose to enable virtual Participants to see and review exhibits. Preferably, this report can take place at the final Arbitration Readiness Conference. The Parties must make a good-faith effort to stipulate to the admissibility of as many of the exhibits as reasonably possible in advance of the hearing, so they can be used efficiently at the time of the hearing. Counsel must take reasonable steps to protect the privacy of personal information in the exhibits.

7.3 **Management of Electronically Stored Information.** If electronic access to documents will be necessary during the hearing, the Parties, at their own expense, will use Case Anywhere or another similarly secure electronic document storage system to make the exhibits available to all Participants who will need them. Each virtual Participant must download any necessary files, including exhibits, onto the device(s) that will be used for the proceeding. The Parties should preferably provide the relevant exhibits to virtual witnesses for download in advance of the proceeding. However, they are not obligated to do so to the extent such advance disclosure would, in the good-faith opinion of the Parties' counsel, risk jeopardizing the full and fair presentation of a Party's case. If any exhibit is withheld for presentation at the time of the hearing, the Party withholding that exhibit must have devised a reasonable method of revealing the exhibit at the hearing that will not cause unreasonable delay.

7.4 **Hard-Copy Exhibits.** The Arbitrator(s) may request, preferably with at least 14 days' notice to the Parties, to receive some or all exhibits in hard copy. If hard copies will be used during the hearing for the presentation of evidence, they shall be made available to the applicable witness and all Parties at least 10 calendar days before the hearing, unless, in the good-faith opinion of counsel proffering the evidence, advance notice would risk jeopardizing the full and fair presentation of a Party's case. One suggestion for the latter case is to deliver the documents in a sealed container to be opened "on camera" in full view of the Parties at the hearing.

7.5 **Counsel Responsibility.** It is counsel's responsibility to ensure that any witness examined by that counsel, whether on direct or cross-examination, has full and fair access to any exhibits counsel may use to examine the witness, or to which reference is made during the witness' examination.

7.6 **Telephone Testimony.** The Arbitrator(s) may permit a witness to testify by telephone in exceptional circumstances. Before doing so, the Arbitrator(s) must be satisfied that in view of the nature of the witness and the subject of the testimony, a telephonic examination will be fair and will not prejudice the presentation of the case of any Party. Any Party considering offering testimony by telephone or affidavit shall disclose that intent at least 30 days in advance of the proceeding and preferably at the Arbitration Readiness Conference so the issue can be appropriately managed before the hearing.

7.7 **No Coaching or Consultation of Witnesses.** Virtual witnesses should preferably be alone in the room from which they are testifying. If others are present, they must be disclosed as provided in Virtual Guideline § 6.4. No one other than the attorneys actually conducting examination may communicate with the witness during his or her testimony. If a witness refers to notes, documents, or other things during testimony, that fact and the item referenced must be disclosed to all counsel. Communicating, coaching, or suggesting answers in any form is unlawful and may constitute witness tampering, a crime. Counsel shall carefully inform witnesses of these requirements in advance of the proceeding and reasonably assure that they are followed.

8. Enforcement

The Parties, by participating in this proceeding, agree that the award and any orders made by the Arbitrator(s) shall have the same force and effect as if they were the result of a fully in-person arbitration proceeding. No Party will seek to vacate or oppose enforcement of any order or award on the basis that some or all of the arbitral hearing was conducted by remote videoconference.

9. Modifications to These Guidelines

The parties, with the approval of the Arbitrator(s), may establish changes or modifications to these Guidelines. Preferably, the Parties should request a conference call with the Arbitrator(s) within 10 calendar days of receiving the Guidelines to discuss the Parties' proposed changes. The Arbitrator(s) may also modify any of the Guidelines after consultation with the parties.