ETHICS

Ethical issues that may arise from doing business in multiple jurisdictions and across many local contexts: messaging to the workforce about ethics that push out the organization’s values; current legal challenges; the roles of in-house and outside counsel in developing solutions; and sound business and legal practices.

Speakers
Hope Case, Ute Krudewagen and Maria Rodriguez

Scenario 1

Does the use of technology to transmit confidential information, transmission via internet, copy storage, etc. raise ethical issues.

Scenario 2

GoodCo has a global code of conduct that provides that GoodCo will not discriminate against any of its workforce based on “race, color, religion, sex, or national origin.” A couple of situations arise:

(1) GoodCo is setting up operations in Saudi Arabia. Should it segregate production lines in line with Sharia law?

(2) GoodCo is hiring in Brazil and the best candidate is from Mexico. 1 of GoodCo’s 2 Brazilian employees is from the U.S. and immigration counsel tells GoodCo they are violating the “2/3 rule” and cannot hire the candidate from Mexico.

Scenario 3

BadCo is setting up operations in China. Unfortunately, the local government has been dragging its feet, and BadCo is about to lose a crucial deal in China. Eager Max has a good friend in the Shenzhen government who can “speed things up.” Thoughts?
1. What ethical obligations do work-at-home arrangements pose for in-house legal departments?
   a. What ethical steps should a legal department take to preserve attorney-client privilege with at-home workers?
   b. What steps should companies take to help secure proprietary and confidential information?

2. What employment law issues are raised by work-at-home arrangements? Consider these aspects of employment law:
   a. Wage and hour laws
   b. OSHA compliance
   c. Workers compensation
   d. Disability accommodations

3. Should the telecommuting policy be in writing? What components should be included in that policy?
4. Can at-home work arrangements help you recruit and retain the best legal talent?
5. Does company management support work-at-home arrangements? Why or why not? Has this ever been discussed?
6. For legal departments that have implemented such arrangements, what has worked? What has not?
7. What positions are appropriate to be entirely or partially work-at-home? What positions should not be permitted at all to be work-at-home?
8. What other advantages exist with respect to work-at-home arrangements? For instance, how do such arrangements affect company real estate issues? Is your global footprint reduced?
9. Who is supplying the technology for work-at-home arrangements? How is company data accessed by those working at home? How is it preserved?
ISSUE: Does an attorney violate the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?

DIGEST: Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client’s instructions and circumstances, such as access by others to the client’s devices and communications.

AUTHORITIES INTERPRETED: Rules 3-100 and 3-110 of the California Rules of Professional Conduct. Business and Professions Code section 6068, subdivision (e)(1). Evidence Code sections 917(a) and 952.

STATEMENT OF FACTS

Attorney is an associate at a law firm that provides a laptop computer for his use on client and firm matters and which includes software necessary to his practice. As the firm informed Attorney when it hired him, the computer is subject to the law firm’s access as a matter of course for routine maintenance and also for monitoring to ensure that the computer and software are not used in violation of the law firm’s computer and Internet-use policy. Unauthorized access by employees or unauthorized use of the data obtained during the course of such maintenance or monitoring is expressly prohibited. Attorney’s supervisor is also permitted access to Attorney’s computer to review the substance of his work and related communications.

Client has asked for Attorney’s advice on a matter. Attorney takes his laptop computer to the local coffee shop and accesses a public wireless Internet connection to conduct legal research on the matter and email Client. He also takes the laptop computer home to conduct the research and email Client from his personal wireless system.

DISCUSSION

Due to the ever-evolving nature of technology and its integration in virtually every aspect of our daily lives, attorneys are faced with an ongoing responsibility of evaluating the level of security of technology that has increasingly become an indispensable tool in the practice of law. The Committee’s own research – including conferring with computer security experts – causes it to understand that, without appropriate safeguards (such as firewalls, secure username/password combinations, and encryption), data transmitted wirelessly can be intercepted and read with increasing ease. Unfortunately, guidance to attorneys in this area has not kept pace with technology. Rather than engage in a technology-by-technology analysis, which would likely become obsolete shortly, this
opinion sets forth the general analysis that an attorney should undertake when considering use of a particular form of technology.

1. **The Duty of Confidentiality**

In California, attorneys have an express duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”\(^1\) (Bus. & Prof. Code, § 6068, subd. (e)(1).) This duty arises from the relationship of trust between an attorney and a client and, absent the informed consent of the client to reveal such information, the duty of confidentiality has very few exceptions. (Rules Prof. Conduct, rule 3-100 & discussion “[A] member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.”.)\(^2\)

Unlike Rule 1.6 of the Model Rules of Professional Conduct (“MRPC”), the exceptions to the duty of confidentiality under rule 3-100 do not expressly include disclosure “impliedly authorized in order to carry out the representation.” (MRPC, Rule 1.6.) Nevertheless, the absence of such language in the California Rules of Professional Conduct does not prohibit an attorney from using postal or courier services, telephone lines, or other modes of communication beyond face-to-face meetings, in order to effectively carry out the representation. There is a distinction between actually disclosing confidential information to a third party for purposes ancillary to the representation,\(^3\) on the one hand, and using appropriately secure technology provided by a third party as a method of communicating with the client or researching a client’s matter,\(^4\) on the other hand.

Section 952 of the California Evidence Code, defining “confidential communication between client and lawyer” for purposes of application of the attorney-client privilege, includes disclosure of information to third persons “to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.” (Evid. Code, § 952.) While the duty to protect confidential client information is broader in scope than the attorney-client privilege (Discussion [2] to rule 3-100; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, fn. 5 [120 Cal.Rptr. 253]), the underlying principle remains the same, namely, that transmission of information through a third party reasonably necessary for purposes of the representation should not be deemed to have destroyed the confidentiality of the information. (See Cal. State Bar Formal Opn. No. 2003-161 [repeating the Committee’s prior observation “that the duty of confidentiality and the evidentiary privilege share the same basic policy foundation: to encourage clients to disclose all possibly pertinent information to their attorneys so that the attorneys may effectively represent the clients’ interests.”].) Pertinent here, the manner in which an attorney acts to safeguard confidential client information is governed by the duty of competence, and determining whether a third party has the ability to access and use confidential client information in a manner that is unauthorized by the client is a subject that must be considered in conjunction with that duty.

