THE BAR ASSOCIATION OF SAN FRANCISCO

Legal Ethics
Ethics Opinions

OPINION 2017-1

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ISSUE:

May an attorney ethically initiate representation of a large group of plaintiffs in a tort action? What ethical obstacles must an attorney consider before undertaking such joint/multiple client representation?

DIGEST:

Law firm seeks to represent a large number of consumers in litigation pertaining to injuries they allegedly sustained from the same defective product. The consumers cannot join together in a class action because of the disparity of claims, and their individual claims alone will not financially support individual actions. Law firm intends to advertise to attract these potential clients. Law firm also plans to modify its fee agreements and streamline its communications with the clients to make the large, joint representation practically feasible and cost effective. Subject to the limitations set forth below, the law firm may ethically undertake the representation.

AUTHORITIES INTERPRETED:

California Rules of Professional Conduct ("CRPC"), Rules 1-400, 3-100, 3-110, 3-310, 3-500, 3-510, 3-700, and 4-200

California's Proposed New and Amended California Rules of Professional Conduct (Proposed CRPC"), Rules 1.7, 1.8.7, 7.3, [1]

Business and Professions Code ("Bus. & Prof. C.") sections 6068 (e), (m) and (n), 6157, 6157.1, 6157.2, 6158, 6158.1, 6158.2, 6158.3, 6158.5, 6159.1, and 6159.2

FACTS:

Consumers of an allegedly defective product may have claims for violations of state and federal statutes and regulations. The possible relief available in this instance varies from person to person, ranging from the cost of the product to relatively minor personal injuries involving a few thousand dollars of medical bills. None of the individual claims alone, however, would be sufficient for a financially viable lawsuit against a major corporation. Based upon the disparity of claims among potential plaintiffs, the case would not likely qualify as a class action.

Law Firm ("Firm") specializes in prosecuting class actions on behalf of consumers and wants to undertake a non-class action representation of the group of consumers, determining that, if enough consumers retain the firm, it will be financially feasible for Firm to represent them jointly against the manufacturer in a single action. *See* Cal. C. Civ. Proc. §378. Under the facts presented, individual actions against the same manufacturer would not be financially feasible. Firm seeks guidance on how it may ethically contact potential clients, inform them about their possible claims and the firm's willingness to represent them, and initiate the joint representation. [2]

DISCUSSION:

For all of the advantages that joint representation offers, such as convenience, economy, and unity against a common adversary, it also presents many unique ethical challenges. Attorneys contemplating such representation must carefully consider all of the possible ethical issues that pertain to the specific circumstances of the matter at issue and to the potential clients involved before ultimately deciding to pursue the representation. Even if the interests of the potential joint clients seem aligned initially, an attorney must consider how those interests may ultimately diverge before, during and after the representation in order to

satisfy the lawyer's ethical obligations, including the requirement to make adequate, written disclosures to each potential client.

In order to effectively and efficiently address the ethical questions involved, the Committee will divide this discussion into two separate opinions: this first opinion ("Part 1") addresses the ethical considerations to be contemplated by an attorney before entering into a joint representation, as well as ethical issues that arise at the outset of the representation; and, the second opinion ("Part 2"), to be released at a later date, will concentrate on the ethical challenges that may arise during and after the joint representation, including a continued discussion of conflicts of interest, settlements, withdrawal and other relevant issues.

I. NOTICE TO AND CONTACT WITH POTENTIAL CLIENTS

Prior to taking steps to contact potential joint clients, the Firm should consider how to notify and attract product consumers to be clients of Firm in an action against the company. Because the claims at issue in this opinion would not qualify as a class action, case law regarding contacting potential plaintiffs in class actions does not necessarily apply. [3] *See, e.g., Atari, Inc. v. Superior Ct.* (1985) 166 Cal.App.3d 867; *Hernandez v. Vitamin Shoppe Indus., Inc.* (2009) 74 Cal.App.4th 144. Therefore, Firm must adhere to the rules, standards and statutes that apply to the solicitation of individual clients and attorney advertising.

A. Advertising and Solicitation

Here, the Firm hopes to identify and communicate with a specific group of people for potential representation in a combined action against a particular defendant. Firm cannot engage in the solicitation of clients in violation of CRPC 1-400; therefore, the question is what means of contact are ethically permitted.

A solicitation is defined by CRPC 1-400(B) as any communication concerning the availability of legal employment where “a significant motive is pecuniary gain,” and which is either delivered in person or by telephone, or directed towards someone known by the sender to be represented by counsel in the matter. Importantly, under CRPC 1-400(C), attorneys are prohibited from making solicitations to prospective clients with whom an attorney has no prior professional or family relationship unless the solicitation is constitutionally protected (*i.e.*, a lawyer is not prohibited from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. [4] *See, e.g.*, *In re Primus* (1978) 436 U.S. 412.

