The State Bar
of California

OPEN SESSION
AGENDA ITEM
MARCH 2019
REGULATION AND DISCIPLINE COMMITTEE II.C

DATE: **March 14, 2019**

TO: **Members, Regulation and Discipline Committee**

FROM: **Andrew Tuft, Supervising Attorney, Office of Professional Competence**

SUBJECT: **Formal Advisory Ethics Opinion 2019-197, Request for Approval for Publication**

EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation and Discipline (RAD) approval for the publication of proposed Formal Ethics Advisory Opinion 2019-197 developed by the Committee on Professional Responsibility and Conduct (COPRAC or Committee).

BACKGROUND

COPRAC is charged with developing the State Bar's non-binding, advisory ethics opinions.[1] Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,[2] which provides that once the committee has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

---

[1] Each published opinion includes the following statement: "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 on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although non-binding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility. (See, e.g., *Huskinson & Brown v. Wolf* (2004)32 Cal.4th 453, 459.)

[2] See Board Resolutions, July 1979, December 2004 and November 2016.

DISCUSSION

This agenda item requests approval for the publication of Proposed Formal Advisory Ethics Opinion 2019-197. Prior to being finalized for publication, while the opinion was still in development and out for public comment, it was styled as Proposed Formal Opinion Interim No. 12-0005.

Proposed Formal Opinion Interim No. 12-0005 was drafted by COPRAC and at its August 25, 2017 meeting, in accordance with COPRAC's Rules of Procedure, the Committee approved the opinion for an initial 90-day public comment distribution. Subsequently, at its April 7, 2018 meeting, COPRAC revised the opinion in response to public comments received and directed an additional 60-day public comment period. At its September 7, 2018 meeting, COPRAC further revised the opinion, in particular updating the opinion to conform to the new Rules of Professional Conduct that took effect on November 1, 2018, and approved a final 60-day public comment period. At its December 7, 2018 meeting, following consideration of the public comments received, COPRAC approved the opinion for submission to RAD for formal publication.

The full text of the proposed opinion recommended for approval is provided as Attachment A. The question addressed in the proposed opinion is: "What ethical obligations arise when lawyers in a law firm consult with outside counsel concerning matters related to the firm's representation of a current client, such as the lawyer's ethical compliance or a possible error by the law firm, and do those ethical obligations change if the lawyer consulted is a member of the same law firm as the consulting lawyer and serves as a law firm in-house counsel?" The opinion digest states:

> Attorneys at times may seek legal advice concerning their ethical and other obligations to clients, advice that may be provided by, among others, outside counsel or a lawyer within the law firm serving as a law firm in-house counsel. The act of seeking legal advice concerning the ethical obligations owed to a client by itself does not create a conflict with the client. Once a lawyer becomes aware that he or she has committed an error that could prejudice the client, the lawyer ethically may seek legal advice concerning obligations to the client and options available, but must comply with the rules governing disclosure to clients and conflicts. The lawyer's ethical obligations in that situation do not vary whether he or she seeks legal advice from a lawyer outside the firm or law firm in-house counsel.

The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approve the publication of Proposed Formal Advisory Ethics Opinion 2019-197.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: None

RECOMMENDATIONS

It is recommended that the Regulation and Discipline Committee approve the following resolution:

> **RESOLVED**, following the publication for public comment and consideration of the comments received, and upon the recommendation of the Standing Committee on Professional Responsibility and Conduct, the Board Committee on Regulation and Discipline approves the publication of proposed Formal Ethics Advisory Opinion 2019-197, attached hereto in Attachment A.

ATTACHMENTS LIST

A. Formal Ethics Advisory Opinion Interim No. 12-0005

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 12-0005

ISSUE: What ethical obligations arise when lawyers in a law firm consult with outside counsel concerning matters related to the firm's representation of a current client, such as the lawyer's ethical compliance or a possible error by the law firm, and do those ethical obligations change if the lawyer consulted is a member of the same law firm as the consulting lawyer and serves as law firm in-house counsel?