2. **The Duty of Competence**

Rule 3-110(A) prohibits the intentional, reckless or repeated failure to perform legal services with competence. Pertinent here, “competence” may apply to an attorney’s diligence and learning with respect to handling matters for clients. (Rules Prof. Conduct, rule 3-110(B).) The duty of competence also applies to an attorney’s “duty to supervise the work of subordinate attorney and non-attorney employees or agents.” (Discussion to rule 3-110.)

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\(^1\) “Secrets” include “[a]ny ‘information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.’” (Cal. State Bar Formal Opn. No. 1981-58.)

\(^2\) Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

\(^3\) In this regard, compare Cal. State Bar Formal Opn. No. 1971-25 (use of an outside data processing center without the client’s consent for bookkeeping, billing, accounting and statistical purposes, if such information includes client secrets and confidences, would violate section 6068, subdivision (e), with Los Angeles County Bar Assn. Formal Opn. No. 374 (1978) (concluding that in most circumstances, if protective conditions are observed, disclosure of client’s secrets and confidences to a central data processor would not violate section 6068(e) and would be the same as disclosures to non-lawyer office employees).

\(^4\) Cf. Evid. Code, § 917(b) (“A communication … does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.”).
With respect to acting competently to preserve confidential client information, the comments to Rule 1.6 of the MRPC provide:

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

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's 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. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

(MRPC, cmts. 16 & 17 to Rule 1.6.) In this regard, the duty of competence includes taking appropriate steps to ensure both that secrets and privileged information of a client remain confidential and that the attorney’s handling of such information does not result in a waiver of any privileges or protections.

3. Factors to Consider

In accordance with the duties of confidentiality and competence, an attorney should consider the following before using a specific technology:

a) The attorney’s ability to assess the level of security afforded by the technology, including without limitation:

i) Consideration of how the particular technology differs from other media use. For example, while one court has stated that, “[u]nlike postal mail, simple e-mail generally is not ‘sealed’ or secure, and can be accessed or viewed on intermediate computers between the sender and recipient (unless the message is encrypted)” (American Civil Liberties Union v. Reno (E.D.Pa. 1996) 929 F.Supp. 824, 834, aff'd (1997) 521 U.S. 844 [117 S.Ct. 2329]), most bar associations have taken the position that the risks of a third party’s unauthorized review of email (whether by interception or delivery to an unintended recipient) are similar to the risks that confidential client information transmitted by standard mail service will be opened by any of the many hands it passes through on the way to its recipient or will be misdirected (see, e.g., ABA Formal Opn. No. 99-413 [concluding that attorneys have a reasonable expectation of privacy in email communications, even if unencrypted, “despite some risk of interception and disclosure”]; Los Angeles County Bar Assn. Formal Opn. No. 514 (2005) [“Lawyers are not required

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5/ In the absence of on-point California authority and conflicting state public policy, the MRPC may serve as guidelines. (City & County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal. 4th 839, 852 [43 Cal.Rptr.3d 771]).

6/ These factors should be considered regardless of whether the attorney practices in a law firm, a governmental agency, a non-profit organization, a company, as a sole practitioner or otherwise.

7/ Rule 1-100(A) provides that “[c]hicles opinions and rules and standards promulgated by other jurisdictions and bar associations may . . . be considered” for professional conduct guidance.

8/ In 1999, the ABA Committee on Ethics and Professional Responsibility reviewed state bar ethics opinions across the country and determined that, as attorneys’ understanding of technology has improved, the opinions generally have transitioned from concluding that use of Internet email violates confidentiality obligations to concluding that use of unencrypted Internet email is permitted without express client consent. (ABA Formal Opn. No. 99-413 [detailing various positions taken in state ethics opinions from Alaska, Washington D.C., Kentucky, New York, Illinois, North Dakota, South Carolina, Vermont, Pennsylvania, Arizona, Iowa and North Carolina].)
to encrypt e-mail containing confidential client communications because e-mail poses no greater risk of interception and disclosure than regular mail, phones or faxes.”]; Orange County Bar Assn. Formal Opn. No. 97-0002 [concluding use of encrypted email is encouraged, but not required].) (See also City of Reno v. Reno Police Protective Assn. (2003) 118 Nev. 889, 897-898 [59 P.3d 1212] [referencing an earlier version of section 952 of the California Evidence Code and concluding “that a document transmitted by e-mail is protected by the attorney-client privilege as long as the requirements of the privilege are met.”].)

ii) Whether reasonable precautions may be taken when using the technology to increase the level of security.9 As with the above-referenced views expressed on email, the fact that opinions differ on whether a particular technology is secure suggests that attorneys should take reasonable steps as a precautionary measure to protect against disclosure.10 For example, depositing confidential client mail in a secure postal box or handing it directly to the postal carrier or courier is a reasonable step for an attorney to take to protect the confidentiality of such mail, as opposed to leaving the mail unattended in an open basket outside of the office door for pick up by the postal service. Similarly, encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous. To place the risks in perspective, it should not be overlooked that the very nature of digital technologies makes it easier for a third party to intercept a much greater amount of confidential information in a much shorter period of time than would be required to transfer the same amount of data in hard copy format. In this regard, if an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced.11 Both of these tools are readily available and relatively inexpensive, and may already be built into the operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended. (See David Ries & Reid Trautz, Law Practice Today, “Securing Your Clients’ Data While On the Road,” October 2008 [noting reports that “as many as 10% of laptops used by American businesses are stolen during their useful lives and 97% of them are never recovered”].)

iii) Limitations on who is permitted to monitor the use of the technology, to what extent and on what grounds. For example, if a license to use certain software or a technology service imposes a requirement of third party access to information related to the attorney’s use of the technology, the attorney may need to confirm that the terms of the requirement or authorization do not permit the third party to disclose confidential client information to others or use such information for any purpose other than to ensure the functionality of the software or that the technology is not being used for an improper purpose, particularly if the information at issue is highly sensitive.12 Under Rule 5.3 [of the MRPC], a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that

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9/ Attorneys also should employ precautions to protect confidential information when in public, such as ensuring that the person sitting in the adjacent seat on an airplane cannot see the computer screen or moving to a private location before discussing confidential information on a mobile phone.

10/ Section 60(1)(b) of the Restatement (Third) of The Law Governing Lawyers provides that “a lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer’s associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.”

