

44th Annual UCLA Entertainment Symposium

WEBINAR SERIES

School of Law
UCLA Ziffren Institute for Media, Entertainment,
Technology & Sports Law

WEDNESDAY, JULY 29, 2020

5:50p - 6:50p PDT

The John H. Mitchell Panel on Ethics and Entertainment
Sponsored by the Patricia W. Mitchell Trust

THE NEWS, THE LAW AND LEGAL ETHICS

moderator:

Dale Cohen

Director, Documentary Film Legal Clinic, UCLA School of Law, and Special Counsel, FRONTLINE

panelists:

Jonathan Anshell

Executive Vice President and General Counsel, ViacomCBS Media Networks

Kelli L. Sager

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Jeffrey Toobin

Chief Legal Analyst, CNN, and Staff Writer, The New Yorker

JONATHAN ANSHELL

EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VIACOMCBS MEDIA NETWORKS

JONATHAN ANSHELL IS EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL OF VIACOM CBS MEDIA NETWORKS. JONATHAN LEADS THE LEGAL AFFAIRS TEAMS FOR CBS'S ENTERTAINMENT AND NEWS OPERATIONS, AS WELL AS THE BUSINESS AND LEGAL AFFAIRS TEAMS FOR THE VIACOMCBS CABLE NETWORKS

IN THE US AND INTERNATIONALLY, INCLUDING SHOWTIME, MTV, VH1, BET, COMEDY CENTRAL, NICKELODEON AND SMITHSONIAN. JONATHAN ALSO OVERSEES THE STANDARDS AND PRACTICES FUNCTION COVERING ALL VIACOMCBS NETWORKS AND PLATFORMS.

DALE COHEN

DIRECTOR, DOCUMENTARY FILM LEGAL CLINIC, UCLA SCHOOL OF LAW, AND SPECIAL COUNSEL, FRONTLINE

DALE COHEN IS DIRECTOR OF DOC FILM LEGAL CLINIC AT UCLA SCHOOL OF LAW. FOUNDED IN 2018, THE DOC FILM LEGAL CLINIC PROVIDES PRO BONO LEGAL SERVICES TO DOCUMENTARY FILMMAKERS ON A WIDE VARIETY OF MATTERS RANGING FROM INTELLECTUAL PROPERTY TO RISK MANAGEMENT AND FROM DEFAMATION TO BUSINESS FORMATION. DALE ALSO SERVES AS SPECIAL COUNSEL TO FRONTLINE, THE AWARD-WINNING PBS DOCUMENTARY SERIES WHERE HE COUNSELS AND LEADS THE NEWS TEAM AND PRODUCERS ON LEGAL ISSUES AND ETHICAL STANDARDS. HIS EXTENSIVE EXPERIENCE AS A MEDIA LAWYER, LITIGATOR AND NEWS EXECUTIVE INCLUDES POSITIONS AT RADIO FREE EUROPE/RADIO LIBERTY, NPR, COX

ENTERPRISES AND TRIBUNE COMPANY. DALE WAS ALSO A LITIGATION PARTNER AT THE LAW FIRM OF SONNENSCHN NATH & ROSENTHAL (NOW DENTON'S) IN CHICAGO.

IN ADDITION TO THE CLINIC, DALE TEACHES *NEWS MEDIA LAW IN THE DIGITAL AGE* AT UCLA. HIS TEACHING EXPERIENCE INCLUDES MEDIA LAW COURSES AT UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, EMORY COLLEGE, UNIVERSITY OF MARYLAND, AND NORTHWESTERN UNIVERSITY. HE IS A FREQUENT SPEAKER AT DOCUMENTARY FILM FESTIVALS AND MEDIA LAW CONFERENCES. HE IS ALSO THE CO-AUTHOR OF A LEADING TEXTBOOK, *MEDIA AND THE LAW* (2ND ED., LEXISNEXIS).

KELLI L. SAGER

PARTNER, DAVIS WRIGHT TREMAINE LLP

KELLI SAGER, A PARTNER IN DAVIS WRIGHT TREMAINE'S LOS ANGELES OFFICE, HAS MORE THAN THIRTY YEARS OF EXPERIENCE REPRESENTING ALL KINDS OF MEDIA/ENTERTAINMENT COMPANIES, INCLUDING WEB PUBLISHERS, BROADCASTERS, FILMMAKERS, NEWSPAPERS, AND BOOK PUBLISHERS. SHE CONSISTENTLY HAS BEEN RECOGNIZED AS ONE OF THE TOP FIRST AMENDMENT ATTORNEYS IN THE COUNTRY: AMONG OTHER ACCOLADES, CHAMBERS USA HAS RANKED HER FOR TEN CONSECUTIVE YEARS IN ITS TOP TIER OF MEDIA ATTORNEYS IN THE U.S.; SHE HAS BEEN ONE OF LAWDRAGON'S 500 LEADING LAWYERS IN AMERICA SINCE 2005, AND SHE REGULARLY IS INCLUDED IN THE LOS ANGELES DAILY JOURNAL'S LISTS