DIGEST: Attorneys at times may seek legal advice concerning their ethical and other obligations to clients, advice that may be provided by, among others, outside counsel or a lawyer within the law firm serving as law firm in-house counsel. The act of seeking legal advice concerning ethical obligations owed to a client by itself does not create a conflict with the client. Once a lawyer becomes aware that he or she has committed an error that could prejudice the client, the lawyer ethically may seek legal advice concerning obligations to the client and options available, but must comply with the rules governing disclosure to clients and conflicts. The lawyer's ethical obligations in that situation do not vary whether he or she seeks legal advice from a lawyer outside the firm or law firm in-house counsel.

AUTHORITIES INTERPRETED: Rules 1.4 and 1.7 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068(m).

STATEMENT OF FACTS

1. A law firm ("Law Firm") defends an individual client ("Client") in a litigation matter involving breach of contract claims. Client's defense includes allegations that there was no valid contract, or, as an alternative theory, that the other party breached the contract. During the course of the litigation, one of the attorneys handling the case ("Lawyer") seeks legal advice from outside counsel ("Outside Counsel") concerning ethical obligations Lawyer must meet in discovery and seeks guidance as to how to

[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

comply with those obligations. Lawyer does not disclose to Client the fact of this consultation but does inform Client of the steps that must be taken to comply with Lawyer's ethical obligations, some of which involve how document collection from Client should proceed and the production of additional documents by Client.

2. Later, Lawyer becomes aware that the limitations period for bringing a cross-complaint on Client's behalf may have lapsed, which if accurate could constitute potential grounds for a claim by Client against Law Firm. Lawyer consults Outside Counsel concerning whether or not Client has a potential claim against Law Firm, and if so, the scope of her ethical obligations to Client. Outside Counsel reviews the facts and applicable law, and concludes the limitations period has lapsed, which would preclude the filing of a cross-complaint by Client. On that basis, Outside Counsel also concludes that Client's inability to bring a cross-complaint could potentially prejudice Client, depending upon how the litigation develops. (There is a possibility that the failure to file the cross-complaint would not result in any damages, depending upon how the court resolves certain of the legal issues relating to the existing complaint, including whether a valid contract exists.) Outside Counsel advises Lawyer to disclose to Client the fact that Lawyer failed to file a cross-complaint, and that the statute of limitations has likely now run on such a claim. Outside Counsel also advises Lawyer to inform Client that because of these facts there is a potential conflict between Client and Law Firm, Law Firm may not continue to represent Client without Client's informed written consent, and Client is encouraged to seek the advice of independent counsel. Lawyer does as Outside Counsel advises.

3. Assume that in each of the two scenarios set forth here, instead of Outside Counsel, the counsel whom Lawyer consults is a lawyer in the same firm who has been designated as law firm in-house counsel ("Firm In-House Counsel").

DISCUSSION

Lawyers owe every client an ethical obligation to represent the client free of competing interests or loyalties, including the lawyer's own personal interests, that would materially impair the lawyer's representation of the client. Lawyers often need legal advice with respect to their own compliance with professional rules, their obligations to clients, or, sometimes, their potential liability arising from professional conduct. Lawyers may engage outside counsel to advise them on such issues, while in other instances they may turn to other lawyers in their own firms for assistance.

When a lawyer consults another lawyer about matters involving the first lawyer's current client, ethical questions arise concerning what disclosures if any the lawyer must make to the client about that consultation. Business and Professions Code section 6068(m). These questions become particularly important when the lawyer becomes aware of facts that may give rise to a claim by the client against the lawyer and seeks advice related to that potential claim. The ethical duties implicated include the duty to communicate with the client and the duty of loyalty.

1. Duty to Communicate With Clients

The fiduciary duty that attorneys owe to their clients includes a duty of communication. "[T]he dealings between practitioner and client frame a fiduciary relationship. The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189 [98 Cal.Rptr. 837]. The duty to communicate is stated in California Rule of Professional Conduct 1.4 and Business and Professions Code section 6068(m) (duty to inform clients of significant developments relating to the representation). Rule 1.4 provides, in pertinent part:

> (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.