11/ Similarly, this Committee has stated that if an attorney is going to maintain client documents in electronic form, he or she must take reasonable steps to strip any metadata containing confidential information of other clients before turning such materials over to a current or former client or his or her new attorney. (See Cal. State Bar Formal Opn. 2007-174.)

12/ A similar approach might be appropriate if the attorney is employed by a non-profit or governmental organization where information may be monitored by a person or entity with interests potentially or actually in conflict with the attorney’s client. In such cases, the attorney should not use the technology for the representation, absent informed consent by the client or the ability to employ safeguards to prevent access to confidential client information. The attorney also may need to consider whether he or she can competently represent the client without the technology.
the service provider will not make unauthorized disclosures of client information. Thus when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard. [Citation.] In connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality.” (ABA Formal Opn. No. 95-398.)

Many attorneys, as with a large contingent of the general public, do not possess much, if any, technological savvy. Although the Committee does not believe that attorneys must develop a mastery of the security features and deficiencies of each technology available, the duties of confidentiality and competence that attorneys owe to their clients do require a basic understanding of the electronic protections afforded by the technology they use in their practice. If the attorney lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant. 13/ (Cf. Rules Prof. Conduct, rule 3-110(C) ["If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."].)

b) Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person’s electronic information. The fact that a third party could be subject to criminal charges or civil claims for intercepting, accessing or engaging in unauthorized use of confidential client information favors an expectation of privacy with respect to a particular technology. (See, e.g., 18 U.S.C. § 2510 et seq. [Electronic Communications Privacy Act of 1986]; 18 U.S.C. § 1030 et seq. [Computer Fraud and Abuse Act]; Pen. Code, § 502(c) [making certain unauthorized access to computers, computer systems and computer data a criminal offense]; Cal. Pen. Code, § 629.86 [providing a civil cause of action to “[a]ny person whose wire, electronic pager, or electronic cellular telephone communication is intercepted, disclosed, or used in violation of [Chapter 1.4 on Interception of Wire, Electronic Digital Pager, or Electronic Cellular Telephone Communications].’’]; eBay, Inc. v. Bidder’s Edge, Inc. (N.D.Cal. 2000) 100 F.Supp.2d 1058, 1070 [in case involving use of web crawlers that exceeded plaintiff’s consent, court stated “[c]onduct that does not amount to a substantial interference with possession, but which consists of intermeddling with or use of another’s personal property, is sufficient to establish a cause of action for trespass to chattel.”].) 14/

c) The degree of sensitivity of the information. The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent. 15/ As noted above, if another person may have access to the communications transmitted between the attorney and the client (or others necessary to the representation), and may have an interest in the information being disclosed that is in conflict with the client’s interest, the attorney should take precautions to ensure that the person will not be able to access the information or should avoid using the technology. These types of situations increase the likelihood for intrusion.

13/ Some potential security issues may be more apparent than others. For example, users of unsecured public wireless connections may receive a warning when accessing the connection. However, in most instances, users must take affirmative steps to determine whether the technology is secure.

14/ Attorneys also have corresponding legal and ethical obligations not to invade the confidential and privileged information of others.

15/ For the client’s consent to be informed, the attorney should fully advise the client about the nature of the information to be transmitted with the technology, the purpose of the transmission and use of the information, the benefits and detriments that may result from transmission (both legal and nonlegal), and any other facts that may be important to the client’s decision. (Los Angeles County Bar Assn. Formal Opn. No. 456 (1989).) It is particularly important for an attorney to discuss the risks and potential harmful consequences of using the technology when seeking informed consent.
d) Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges.\(^{16/}\) Section 917(a) of the California Evidence Code provides that “a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor-victim relationship … is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.” (Evid. Code, § 917(a).) Significantly, subsection (b) of section 917 states that such a communication “does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.” (Evid. Code, § 917(b).) See also Penal Code, § 629.80 [“No otherwise privileged communication intercepted in accordance with, or in violation of, the provisions of [Chapter 1.4] shall lose its privileged character.”], 18 U.S.C. § 2517(4) [“No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of [18 U.S.C. § 2510 et seq.] shall lose its privileged character.”]. While these provisions seem to provide a certain level of comfort in using technology for such communications, they are not a complete safeguard. For example, it is possible that, if a particular technology lacks essential security features, use of such a technology could be deemed to have waived these protections. Where the attorney-client privilege is at issue, failure to use sufficient precautions may be considered in determining waiver.\(^{17/}\) Further, the analysis differs with regard to an attorney’s duty of confidentiality. Harm from waiver of attorney-client privilege is possible depending on if and how the information is used, but harm from disclosure of confidential client information may be immediate as it does not necessarily depend on use or admissibility of the information, including as it does matters which would be embarrassing or would likely be detrimental to the client if disclosed.

e) The urgency of the situation. If use of the technology is necessary to address an imminent situation or exigent circumstances and other alternatives are not reasonably available, it may be reasonable in limited cases for the attorney to do so without taking additional precautions.

f) Client instructions and circumstances. If a client has instructed an attorney not to use certain technology due to confidentiality or other concerns or an attorney is aware that others have access to the client’s electronic devices or accounts and may intercept or be exposed to confidential client information, then such technology should not be used in the course of the representation.\(^{18/}\)

4. Application to Fact Pattern\(^{19/}\)

In applying these factors to Attorney’s situation, the Committee does not believe that Attorney would violate his duties of confidentiality or competence to Client by using the laptop computer because access is limited to authorized individuals to perform required tasks. However, Attorney should confirm that personnel have been appropriately instructed regarding client confidentiality and are supervised in accordance with rule 3-110. (See Crane v. State Bar (1981) 30 Cal.3d 117, 123 [177 Cal.Rptr. 670] [“An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority.”]; In re Complex Asbestos Litig. (1991) 232 Cal.App.3d 572, 588 [283 Cal.Rptr. 732] [discussing law firm’s ability to supervise employees and ensure they protect client confidences]; Cal. State Bar Formal Opn. No. 1979-50 [discussing lawyer’s duty to explain to

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\(^{16/}\) Consideration of evidentiary issues is beyond the scope of this opinion, which addresses only the ethical implications of using certain technologies.