OF TOP LAWYERS IN CALIFORNIA. IN 2019, KELLI RECEIVED THE "EXCELLENCE IN ADVOCACY" AWARD FROM THE BEVERLY HILLS BAR ASSOCIATION, THE FIRST WOMAN TO RECEIVE THAT HONOR. KELLI HAS ARGUED DOZENS OF TIMES IN FEDERAL AND STATE APPELLATE COURTS, INCLUDING MANY TIMES IN THE CALIFORNIA SUPREME COURT AND NINTH CIRCUIT COURT OF APPEALS. SHE HAS SERVED IN LEADERSHIP ROLES IN VIRTUALLY EVERY MEDIA-RELATED BAR ASSOCIATION AND NON-PROFIT, INCLUDING CHAIRING THE ABA FORUM ON COMMUNICATIONS LAW, THE IBA'S MEDIA COMMITTEE, AND THE MEDIA LAW RESOURCE CENTER DEFENSE COUNSEL SECTION.

JEFFREY TOOBIN

CHIEF LEGAL ANALYST, CNN AND STAFF WRITER, THE NEW YORKER

JEFFREY TOOBIN, A STAFF WRITER FOR THE NEW YORKER AND CHIEF LEGAL ANALYST FOR CNN, IS ONE OF THE MOST RECOGNIZED AND ADMIRER LEGAL

JOURNALISTS IN THE COUNTRY. HIS MOST RECENT BOOK, AMERICAN HEIRESS: THE WILD SAGA OF THE KIDNAPPING, CRIMES AND TRIAL OF PATTY HEARST,

WAS PUBLISHED BY DOUBLEDAY IN 2016 AND BECAME AN IMMEDIATE NEW YORK TIMES BEST-SELLER. HIS NEW BOOK, "TRUE CRIMES AND MISDEMEANORS: THE INVESTIGATION OF DONALD TRUMP," ABOUT THE INVESTIGATION LED BY SPECIAL COUNSEL ROBERT MULLER AND THE IMPEACHMENT OF PRESIDENT TRUMP, WILL BE PUBLISHED BY DOUBLEDAY IN AUGUST 2020.

HIS BOOK, "THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON," WAS THE BASIS FOR THE ACCLAIMED TEN-PART LIMITED SERIES, "AMERICAN CRIME STORY," STARRING JOHN TRAVOLTA AND CUBA GOODING, JR., ON THE FX NETWORK, IN 2016. IN 2021, "AMERICAN CRIME STORY" ON FX NETWORK WILL FEATURE A LIMITED SERIES BASED ON HIS BOOK, "A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT."

HIS BOOK, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT, WAS PUBLISHED BY DOUBLEDAY IN 2012 AND WAS ALSO A NEW YORK TIMES BEST-SELLER. THE OATH FOLLOWED THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT, WHICH WAS ALSO A BEST-SELLER AND EARNED THE 2008 J. ANTHONY LUKAS

PRIZE FOR NONFICTION FROM THE COLUMBIA GRADUATE SCHOOL OF JOURNALISM AND THE NIEMAN FOUNDATION FOR JOURNALISM AT HARVARD UNIVERSITY.

TOOBIN, WHO IS ALSO A NOTED LECTURER, HAS WRITTEN SEVERAL OTHER CRITICALLY ACCLAIMED, BEST-SELLING BOOKS, INCLUDING AND TOO CLOSE TO CALL: THE 36-DAY BATTLE TO DECIDE THE 2000 ELECTION.

PREVIOUSLY, TOOBIN SERVED AS AN ASSISTANT U.S. ATTORNEY IN BROOKLYN. HE ALSO SERVED AS AN ASSOCIATE COUNSEL IN THE OFFICE OF INDEPENDENT COUNSEL LAWRENCE E. WALSH, AN EXPERIENCE THAT PROVIDED THE BASIS FOR HIS FIRST BOOK, OPENING ARGUMENTS: A YOUNG LAWYER'S FIRST CASE—UNITED STATES V. OLIVER NORTH.

TOOBIN EARNED HIS BACHELOR'S DEGREE FROM HARVARD COLLEGE AND GRADUATED MAGNA CUM LAUDE FROM HARVARD LAW SCHOOL WHERE HE WAS AN EDITOR OF THE HARVARD LAW REVIEW.