The duty of communication requires, among other things, the attorney to disclose the material facts potentially giving rise to any legal malpractice claim against the attorney. Cal. State Bar Formal Opn. 2009-178 at p. 4 (citing *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 514 [66 Cal.Rptr.3d 52] ("attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice.")); see also *Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1234 [180 Cal.Rptr.3d 620] (duty to report acts of malpractice to clients). This conclusion is supported by rule 1.4, paragraph (a). An error potentially giving rise to a legal malpractice claim is a "significant development relating to the representation." Other authorities generally support this view. ABA Formal Opn. No. 481 (2018); Restatement (Third) of the Law Governing Lawyers § 20 Comment c. (2000); New Jersey Supreme Court Advisory Committee on Professional Ethics Opn. No. 684 (1998) ("Clearly RPC 1.4 [communication] requires prompt disclosure in the interest of allowing the client to make informed decisions."). The attorney is not permitted to

provide legal advice to the client on the merits of any such claim; to do so would be to provide legal advice to the client on an issue on which the attorney's interests squarely conflict with the client's.[2/] Instead, as more fully described below, under rules 1.4 and 1.7(b), the attorney has a duty to disclose the conflict and the resulting limitations on her ability to advise the client. The attorney should also consider advising the client to consult independent counsel concerning the circumstances.

2. <u>Duty of Loyalty: Conflicts of Interest</u>

The duty of loyalty owed to current clients "forbids any act that would interfere with the dedication of an attorney's 'entire energies to [the] client's interests . . . .'" *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289 [36 Cal.Rptr.2d 537]; see also *People v. Bonin* (1989) 47 Cal.3d 808, 835 [254 Cal.Rptr. 298] ("Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by . . . his own interests."). The duty of loyalty is reflected in the California Rules of Professional Conduct, including rule 1.7, as well as by case law and common law. See, e.g., *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548 [28 Cal.Rptr.2d 617] (referencing common law duty of loyalty); *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768] (attorney's fiduciary duty determined by rules of conduct along with statutes and general principles relating to other fiduciary duties).

Rule 1.7(b) states in pertinent part that: "A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited . . . by the lawyer's own interests." As was the case with the predecessor to rule 1.7(b), former rule 3-310(B)(4), "[t]he primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise his or her representation of the client to advance the attorney's own financial or personal interests." *Santa Clara County Counsel Attys. Assn. v. Woodside*, *supra,* 7 Cal.4th at p. 546 (construing fomer rule 3-310(B)(4)).[3/]

Rule 1.7 differs from its predecessor rule, however, in that it adopts the basic framework, and important elements of the language, of ABA Model Rule 1.7(a)(2), in three respects that are relevant here. First, the actual and potential conflicts are those that give rise to a "significant

---

[2/] See Colorado Formal Ethics Opn. No. 113 (November 19, 2005) ("[t]he lawyer need not advise the client about whether a claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so."); North Carolina 2015 Formal Ethics Opn. No. 4, p. 3 (when an attorney has committed an error in a client representation, the attorney must disclose the facts but "[t]he lawyer should not disclose to the client whether a claim for malpractice exists or provide legal advice about malpractice.").

[3/] For example, where a fee dispute between a lawyer and a client involves an actual or potential legal malpractice claim against the attorney, and the parties propose to enter into a settlement that releases "all known and unknown claims between the attorney and client," the lawyer has an interest in the matter (as defined in former rule 3-310(B)(4)). Cal. State Bar Formal Opn. No. 2009-178, at p. 3. As explained in that opinion, "Written disclosure to the client of the conflict of interest arising from the lawyer's financial or professional interests in the dispute should be given." *Id.* at p. 3-4.

risk the lawyer's representation of the the client will be materially limited" by the conflicting interest. Second, instead of requiring written disclosure to the client, rule 1.7 requires informed written consent.[4/] Third, even with the client's informed written consent, rule 1.7(d) states that the lawyer may not continue with the representation unless: "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding bethe fore a tribunal."