\(^{17/}\) For example, with respect to the impact of inadvertent disclosure on the attorney-client privilege or work-product protection, rule 502(b) of the Federal Rules of Evidence states: “When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: 1. the disclosure is inadvertent; 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).” As a practical matter, attorneys also should use appropriate confidentiality labels and notices when transmitting confidential or privileged client information.

\(^{18/}\) In certain circumstances, it may be appropriate to obtain a client’s informed consent to the use of a particular technology.

\(^{19/}\) In this opinion, we are applying the factors to the use of computers and wireless connections to assist the reader in understanding how such factors function in practice. Use of other electronic devices would require similar considerations.
employee what obligations exist with respect to confidentiality). In addition, access to the laptop by Attorney’s supervisor would be appropriate in light of her duty to supervise Attorney in accordance with rule 3-110 and her own fiduciary duty to Client to keep such information confidential.

With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client’s matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall.\textsuperscript{20} Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so.\textsuperscript{21}

Finally, if Attorney’s personal wireless system has been configured with appropriate security features,\textsuperscript{22} the Committee does not believe that Attorney would violate his duties of confidentiality and competence by working on Client’s matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection.

**CONCLUSION**

An attorney’s duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client’s representation does not subject confidential client information to an undue risk of unauthorized disclosure. Because of the evolving nature of technology and differences in security features that are available, the attorney must ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

\textsuperscript{20} Local security features available for use on individual computers include operating system firewalls, antivirus and antispam software, secure username and password combinations, and file permissions, while network safeguards that may be employed include network firewalls, network access controls such as virtual private networks (VPNs), inspection and monitoring. This list is not intended to be exhaustive.

\textsuperscript{21} Due to the possibility that files contained on a computer may be accessed by hackers while the computer is operating on an unsecure network connection and when appropriate local security features, such as firewalls, are not enabled, attorneys should be aware that any client’s confidential information stored on the computer may be at risk regardless of whether the attorney has the file open at the time.

\textsuperscript{22} Security features available on wireless access points will vary and should be evaluated on an individual basis.
Legal Ethics Corner

Ethics Corner is designed to present ethical issues that practitioners might well face on a daily basis. It is a service of the Legal Ethics Committee of the San Diego County Bar Association for SDCBA members.

Clean Your Copies

It's not that attorneys don't have enough to worry about in protecting the confidentiality of their clients' communications. Now modern technology can create inadvertent disclosures which must concern us. Who would have thought that when the copy machine company comes to deliver the new copier and take away the old one it could be taking away retrievable files of your most confidential documents with it? "What?", you say. It turns out most modern copy machines electronically store on a hard drive copies of the documents which have been duplicated on it, according to a report by CBS News.

In a 2010 report, CBS said that "nearly every digital copier built since 2002 contains a hard drive - like the one on your personal computer - storing an image of every document copied, scanned, or emailed by the machine." These digital files can be accessed with software obtainable on the Internet. Comically, in the CBS report, one of the first copiers they randomly examined out of a warehouse of used copiers still had a document on the copier glass from the Buffalo, N.Y., Police Sex Crimes Division. Any attorney that allowed this to happen would have violated the confidentiality requirements of Rule of Professional Conduct 3-100(A) and Bus. & Prof. Code section 6068(e)(1).

Protecting images on your discarded copier may be a more inadvertent violation than leaving a document in the copier, but we as attorneys have the duty to protect the confidences of our clients from even inadvertent disclosure. Bus. & Prof. Code section 6068(e)(1) states that attorneys must protect the confidences "at every peril to himself or herself to preserve the secrets of his or her client."

Even if your copier only has copies from former clients, the ethical obligation of confidentiality survives the representation and, arguably, runs forever. (Wutchuruma Water Co. v. Bailey (1932) 216 Cal. 564, 571; Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 945; Rule of Prof. Conduct 3-110(E),) It even survives the client's death. (Los Angeles Bar Ass'n Formal Opinion 414 (1983); San Diego Bar Ass'n Formal Opinion 1993-2.)

The San Diego based Identity Theft Resource Center has issued a fact sheet on copiers stating the following: "Some of the high-end photo-copiers are equipped with a software program which allows for deletion of files. For many machines, this program is an add-on feature that must be purchased. Armed with this knowledge, companies need to put into place a policy to have the hard drive erased or destroyed when the photocopier reaches its end of service life."

"So" you say, "I am a sole practitioner who only has a small copier with no hard drive. I am safe." Sounds like it, unless you take those large copy projects to Kinkos or some other copy service. To satisfy your professional obligations, you need to ascertain whether they have a policy to deal with the hard drive images stored on their copiers. Our jobs seem to get more complicated all the time.

--Michael L. Crowley

**No portion of this summary is intended to constitute legal advice. Be sure to perform independent research and analysis. Any views expressed are those of the author only and not of the SDCBA or its Legal Ethics Committee.
Why cultural intelligence matters; Critical to the success of international transactions and cases are lawyers who can conduct business with ease in a variety of cultural settings across the globe.

BYLINE: MARNI GOLDSTEIN CAPUTO AND LAUREN RASMUS

BODY:

It is no secret that law schools and law firms prioritize "intelligence" when deciding which students or lawyers will be invited to join their ranks. A high IQ (traditional intelligence quotient) and a certain degree of EQ (emotional intelligence), the commonly used barometers, are not enough to guarantee that a law student or associate will thrive in the increasingly global legal market. For budding lawyers within this international marketplace, the definition of required intelligence should be expanded to include CQ, or cultural intelligence.

A professional with a high CQ can operate with agility and ease in foreign cultural settings. CQ guru David Livermore scientifically breaks CQ into four quadrants: CQ drive (motivation to become culturally competent), CQ knowledge (learning the micro and macro differences between cultures), CQ strategy (a plan to navigate these differences) and CQ action (the confidence to cross the cultural divide).

CQ can be improved by developing an overall sensitivity to world cultures and by asking many questions about the norms and values of people from different countries. For instance, do meetings happen on a tight timetable, as is common in the United States, or do they end only when the matter is resolved? Do people with different ranks within an organization interact in a casual or formal manner? Is it critical or taboo to ask about a colleague's family or religious celebrations? Having a high CQ means being motivated to ask these types of questions, processing and utilizing the answers and deriving a certain degree of enjoyment from experiencing the world as a varied and textured place.