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CONTINUING EDUCATION CREDITS

MCLE. UCLA SCHOOL OF LAW IS A STATE BAR OF CALIFORNIA APPROVED MCLE PROVIDER. BY ATTENDING THE 44TH ANNUAL UCLA ENTERTAINMENT SYMPOSIUM WEBINAR SERIES ON JULY 29, 2020, YOU MAY EARN MINIMUM CONTINUING LEGAL EDUCATION CREDIT IN THE AMOUNT OF UP TO **0.75 HOUR OF GENERAL CREDIT AND 1 HOUR OF LEGAL ETHICS CREDIT.** (0.75 HOUR OF GENERAL CREDIT FOR BACKEND? WHAT BACKEND? ARE PROFIT PARTICIPATIONS AN OUTDATED CONCEPT IN THE NEW TELEVISION ERA? AND 1 HOUR OF LEGAL ETHICS CREDIT FOR THE NEWS, THE LAW AND LEGAL ETHICS).

IN ORDER TO RECEIVE CREDIT, **YOU MUST VERIFY YOUR PARTICIPATION.** DURING EACH OF THE TWO PRESENTATIONS OF EACH WEEKLY WEBINAR, **A UNIQUE CODE WILL BE ANNOUNCED AND/OR SHOWN.** EACH ATTENDEE WILL THEN NEED TO WRITE DOWN THE CODE FOR THE CORRESPONDING PRESENTATION ON AN ATTENDANCE FORM WHICH, ALONG WITH AN EVALUATION, IS PROVIDED ON THE NEXT PAGES. **YOU ARE REQUIRED TO RETURN THE COMPLETED ATTENDANCE FORM TO EVENTS@LAW.UCLA.EDU WITHIN FIVE DAYS AFTER THE LAST DAY OF THE MONTH IN WHICH THE WEBINAR TAKES PLACE TO RECEIVE YOUR CERTIFICATE OF PARTICIPATORY ATTENDANCE.** YOU MAY ALSO RETURN A COMPLETED EVALUATION TO EVENTS@LAW.UCLA.EDU.

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OFFICIAL RECORD OF PARTICIPATORY ATTENDANCE FOR CALIFORNIA MCLE

PROVIDER: UCLA SCHOOL OF LAW (provider #1211)

SUBJECT MATTER/TITLE: The 44th Annual UCLA Entertainment Symposium Webinar Series

DATE AND TIME: Wednesday, July 29, 2020, 5:00 p.m. - 6:50 p.m. PDT

LOCATION: Los Angeles, California

LENGTH OF ACTIVITY: 1.75 hours

ELIGIBLE CALIFORNIA MCLE CREDIT: up to 0.75 hour of general credit and 1 hour of legal ethics credit

	Presentation	MCLE CODE	Attended (please initial)
5:00 pm - 5:45 pm 45 minutes 0.75 hour of general credit	<p>BACKEND? WHAT BACKEND? ARE PROFIT PARTICIPATIONS AN OUTDATED CONCEPT IN THE NEW TELEVISION ERA?</p> <p>Craig Wagner (Moderator), John V. Berlinski, Craig A. Emanuel, and Karen Tatevosian</p>	_____	_____
5:50 pm - 6:50 pm 1 hour 1 hour of legal ethics credit	<p>THE NEWS, THE LAW AND LEGAL ETHICS</p> <p>Dale Cohen (Moderator), Jonathan Anschell, Kelli L. Sager, and Jeffrey Toobin</p>	_____	_____

The undersigned attendee affirms that he/she attended the above-referenced session(s) as initialed above.

Attendee Full Name:

Attendee Bar Number:

Attendee Signature:

Attendee Email Address:

Please return completed form to events@law.ucla.edu within five days after the last day of the month in which the course takes place.

UCLA School of Law is a State Bar of California approved MCLE provider.

ACTIVITY EVALUATION FORM FOR CALIFORNIA MCLE

Please complete and return to events@law.ucla.edu

PROVIDER	UCLA School of Law (provider #1211)
PROVIDER PHONE #	(310) 825-0971
PROVIDER ADDRESS	1242 Law Building, Box 951476, Los Angeles, CA 90095-1476
TITLE OF ACTIVITY	The 44th Annual UCLA Entertainment Symposium Webinar Series
DATE OF OFFERING	Wednesday, July 29, 2020, 5:00 p.m. - 6:50 p.m. PDT
SITE	Los Angeles, California

NAME OF PARTICIPANT (optional)

Please indicate your evaluation of this course by completing the table below

Question	Yes	No	Comments
Did this program meet your educational objectives?			
Were you provided with substantive written materials?			
Did the course update or keep you informed of your legal responsibilities?			
Did the activity contain significant professional content?			
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?			