Under rule 1.4, the identification of a potential conflict of interest gives rise to additional disclosure obligations. Under rule 1.4(a)(1), the lawyer must promptly inform the client of any decision or circumstance requiring informed consent – that would include an informed consent to continued representation. In addition, because the lawyer cannot advise a client concering a matter where the lawyer's interest conflicts with the client, and because many clients may not be aware of that prohibition, rule 1.4(a)(4) will require that the lawyer advise the client of that limitation on his or her representation, at least when the lawyer knows that the client expects such advice.

Thus, where there is a significant risk that a lawyer's representation of a client may be materially limited by the lawyer's personal interests, including interests that are actually or potentially adverse to the client's interests, a conflict of interest exists, which would require informed written consent and compliance with rule 1.7(d), and may justify additional steps as discussed below.

APPLICATION

1. Hypothetical One: Lawyer Seeks Legal Advice Concerning Ethical Compliance in Discovery

The first hypothetical involves Lawyer seeking legal advice from Outside Counsel concerning her ethical obligations in connection with a discovery matter. The central ethical questions are: (1) whether Lawyer has an actual or potential conflict of interest with the client that requires further action and (2) whether Lawyer met his ethical duty to communicate with Client.

With regard to the question of whether the circumstances here give rise to or reflect a conflict between Lawyer and Client, the starting point of the analysis is whether the provisions of rule 1.7(b) apply.

[4/] Under rule 1.0.1(e), "informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained the relevant circumstances and the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

Under rule 1.0.1(e-1), "informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.

The American Bar Association (ABA) looked at a similar issue in ABA Formal Opn. No. 08-453.[5/] Applying the substantially identical language of Model Rule 1.7(a)(2), the ABA considered whether a lawyer's seeking legal advice regarding ethical obligations owed to a client created a conflict of interest with that client.[6/] The ABA opined that "[a] lawyer's effort to conform her conduct to applicable ethical standards is not an interest that will materially limit the lawyer's ability to represent the client . . . . In situations . . . where the lawyer is seeking prophylactic advice to assist in her representation of the client, there is no significant risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's interest in avoiding ethical misconduct." ABA Formal Opn. No. 08-453, p. 3.[7/]

We believe that the same result should follow under the language of California rule 1.7(b). The principle that a lawyer seeking legal advice to ensure compliance with ethical obligations does not in itself create adversity between the client's and the lawyer's interests seems clearly correct. Lawyer and Client have a shared interest in ensuring that Lawyer meets his professional obligations. Clients should understand that their attorneys are required to act ethically, that is, in accordance with professional rules and standards; the fact that attorneys may seek legal advice concerning how to conduct themselves ethically is not in any way contrary to the client's valid interests or inconsistent with rule 1.7(b). In fact, a lawyer may need advice to even determine whether rule 1.7(b) applies. Accordingly, Lawyer's consultation with Outside Counsel seeking advice concerning his ethical obligations and compliance does not itself create a conflict between Lawyer and Client.

With regard to the duty to communicate, rule 1.4(a)(3) requires disclosure of "significant developments relating to the representation." In the hypothetical, Lawyer disclosed the conclusions reached as a result of the consultation with Outside Counsel, but did not reveal to Client the fact that Lawyer had sought legal advice concerning his ethical obligations.

Looking at a similar issue, the New York State Bar Association concluded that, ordinarily, where a lawyer seeks legal advice on compliance with ethical obligations, the lawyer does not need to disclose the fact of that consultation to the client. "Clients are entitled to counsel who comply with applicable standards of professional responsibility. Those lawyers are entitled to seek advice on how best to comply with those standards, and to do so without apprehending that

---

[5/] Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered. Rule 1.0, Comment [4].

[6/] Model Rule 1.7 defines a conflict as including a situation where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer." Model Rule 1.7(a)(2).