Junior and senior lawyers involved in corporate transactions cannot avoid the international nature of their work. Consider this recent transaction in which Dewey & LeBoeuf advised MetLife Inc. on its $16.2 billion acquisition of American Life Insurance Co. from American International Group (AIG). This transaction involved life insurance companies doing business in more than 40 countries. Lawyers in New York; Chicago; London; Dubai, United Arab Emirates; Frankfurt, Germany; Madrid, Spain; Milan, Italy; Moscow; Paris; Riyadh, Saudi Arabia; and Warsaw, Poland, were called upon to structure, negotiate and document the transaction, as well as to coordinate due diligence and obtain regulatory and competition approvals from more than 55 overseas governmental authorities. Critical to the success of the deal were lawyers who spoke languages other than English and could acclimate to the styles of and collaborate with
Why cultural intelligence matters; Critical to the success of international transactions and cases are lawyers who can conduct business with ease in a variety of cultural settings across the globe. The lawyers were required to work under the regulatory frameworks of different countries while also meeting the client's overarching deal time line. International coordination, respect and agility are not legal skills; they are CQ skills.

The deal described was notable for its size and complexity, but not for its global nature. Law firm growth in the past decade has been largely international. Firms have continued to expand and open offices in Europe, Asia, the Middle East, Latin America and Africa. The top 15 firms by number of lawyers in The American Lawyer's Global 100 have between 5% and 86% of their lawyers working outside their home country and have offices in anywhere from five to 39 countries.

Law firm expansion into new markets involves compliance with the licensing and bar registration scheme in the country, the temporary or permanent relocation of lawyers and their families, the recruitment of lawyers at all levels with an interest in working abroad, the hiring of local lawyers and the courting of clients (beyond the one or two that may have prompted the opening of the office at the outset). Although all of these tasks may seem straightforward, if done with a level of CQ nuance they can transform a fledgling office into a successful part of the overall firm.

Even for the lawyers who work in the U.S. offices of these firms, and who consider their practices to be largely domestic, CQ is essential in their interactions with international offices and clients. Operating in a comfortable and efficient way within this global scheme is of benefit to all lawyers within the firm, whether or not they live and work outside the United States.

Given it is the height of the recruiting season, law firms would be wise to focus on applicants who either already possess CQ, or who exhibit the propensity to develop it. After all, the business world—which is comprised of the firms' current or future clients—has long understood, and even quantified, the extent to which having a high CQ positively affects commercial transactions. Professional schools abroad have begun to educate their students about how CQ can make them more competitive. American law schools have placed an increased emphasis on the practical skills needed to be an effective lawyer, and CQ should be included in the practical-skills curriculum. By developing CQ in new lawyers, law schools will be equipping them with the "beyond just good grades" intelligence that will make them attractive recruits in this global market.

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Headline: Legal ethics on a global scale;
As lawyers are increasingly subject to competing state and international ethical rules, the bar needs a fundamental re-thinking of its regulatory structures.

Opinion

Byline: Deborah L. Rhode, Special to the national law journal

Body:

En route to one of my first international meetings on legal ethics, I had a dispiriting preview of the topic. At a Canadian passport control desk, an obviously bored official began probing the "business purpose" of my trip. On learning my subject, his lip curled as if he were wondering why Canadian tax dollars were being squandered on a subject so futile. "Legal ethics? Really?" he asked. "Bit of an oxymoron, don't you think?"

This past July, more than 170 experts from around the globe assembled to discuss that much maligned but critically important subject. Stanford's Center on the Legal Profession, with co-sponsorship from the American Bar Association, hosted the fourth International Legal Ethics Conference (ILEC), held this year for the first time in the United States. Two themes stood out. One was the disconnect between the increasingly international dimensions of legal practice and the structure of professional regulation. A second theme was the need for less insular approaches to the delivery and oversight of lawyers' services.

Then-ABA President Carolyn Lamm gave a keynote address that aptly summarized the growing globalization of legal work. The United States now exports about $7.2 billion in legal services and imports some $1.9 billion. Those numbers are dramatically increasing, driven by the growth of international trade and immigration. The rising number of clients with business, property and family ties to other nations is expanding the market for cross-jurisdictional lawyering.

The growing reach of legal practice is occurring on Main Street as well as Wall Street. As one example, Lamm described a Midwest lawyer's efforts in finalizing a joint venture between an American and a Canadian company to transfer production technology to a third country. The transaction occurred in Ucon, Idaho, population 943. This is not an isolated exception. In 2009, all but one state exported more than a billion dollars of goods and services. Lawyers in all corners of the country are more and more likely to engage in cross-border practice subject to sometimes conflicting ethical rules.
Legal ethics on a global scale: As lawyers are increasingly subject to competing state and international ethical rules, the bar needs a fundamental rethinking of its regulatory structures.; OPINION Th

Technology is also eroding the importance of jurisdictional boundaries that structure professional regulation. As lawyers increasingly market services, communicate with clients and outsource work via the Internet, they are subject to competing state and international ethical rules. Significant differences appear in standards governing confidentiality, conflicts of interest, advertising, witness preparation, unauthorized practice and a host of other issues.

Although bar associations have provided some guidance on how to deal with these conflicts, current rules are by no means adequate. For example, the ABA's Model Rule 8.5 sets forth a test for determining which jurisdiction's ethics rules will apply to a transaction crossing state lines. The standard is where the transaction will have its "predominant effects." But as ILEC conference participants noted, the answer is not always self-evident and may change over time. In some cases, no single location will ever clearly predominate. In economic and technological settings in which geographic borders have declining significance, the bar needs a fundamental rethinking of its regulatory structures.

Such an analysis should be informed by international innovations in the delivery and oversight of legal services. Conference participants explored multiple examples. Among the most important are the financing and regulation of law firms. Australia has paved the way for nonlawyer investment in firms and new forms of protection for clients. The Australian states of New South Wales and Queensland have independent legal services commissions with more consumer-oriented and transparent remedial structures than those in the United States. Australian law firms are also subject to more requirements of self-assessment that can improve risk management.

The United Kingdom has moved in similar directions. Recent legislation created an independent Legal Services Board, chaired by a layperson, that oversees an Office for Legal Complaints, also headed by a lay chair. The office has broad power to ensure effective responses to complaints about lawyer misconduct. Multinational firms are about to be given access to new sources of capital, as well as opportunities to enter into "alternative business structures" with nonlawyers. Faced with growing competition from such firms, the American bar needs systematic research on their performance, and may do well to revisit its own prohibitions on lay investment and partnerships.