Please rate the instructor(s) of the course below

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Craig Wagner (Moderator), John V. Berlinski, Craig A. Emanuel, and Karen Tatevosian	Overall Teaching Effectiveness	
BACKEND? WHAT BACKEND? ARE PROFIT PARTICIPATIONS AN OUTDATED CONCEPT IN THE NEW TELEVISION ERA?	Knowledge of Subject Matter	

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Dale Cohen (Moderator), Jonathan Anschell, Kelli L. Sager, and Jeffrey Toobin	Overall Teaching Effectiveness	
THE NEWS, THE LAW AND LEGAL ETHICS	Knowledge of Subject Matter	

THE NEWS, THE LAW AND ETHICS

OUTLINE OF TOPICS/ISSUES

THE NEWS BUSINESS OFT TIMES SEEMS LIKE IT IS AFLAME: MASSIVE LAWSUITS FILED BY PUBLIC FIGURES AND GOVERNMENT OFFICIALS; DAMAGING HACKS AND REVEALING LEAKS ABOUT CELEBRITIES, POLITICIANS AND PUBLIC COMPANIES; SOCIAL MEDIA FUELING CONTROVERSIES ABOUT DISAGREEMENTS BIG AND SMALL. AND PROGRAMS AND PUNDITS SPINNING EVERY EVENT, OFTEN SPRINKLING IN "ALTERNATIVE FACTS" AND PERSPECTIVES CONDEMNED AS FAKE NEWS. OUR EXPERT PANEL WILL DISCUSS THE LAWYER'S ETHICAL RESPONSIBILITIES WHEN ADVISING JOURNALISTS AND MEDIA COMPANIES TELLING STORIES THAT RAISE DIFFICULT LEGAL AND FAIRNESS ISSUES INCLUDING, REPORTING BASED ON HACKS AND LEAKS, NDA BREACHES, AND SURREPTITIOUS RECORDINGS. TO FACILITATE OPEN DIALOGUE, THE PANELISTS WILL ANALYZE A HYPOTHETICAL FACT PATTERN THAT RAISES MANY FAMILIAR ISSUES.

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Rules 1.1, 1.2, 1.2.1, 1.7, 2.1, 4.1, 4.4, and 8.4

Chapter 1 – Lawyer-Client Relationship

Rule 1.1 Competence

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

Comment

- [1] This rule addresses only a lawyer’s responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.
- [2] See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

Rule 1.2 Scope of Representation and Allocation of Authority

- (a) Subject to rule 1.2.1, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to

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

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

Comment

Allocation of Authority between Client and Lawyer

- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. (See, e.g., Cal. Const., art. I, § 16; Pen. Code, § 1018.) A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].)
- [2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

Rule 1.2.1 Advising or Assisting the Violation of Law

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) discuss the legal consequences of any proposed course of conduct with a client; and
 - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*

Comment

- [1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent* does not of itself make a lawyer a party to the course of action.
- [2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.
- [3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.
- [4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For

example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.

- [5] If a lawyer comes to know* or reasonably should know* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)
- [6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

Rule 1.7 Conflict of Interest: Current Clients

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) 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 responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:
 - (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the

lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

- (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
 - (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 before a tribunal.
- (e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable class of persons.*

Comment

- [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].) A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person* in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm.* Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

- [2] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an “uncontested” marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).
- [3] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that paragraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer’s consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer’s interest is only as an indemnity provider and not as a direct party to the action.
- [4] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer’s obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer’s representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer’s firm*, with a party, a witness, or another person* who may be affected substantially by the resolution of the matter.
- [5] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer’s

representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

- [6] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals* at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.
- [7] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code, § 6068, subd. (e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.
- [8] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)
- [9] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the

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

- [10] A material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. (See rule 1.9(c).)
- [11] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

Chapter 2 – Counselor

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

- [1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

- [2] This rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

Chapter 4 – Transactions with Persons Other than Clients

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:*

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

Comment

- [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.
- [2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*
- [3] Under rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation in compliance with rule 1.16.

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

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*

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

- (a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and
- (b) promptly notify the sender.

Comment

- [1] If a lawyer determines this rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* (See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].) In providing notice required by this rule, the lawyer shall comply with rule 4.2.
- [2] This rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person.* (See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].)

Chapter 8 – Maintaining the Integrity of the Profession

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, “judge” and “judicial officer” have the same meaning as in rule 3.5(c).

Comment

- [1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.
- [2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.
- [3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)
- [4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.
- [5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these rules and the State Bar Act.
- [6] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.