[7/] The New York State Bar Association reached a similar conclusion. "A lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation." New York State Bar Association Opn. No. 789 (2005), p. 3.

seeking the advice is itself a violation of those standards. The Code does not obligate a lawyer to tell a client how the lawyer has reached a conclusion concerning a particular matter of professional responsibility." New York State Bar Association Opn. No. 789 (2005), p. 3.

While rule 1.4 is not identical to New York's Rule of Professional Conduct 1.4 governing disclosure to clients,[8/] the same reasoning set forth in the New York opinion would apply under California ethics rules and law: adhering to professional rules and standards is an inherent part of a lawyer's representation of a client.[9/] Accordingly, the fact that a lawyer has secured legal advice concerning such compliance would not normally constitute a "significant development" the lawyer is required to disclose.

In many instances, however, it may be necessary for the lawyer to disclose to the client the conclusions reached as part of that consultation. For example, if Lawyer determined as part of the consultation with Outside Counsel that the rules required Lawyer to advise Client that additional documents must be produced to the other side, Lawyer would have an obligation to disclose that fact to Client, and may need to explain the reasoning behind the decision reached. Lawyer would not be required to disclose to Client the fact that Lawyer reached the decision concerning document production as the result of a consultation with Outside Counsel, but would be permitted to do so.

Consistent with this analysis, Lawyer here acted in accordance with his ethical obligations.

2. Hypothetical Two: Ethical Obligations Arising from Lawyer's Consultation With Outside Counsel Concerning Possible Negligence in the Representation

In the second scenario presented, Lawyer consults Outside Counsel regarding his concern about a possible error – failing to file the cross-complaint within the applicable limitations period – which, if Lawyer is correct that the limitations period has lapsed, could potentially prejudice Client and give rise to a claim by Client against Law Firm. This situation implicates possible conflicts of interest, and may give rise to certain obligations owed by Lawyer to Client.

As a general rule, a conflict arises between Client and Lawyer/Law Firm when their interests become adverse, including when there is a significant risk that the lawyer's representation of the client may be materially limited by his or her own interests. Rule 1.7(b); see, e.g., *Stanley v. Richmond*, *supra,* 35 Cal.App.4th at p. 1086. Lawyers have a continuing obligation to monitor

---

[8/] New York rule 1.4 governs communication with clients, which requires an attorney, among other things, to "promptly inform the client of . . . material developments in the matter including settlements or plea deals."

[9/] While the California rules do not contain an express exception to the duty of confidentiality allowing an attorney to seek legal advice concerning his or her own legal situation, unlike ABA Model Rule 1.6, case law does recognize that attorneys may disclose confidential client information to an attorney for the purpose of seeking legal advice. See, e.g., *Chubb & Sons v. Superior Court* (2014) 228 Cal.App.4th 1094 [176 Cal.Rptr.3d 389]; *Fox Searchlight Pictures Inc. v. Paladino* (2001) 89 Cal.App.4th 294 [106 Cal.Rptr.2d 906]; and Cal. State Bar Formal Opn. No. 2012-183.

their client relationships for conflicts, whether, for example, in the form of a newly discovered claim by one client against another client of the firm, a witness disclosed to testify against a client and with whom a lawyer has a professional relationship, or an adverse interest developing between the lawyer and the client. If a lawyer becomes aware of facts that may give rise to a conflict, the lawyer must take action to investigate, analyze the situation and take any additional steps required by the rules. What the lawyer may not do in the course of such investigation and analysis is take any actions that could prejudice the interests of his or her client in the ongoing representation.

In the second hypothetical, at the initial point of the consultation, when Lawyer first raises the possibility with Outside Counsel that he has committed a prejudicial error but is not yet certain that he has committed an error, any conflict between Lawyer and Client is only a possible one that, under these facts, has not affected his representation of Client. Lawyer's concern may be unfounded, either because he was incorrect in his understanding of the deadline for filing a cross-complaint, or because there may be options for relief from any deadlines that had passed. Therefore, under these facts, Lawyer and Law Firm do not yet know whether their interests give rise to a significant risk of a material limitation to the representation. At that point there is not yet a duty to inform Client; however, Lawyer and Law Firm owe Client a duty to investigate further.