Other countries are also promoting access to justice in ways that may be appropriate for export. For example, in Australia, some local governments have recently begun requiring firms that seek government contracts to contribute a specified percentage of pro bono work. A few local governments in this country have imposed similar mandates - both the profession and the public stand to gain from analysis of how these requirements play out in practice.

Our rapidly evolving and increasingly interconnected legal world urgently needs more dialogue, experimentation and evaluation concerning such issues. Those who focus on professional responsibility and regulation talk endlessly about the need to unite theory and practice, but seldom manage to accomplish it. The Stanford conference was a rare exception, and has already encouraged the formation of a new Association of International Legal Ethics. But that is only a first step in what should be more sustained efforts to think globally about our profession's shared aspirations and concerns.

Deborah L. Rhode is director of the Center on the Legal Profession and E.W. McFarland Professor of Law at Stanford Law School.
ISSUES:

1. When at the outset of representation it appears an attorney would need to serve a discovery subpoena for production of documents on another current client of the attorney or the attorney’s law firm, may the attorney accept the representation of the new client and serve the discovery subpoena on the current client?

2. If doing so raises a conflict of interest, may the attorney seek informed written consent in order to accept the representation including possible service of the subpoena?

3. What obligations arise if an attorney seeks informed written consent?

DIGEST:

When an attorney discovers at the outset of representation that the attorney must serve a discovery subpoena for production of documents on another current client of the attorney or the attorney’s law firm, serving the discovery subpoena is an adverse action such that a concurrent client conflict of interest arises. To represent a client who seeks to serve such a subpoena, the attorney must seek informed written consent from each client, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent.

AUTHORITIES INTERPRETED:

Rules 3-100 and 3-310 of the Rules of Professional Conduct of the State Bar of California

Business and Professions Code section 6068, subdivision (e)

STATEMENT OF FACTS

Prospective Client requests Attorney to represent Prospective Client in litigation. Before agreeing to represent Prospective Client, Attorney runs a conflict check listing the adverse parties and all potential witnesses identified by Prospective Client and Attorney. The conflict check reveals that Witness Client, a potential witness who has documents critical to the litigation, is represented by Partner, another attorney at Attorney’s law firm in an unrelated matter.

Is it a conflict of interest for Attorney to accept the representation of Prospective Client and serve a discovery subpoena for documents (“document subpoena”) on Witness Client? If it is a conflict of interest, may Attorney do so with informed written consent of Prospective Client and Witness Client? What obligations arise if an attorney seeks informed written consent to such a representation?

1/ Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

2/ This opinion does not address whether Attorney may ethically do anything other than decline the representation should Witness Client refuse to consent to the representation of Prospective Client. Further, this opinion does not address Attorney’s obligation should a conflict arise after representation has been accepted. In Cal West Nurseries, Inc. v. Superior Court (2005) 129 Cal.App.4th 1170 [29 Cal.Rptr.3d 170], the court disqualified an entire law firm which had served discovery on a current client, to which the firm was adverse in ongoing litigation, even though the firm withdrew as to that party and associated other counsel for that party. Similarly, UMG Recordings, Inc. v. MySpace (C.D. Cal. 2007) 526 F.Supp.2d 1046 (applying California law), expressed reservations about the independence of a second firm associated in by a law firm to serve discovery on a party previously represented by
DISCUSSION

1. Conducting Third Party Discovery of a Current Client is Adverse

This opinion addresses the issue of whether an attorney may accept representation of a new client when at the outset of the representation it appears the attorney would need to serve a discovery subpoena for documents on another existing client of the attorney’s law firm. The first question is whether serving a document subpoena on a witness/client is “adverse” to the interests of that client. California law has not expressly defined “adverse” for purposes of analysis of conflicts between an attorney’s clients. Neither rule 3-310 nor California case law supply an explicit definition in that context. In Flatt v. Superior Court (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], the California Supreme Court held that it would be a breach of the duty of loyalty for an attorney to represent or provide advice to a client or person that is adverse to the interests of an existing client on any matter, whether related or unrelated. It is a violation of the duty of loyalty for an attorney to put himself in a position where he may have to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. Flatt, supra, 9 Cal.4th at p. 289, citing Anderson v. Eaton (1930) 211 Cal. 113, 116 [293 P. 788]; People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1146-47 [86 Cal.Rptr.2d 816]; see Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 821 [124 Cal.Rptr.3d 256]. “‘By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests.’” Flatt, supra, quoting Anderson, supra (emphasis added by court in Flatt). In such circumstances, “the rule of disqualification . . . is a per se or ‘automatic’ one.” Flatt, supra, 9 Cal.4th at p. 284 (emphasis in original); Anderson, supra, 211 Cal. at p. 116. The purpose of this rule is to maintain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. Flatt, supra, 9 Cal.4th at p. 285.

While Flatt arose out of one client potentially suing another client, or party adversity, other cases have applied the proscription against adverse representation in situations where the existing client is a third-party witness rather than an adverse party. For instance, in Hernandez v. Paicius (2003) 109 Cal.App.4th 452 [134 Cal.Rptr.2d 756], disapproved on other grounds, People v. Freeman (2010) 47 Cal.4th 993 [103 Cal.Rptr.3d 723], an attorney cross-examined his own current client during a trial in which he was an expert witness for the opposing party. The court stated the attorney’s “representation . . . required her to create a record impeaching her other client’s professional reputation and credibility. In pursuing her ends in this case, counsel demonstrated a dulled sensitivity to professional ethics and engaged in an egregious and shocking breach of her duty of loyalty to” the current client whom she cross-examined. Hernandez, supra, at p. 466. Adversity arises where the client is a potential third-party witness.