Lawyer's actions in seeking legal advice as to whether he committed an error, his obligations to Client, and possible remedial measures to protect the client are not adverse to Client. "A law firm is not necessarily disloyal to a client 'by seeking legal advice to determine how best to address [a] potential conflict [with a current client].'" *Palmer v. Superior Court, supra,* 231 Cal.App.4th at p. 1233 (citing *RFF Family Partnership, LLP v. Burns & Levinson LLP* (2013) 465 Mass. 702 [991 N.E.2d 1066, 1078]).[10/] "The attorney's and client's interests are likely to dovetail insofar as the attorney seeks to resolve the dispute to the client's satisfaction, or determine through consultation with counsel what his or her ethical and professional responsibilities are in order to comply with them." *Id.* at p. 1233-1234.

The ethical obligations owed to Client once Law Firm is aware that Lawyer erred include the duty to disclose the relevant facts to Client. *Beal Bank, SSB v. Arter & Hadden, LLP*, *supra,* 42 Cal.4th at p. 514. The disclosure would likely include the fact that the deadline to file a cross-complaint had passed; that Lawyer failed to file a cross-complaint; that the error cannot be remedied; and that the client no longer has the opportunity to seek its own breach of contract claims against the opposing party. Lawyer and Law Firm may disclose other facts that may bear upon Client's decision regarding how to proceed, including (as applicable) the possible impact

[10/] Important policy reasons support this conclusion, including the desire to encourage lawyers to seek legal advice to understand ethical and other obligations to their client and to promote early detection of potential problems, which is usually in the client's best interests as well. See, Chambliss, *The Scope of In-Firm Privilege* (2005) 80 Notre Dame L.Rev. 1721, 1758; see also *Stock v. Schnader Harrison Segal & Lewis LLP* (2016) 142 A.D.3d 210, 235 [35 N.Y.S.3d 31]; *RFF Family Partnership, LLP v. Burns & Levinson, LLP* (Mass. 2013) 465 Mass. 702 [991 N.E.2d 1071-72].

of the lost cross-complaint upon Client's potential recovery and handling of the case.[11/] Lawyer and Law Firm should not advise Client as to its rights against the firm, or whether the actions constitute malpractice. Lawyer and Law Firm have a conflict of interest that bars them from advising the Client on those issues and should consider advising Client to consult independent counsel concerning the circumstances.[12/] As noted above, rule 1.4(a)(4) requires Lawyer to explain the ethical limitations that prevent her from giving such advice when she knows that the client expects it. In addition, Lawyer should consider whether such explanation is required under Rule 1.4 (a)(3) to ensure that the Client is reasonably informed concerning the consequences of this significant development in the case.

As part of the required disclosure, must Lawyer or Law Firm disclose to Client that he or it has consulted Outside Counsel? The answer depends on whether the consultation with Outside Counsel is itself a significant development relating to the representation under rule 1.4. In this situation, if Lawyer discloses to Client the facts set forth above, Client will be in a position to understand the circumstances and assess the situation. The additional fact that Lawyer consulted Outside Counsel to make the determination that the statute had run and/or to advise Lawyer as to his obligations to Client would not appear under these facts to constitute a significant fact concerning the Client's representation, as *who* made the determination makes no difference to what happened or what options are available for moving ahead at this point. There may be other situations, however, where consultation with Outside Counsel would constitute a fact that a lawyer should disclose to a client pursuant to rule 1.4.

Once Law Firm knows that Client has a potential claim, Law Firm must consider carefully whether it may ethically continue to represent Client or whether it should withdraw. Consistent with rule 1.7(d), Law Firm should not continue to represent the client unless it reasonably believes that it will be able to provide competent and diligent representation, including by exercising independent judgment on Client's behalf. If Law Firm concludes it can ethically continue to represent Client, it should seek the Client's informed written consent to proceed with the representation.