The California Supreme Court, in Ames v. State Bar (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489], cited a definition of “adverse” drawn from a dictionary, albeit in connection with the construction of the predecessor of rule 3-300 prohibiting a lawyer from acquiring an interest “adverse” to a client. The Supreme Court relied upon the dictionary definition of “adverse” as entailing “acting against or in a contrary direction...g hostile, opposed, antagonistic,” “in opposition to one’s interests: detrimental, unfavorable,” “having opposing interests: having interests for preservation of which opposition is essential.” Ames, supra, 8 Cal.3d at p. 917 (internal quotation marks omitted). The Ames Court made clear that an interest acquired by a lawyer may be “adverse” to a client even if its acquisition does not actually cause the client “injury,” so long as “injury” is “one of the foreseeable though not inevitable consequences.” (Ames, supra, 8 Cal.3d at pp. 919-20.) Indeed, the Ames Court implied that, broadly speaking, “adverse” means “unfavorable” in the sense of something that generally could cause injury even if in any particular case it does not do so.

the first law firm. These cases suggest association of independent counsel to handle the document subpoena might not be permitted, but they did not involve the situation addressed in this opinion where the document subpoena would be served on a nonparty to the litigation. But see ABA Formal Opn. No. 92-367 suggesting, under the ABA Model Rules, independent counsel may be retained to pursue the discovery when the conflict arises after the representation is underway. The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do no conflict with California policy. See State Compensation Insurance Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, 655-656 [82 Cal.Rptr.2d 799].
Defining “adverse” as “potential injury” in the sense of at least threatening injury is also consistent with other authority that addresses the term in a conflicts context. See American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal.App.4th 1017, 1043 [117 Cal.Rptr.2d 685] (holding that the interest of one of a lawyer’s clients is “adverse” to another if it causes the lawyer to “put himself in the position” of choosing a course of action that might be injurious to one of the clients). California State Bar Formal Opn. No. 1993-133 states that rule 3-310 “is designed to prevent lawyers from putting themselves in a position where they may be required to choose between conflicting duties or have to attempt to reconcile conflicting interests rather than to enforce to the fullest extent the right of the client they should alone represent.” (Italics added.) Thus, “adverse” requires that the attorney has placed himself in a position of potential injury to the client. See, e.g., People v. Rhodes (1974) 12 Cal.3d 180, 184 [115 Cal.Rptr. 235] (city attorney with prosecutorial authority may not represent criminal defendant because of the inevitable “struggle” the lawyer would face between the specific duty to the client and the broader interests of the prosecutorial function); Anderson v. Eaton, supra, 211 Cal. at p. 117 (“Conscience and good morals dictate that an attorney should not so conduct himself as to be open to the temptation of violating his obligation of fidelity and confidence.”); Goldstein v. Lees (1975) 46 Cal.App.3d 614, 620 [120 Cal.Rptr. 253] (discussing difficulty of attorney providing client with undivided loyalty while seeking to avoid revelation of confidences of a different former client).

Having defined “adverse” as “potential injury,” we are led to the conclusion that serving any type of third-party discovery on a current client is adverse and would violate an attorney’s duty of loyalty. First, as noted in O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal.App.4th 563, 577 [69 Cal.Rptr.2d 389], “discovery is coercion” since it entails bringing “[t]he force of law…upon a person to turn over certain documents.” (Emphasis in original.) Second, propounding discovery on an existing client may affect the quality of an attorney’s services to the client seeking the discovery, resulting in a diminution in the vigor of the attorney’s discovery demands or enforcement effort. In addition, it is possible the documents sought could expose the client from whom discovery is being sought to claims from the client serving the discovery. Therefore, we conclude that Attorney’s service of a document subpoena on Witness Client would be an action adverse to Witness Client's interests, and as a result such service would be prohibited absent proper consent.

2. Availability of Informed Written Consent from Each Client

Assuming Prospective Client wants to retain Attorney despite the firm’s concurrent representation of Witness Client, the question arises whether Attorney may accept the representation and proceed with serving a document subpoena on Witness Client. We conclude that Attorney may do so, as long as Attorney believes that Attorney can properly fulfill his professional duties and obtains informed written consent from each client before accepting the representation of Prospective Client. The rules allow representation adverse to a current client with the client’s informed written consent where the attorney has obtained confidential information material to the employment. See rule 3-310(E). Since an attorney may represent one current client adverse to another current client with informed written consent when the attorney possesses material confidential information of the consenting client, it follows that such consent may be allowed in some but not all cases where the duty of loyalty is the duty that is implicated. This position is further supported by rule 3-310(C)(1)-(3), which allow informed written consent in connection with other sorts of concurrent client conflicts.

Case law also confirms that a conflict of interest may generally be waived by the persons who are personally interested in the matter. See Flatt, supra, 9 Cal.4th at p. 286 fn. 4 (“The principle of loyalty is for the client’s benefit; most courts thus permit an attorney to continue the simultaneous representation of clients whose interests are

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3/ See, e.g., rules 3-110 and 3-310.

4/ Rule 3-310(E) is not applicable here because under these facts Partner and the law firm received no confidential information from Witness Client that is material to the representation of Prospective Client.

5/ Some conflicts arising out of a concurrent representation cannot be cured with informed client consent. See Flatt, supra, 9 Cal.4th at 284 fn. 3 (“The paradigmatic instance of such prohibited dual representation…occurs where the attorney represents clients whose interests are directly adverse in the same litigation.”); Klemm v. Superior Court (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (“…consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed.”).
adverse as to unrelated matters provided full disclosure is made and both agree in writing to waive the conflict.” (first emphasis in original, second emphasis added)); Anderson, supra, 211 Cal. at p. 116 (“It is also an attorney’s duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter’s free and intelligent consent given after full knowledge of all the facts and circumstances.”) (emphasis added); In re Marriage of Friedman (2002) 100 Cal.App.4th 65, 70-71 [122 Cal.Rptr.2d 412]. Thus, in many circumstances interested persons may consent to representation even though an attorney has a conflict of interest.

3. Disclosure to Each Client

To obtain informed written consent, Attorney must disclose to each client the relevant facts and circumstances and the reasonably foreseeable adverse consequences of waiving any conflicts arising out of Attorney’s representation of Prospective Client and service of a document subpoena on Witness Client. Rule 3-310(A)(1).6 “California law does not require that every possible consequence of a conflict be disclosed for a consent to be valid.” Zador Corp. v. Kwan (1995) 31 Cal.App.4th 1285, 1301 [37 Cal.Rptr.2d 754]. A conflict waiver may be valid even though it does not undertake “the impossible burden of explaining separately every conceivable ramification.” Maxwell v. Superior Court (1982) 30 Cal.3d 606, 622 [180 Cal.Rptr. 177].