Under the second hypothetical presented, Lawyer and Law Firm acted in compliance with their ethical obligations. Once Outside Counsel determined that Lawyer committed an error that could materially prejudice Client by failing to file the cross-complaint within the limitations period, Lawyer informed Client of the relevant circumstances, including the facts surrounding the error, and explained that as a result Law Firm and Client had a conflict of interest. Lawyer also advised Client to consider seeking the advice of independent counsel as to whether to

---

[11/] A determination of what information must be disclosed to a client in a particular situation is a fact-intensive inquiry, and this opinion does not purport to instruct a lawyer as to what facts must be disclosed in all circumstances. See *Beal Bank, SSB v. Arter & Hadden, LLP*, *supra,* 42 Cal.4th at p. 514.

[12/] Even if a lawyer could obtain the client's informed wrriten consent to such a conflict, the lawyer would not be able to meet the further requirement of rule 1.7(d)(1) that the lawyer reasonably believe that he or she could provide reasonably competent and dilgent representation to the client on such a claim.

continue to be represented by Law Firm, and sought informed written consent to continue such representation.

3. Hypothetical Three: Do Lawyer's Ethical Obligations Change if Counsel Consulted is Firm In-House Counsel

The third hypothetical is a variant on the first two. If, instead of seeking legal advice from Outside Counsel, Lawyer consults Firm In-House Counsel, do any of the ethical obligations Lawyer (and Law Firm) owe to Client in either of those two scenarios change?

For the past few years, there has been considerable attention given to law firm in-house counsel and whether law firms may assert the attorney-client privilege with respect to communications with law firm in-house counsel regarding current clients.[13/] Courts have acknowledged potential benefits to clients of having law firm in-house counsel available to advise lawyers concerning their ethical and professional obligations, including the opportunity to enhance ethical compliance, early identification of potential problems or mistakes, and the possibility of rectifying those mistakes. ". . . [P]ublic policy encourages lawyers to consult with their in-house counsel to understand and comply with their professional responsibilities and ethical restraints." *In re: SonicBlue Inc.*, *supra,* 2008 WL 170562, *9. "The court recognizes that law firms should and do seek advice about the their legal and ethical obligations in connection with representing a client and that firms normally seek this advice from their own lawyers. Indeed, many firms have in-house ethics advisers for this purpose." *Thelen Reid & Priest LLP v. Marland*, *supra,* 2007 WL 578989, *7.

Questions have been raised about whether imputation rules make it ethically impermissible for law firm in-house counsel to advise the firm on matters concerning current clients. However, in recent cases, courts have rejected that view in certain instances. "[T]here is nothing in the language or commentary to [Model Rule 1.10(a), the imputation rule] to suggest that the rule of imputation was meant to prohibit an in-house counsel from providing legal advice to his own law firm in response to a threatened claim by an outside client." *RFF Family Partnership*, *supra*, 991 N.E.2d at p. 1078-79; see also *Stock v. Schnader Harrison*, *supra,* 142 A.D.3d at p. 233. Because we conclude that the act of seeking advice regarding a lawyer's ethical obligations does not create a conflict, we do not believe imputation applies.

[13/] See, e.g., *Edwards Wildman Palmer*, *supra,* 231 Cal.App.4th 1214; *Loop AI Labs Inc. v. Gatti,* 2016 WL 730211 (N.D. Cal. 2016) (rejecting fiduciary exception to privilege); *Thelen Reid & Priest v. Marland*, 2007 WL 578989 (N.D. Cal. 2007); *In re: SonicBlue Incorporated,* 2008 WL 170562 (Bankr. N.D. Cal. 2008); *Landmark Screens, LLC v. Morgan, Lewis & Bockius LLP*, 2010 WL 289858 (N.D. Cal. January 15, 2010); and *E-Pass Technologies, Inc. v. Moses & Singer, LLP*, 2011 WL 3794889 (N.D. Cal. August 26, 2011). Recent cases nationally on this issue are *Stock v. Schnader Hartisan Segal & Lewis LLP* (2016) 142 A.D.3d 210 [35 N.Y.S.3d 31]; *Crimson Trace Corporation v. Davis Wright Tremaine LLP* (2014) 355 Or. 476 [326 P.3d 1181]; *RFF Family Partnership, LP v. Burns & Levinson, LLP*, *supra,* 991 NE.2d 1066; and *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.* (2013) 293 Ga. 419 [746 SE.2d 98].