Initially, Attorney must determine whether his duties to Witness Client preclude him from disclosing information to Prospective Client necessary to obtain informed written consent. Specifically, Attorney cannot disclose any confidential information obtained in the representation of Witness Client without Witness Client’s informed consent. See Business and Professions Code section 6068(e)(1) and rule 3-100(A). In most situations, the identity of a client is not considered confidential and in such circumstances Attorney may disclose the fact of the representation to Prospective Client without Witness Client’s consent. Los Angeles County Bar Association Formal Opn. Nos. 456, 374.7

In preparing the disclosure to Prospective Client, Attorney must identify the relevant facts and circumstances (i.e., the fact that the firm represents Witness Client in an unrelated matter). Necessary disclosure includes explaining the nature of the conflict of interest, the purpose of the disclosure, the legal and other benefits and detriments resulting from consenting to representation despite the conflict, and any other facts that could have an important bearing on the client’s decision. See Los Angeles County Bar Association Formal Opn. No. 456. In the circumstances addressed here, Attorney may need to make further disclosures to Prospective Client, such as the nature and extent of Partner’s relationship with Witness Client. Depending on the facts and circumstances, Attorney may need to make additional disclosures to provide appropriate information on which Prospective Client can base a decision.

Attorney must also disclose to Prospective Client the reasonably foreseeable adverse consequences of the firm’s ongoing relationship with Witness Client, such as issues that might arise if discovery is opposed. In this regard, the primary adverse consequence is that, because serving third-party discovery on a current client would violate the duty of loyalty of Attorney’s firm to that client,8 Attorney cannot serve Witness Client with the proposed discovery.

6 Upon learning that Partner represents Witness Client, if Attorney still wishes to seek to represent Prospective Client, Attorney has an independent duty to disclose Partner’s representation of Witness Client to Prospective Client. Rule 3-310(B)(1) and the Discussion to the rule require Attorney to disclose in writing to Prospective Client that Partner has a legal, business, financial, professional, or personal relationship with a witness in the same matter. However, in the circumstances considered here, such disclosure will of necessity occur when Attorney seeks informed written consent from Prospective Client.

7 In certain limited circumstances, a client’s identity would be confidential and could not be disclosed without the client’s consent. See Rosso, Johnson, Rosso & Ebersold v. Superior Court (1987) 191 Cal.App.3d 1514, 1518-1519 [237 Cal.Rptr. 242] (client’s name is privileged if disclosure would betray confidential communication); Baird v. Koerner (9th Cir. 1990) 279 F.2d 623, 632 (client’s identity is confidential if revealing it would constitute the “last link” in chain of evidence likely to lead to the client’s conviction).

8 In Flatt, supra, the court imputed an attorney’s duty of loyalty to the attorney’s law firm. See also Streit v. Covington & Crowe (2000) 82 Cal.App.4th 441, 445 [98 Cal.Rptr.2d 193] (in discussing attorney’s duty of care, court stated when a client retains a single attorney, the client retains all attorneys who are partners or employees of that attorney).
absent informed written consent from Witness Client, which will require disclosure to Witness Client of the relevant facts and circumstances involved in Prospective Client’s litigation. Other reasonably foreseeable adverse consequences include the risk that, because of the firm’s ongoing relationship with Witness Client, the duty of loyalty to Prospective Client may conflict with the duty of loyalty to Witness Client, and Prospective Client may be concerned that, because of the ongoing relationship with Witness Client, Attorney could be hesitant to seek documents that Witness Client might consider confidential or sensitive. In addition, Attorney should disclose to Prospective Client the risk that Witness Client will contest the subpoena, and without the consent of Witness Client, Attorney will not be able to pursue enforcement of the subpoena against Witness Client.

In preparing the disclosure to Witness Client, similar considerations concerning client identity, confidential information of Prospective Client, and potential favoritism toward Prospective Client may apply. Specifically, in this circumstance Prospective Client’s consent may be required for Attorney to disclose to Witness Client the relevant facts and circumstances involved in Prospective Client’s litigation. Attorney also may be required to disclose to Witness Client that the subpoena served on behalf of Prospective Client may request documents that Witness Client might consider confidential or sensitive. In addition, Attorney should disclose to Witness Client the risk that Attorney might be required to pursue enforcement of the subpoena against Witness Client and should seek consent to do so.

4. **Attorneys Should Check for Conflicts before Accepting Representation of a Client in any Matter**

The California Rules of Professional Conduct prohibit attorneys from accepting or continuing representation of a client without providing written disclosure of certain types of conflicts to a client. Rules 3-310(B), (C) and (E). Unlike the ABA Model Rules of Professional Conduct, the California Rules of Professional Conduct do not address conflict checks by attorneys as part of client representation. The Committee believes that, absent exigent circumstances which require immediate action by the attorney on behalf of the client or the applicability of rule 1-650, the attorney should check for any potential conflicts with those who are adverse and potentially adverse, including reasonably foreseeable parties and witnesses, before accepting representation of a client. See rule 3-310(A)(1). If exigent circumstances prevent performing a conflict check, the attorney should accept representation contingent upon a subsequent conflict check revealing no conflicts, run a conflict check as soon as it is possible to do so and inform the attorney’s new client that if such a conflict arises, the attorney may be required to withdraw unless appropriate informed written consent is obtained. In such a circumstance, the attorney must realize that accepting representation, however exigent the circumstances may be, remains subject to the requirements of the Rules of Professional Conduct, the State Bar Act, and applicable case law. The attorney should also refresh conflict checks upon the appearance of new parties and witnesses during the pendency of a representation.

**CONCLUSION**

Without informed written consent, an attorney may not serve third-party discovery on a current client or the attorney’s law firm, because doing so is adverse to the interests of the client. To accept the representation, an

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9/ ABA Model Rule 1.7, Comment [3] states in part: “To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved…. Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule.”

10/ Rule 1-650 essentially dispenses with the need for conflicts checks in certain attorney pro bono limited legal services representations not applicable to this opinion.

11/ While the facts here concern litigation, conflict checks regarding known persons or entities involved in other matters, such as transactional and administrative matters, should also be conducted initially and refreshed as the attorney becomes aware of new persons or entities who will be involved in the matter.

12/ Rules 3-310(B) and (C)(2) prohibit an attorney from continuing representation in the presence of the conflicts discussed in those rules.
attorney must seek informed written consent from both clients, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.