In Hypothetical One, Lawyer seeks advice concerning his ethical obligations and compliance, a situation which we opine does not in itself give rise to a conflict between Lawyer and Client. The ethical obligations Lawyer and Law Firm owe Client in that circumstance are therefore the same whether Firm In-House Counsel or Outside Counsel is involved.

Hypothetical Two concerns Lawyer's consultation with Outside Counsel concerning whether or not he has committed negligence, and if so, what his next steps may be. Does the ethical analysis change if that initial consultation is with Firm In-House Counsel? We conclude in Hypothetical Two that the act of Lawyer's seeking legal advice concerning his possible error and his resulting ethical obligations to Client does not itself create a conflict between Law Firm and Client. Once Law Firm concludes that Lawyer has committed an error and Client has a possible claim against the Firm, there is a potential conflict that triggers a duty to disclose and to seek informed written consent to continued representation under the conflicts rules.

Based on our analysis, there is no reason to treat differently a consultation by Lawyer with Firm In-House Counsel under the facts described. Law Firm necessarily must do the analysis required by the rules to determine its ethical obligations to client and the options available to both Client and Law Firm. Whether that analysis is performed by Lawyer himself, a colleague, Firm In-House Counsel or Outside Counsel, there is no conflict that prevents any lawyer from undertaking that preliminary task; in fact, the rules require that lawyers consider and analyze possible conflicts. Further, as noted in case law and commentary, there are potential benefits to the client and the law firm of having in-house counsel involved, including accessibility and timing. Of course, once Firm In-House Counsel concludes that Lawyer committed an error, at that point, just as when Outside Counsel is involved, Law Firm must make appropriate disclosure to Client of the material facts, and must carefully consider whether continued representation is possible and under what terms, or whether Law Firm must withdraw.

The last question is whether the participation of Firm In-House Counsel must be disclosed to Client at any stage in the fact scenarios set forth in Hypotheticals One and Two.[14/] For the situation described in Hypothetical One, where lawyer seeks advice on compliance with ethical obligations and rules only, there is no reason Lawyer must disclose to Client that he consulted Firm In-House Counsel. Both Lawyer and Client have an interest in ensuring that Lawyer meets ethical obligations, and therefore the consultation itself is not a material development that must be disclosed pursuant to rule 1.4(a)(3).

With regard to Hypothetical Two, under the facts present here, there appears to be no requirement to disclose Firm In-House Counsel's involvement to Client, just as there was no requirement to disclose the role played by Outside Counsel. However, as with respect to the

[14/] Some law firms include a provision in their representation agreements that states that law firm may consult its own in-house counsel, and seeks the client's agreement that it may do so. Such provisions usually also state such consultation will be privileged between the law firm and its counsel. To date, no California courts have opined as to the effect of such a clause, either upon a law firm's ethical obligations to the client or applicability of the attorney-client privilege.

participation of Outside Counsel, there may be facts in a given situation that would cause the participation of Firm In-House Counsel to be a material development. In that instance, Law Firm would have an obligation to disclose under rule 1.4(a)(3).

CONCLUSION

A lawyer's seeking legal advice concerning ethical obligations owed to a client does not by itself create a conflict with the client. Once a lawyer becomes aware that he or she has committed an error that could prejudice the client, the lawyer ethically may seek legal advice concerning obligations to the client and options available, but must comply with the rules governing disclosure to clients and conflicts of interest. The lawyer's ethical obligations in that situation do not vary whether he or she seeks legal advice from a lawyer outside the firm or law firm in-house counsel.

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 Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.