The question, then, is to what extent CRPC 1-400(B) limits the means by which Firm may contact potential clients. Under the current CRPC, electronic communications, such as emails, text messages or blog postings, are unlikely to be considered solicitations. California State Bar Formal Opinion ("Cal. State Bar Form. Opn.") 2001-155 concludes that attorney website information relating to employment availability qualifies as a communication under CRPC 1-400(A), but not as a solicitation under CRPC 1-400(B) because it is not “delivered in person or by telephone.” The opinion further considered email, which, while “transmitted through telephone lines,” is more like regular mail in that it allows a recipient time to analyze and reflect upon the content of the communication, and is therefore not a solicitation. [5] Cal. State Bar Form. Opn. 2001-155. [6] Thus, there appears to be no present limitation under the CRPC that prevents Firm from contacting prospective clients via email or similar forms of electronic communications so long as Firm complies with the requirements under CRPC 1-400 and the State Bar Act, Bus. & Prof. C. sections 6157-6157.3, as discussed below. Similarly, the Firm may reach out via other permitted forms of written correspondence, such as letters or newsletters.

Of course, the limitations that generally apply to attorney communications under CRPC 1-400 would also apply to Firm’s communications here. Under subdivision (D) of CRPC 1-400, which applies to both communications and solicitations, the Firm’s attempts to garner clients must be truthful, must not be deceptive, must not omit information making the communication misleading, must clearly state that it is advertising, and must not be intrusive, coercive or threatening. Additionally, the communication must avoid presumptive violations of CRPC 1-400 as set forth in the Standards accompanying CRPC 1-400, including the following:

- Claims about the Firm's prior successes may be seen as a guarantee, warranty, or prediction, which presumptively violate CRPC 1-400. Standard (1).
- If the communication will include one or more testimonials by former clients, Firm must also include a disclaimer that "this testimonial does not constitute a guarantee, warranty, or prediction" about the outcome of the matter for which representation is sought. CRPC 1-400, Standard (2).
- Any communication directed to potential clients must state in twelve-point type that it is an advertisement or "newsletter" on the first page of the communication, and the same words must be used (or words of similar import) on the envelope enclosing the communication. Standard (5).
- Even though the communication comes from Firm, one lawyer in Firm must be identified in the communication as being the person responsible for it. CRPC 1-400, Standard (12).
- If Firm is going to announce that it will not receive a fee unless the client obtains a recovery, then it must also include a statement disclosing whether the client will be responsible for costs. CRPC 1-400, Standard (14); *see also* Bus. & Prof. C. § 6157.2(d).

Legal advertising is also regulated by the State Bar Act, Bus. & Prof. C. sections 6157-6157.3. Bus. & Prof. C. section 6157.1 repeats the admonition against false, deceptive or misleading advertising found in CRPC 1-400. Section 6157.2(c) bars advertising that uses actors to impersonate the attorneys doing the advertising, or their present or prior clients. If a third party is paying for the communication, Firm must disclose the relationship between it and the payor in the communication. Bus. & Prof. C. § 6157.3.

If Firm communicates to potential clients via e-mail, tweets, texts, or other forms of electronic communications, it must also comply with Bus. & Prof. C. sections 6158 et seq. If Firm advertises a recent achievement or victory, it must provide information as to the facts or law giving rise to the outcome, or it must state that the outcome achieved was based on particular facts and that a different outcome may result from different facts. Bus. & Prof. C. §§ 6158.1(a), 6158.3. However, even a disclaimer under section 6158.3 may not be sufficient to overcome the presumption in section 6158.1 that the message is false, deceptive or misleading.1

B. Obtaining Potential Client Information

Because the Firm's case does not qualify as a class action, in which class counsel can often obtain pre-certification contact information for putative class members, it may be difficult for Firm to obtain potential client contact information. One option is to use investigators to assist Firm in obtaining contact information for potential clients. While that is permissible, the Firm must supervise the investigator's actions. Firm must ensure that the investigator does not engage in unlawful solicitation as a "runner" or "capper" under Bus. & Prof. C. sections 6151-6152, which prohibit persons or entities acting for consideration as an agent of the lawyer from soliciting business for the lawyer. Bus. & Prof. C. section 6152(a)(1) further prohibits any person or entity from "soliciting any business" for an attorney on public or private property and does not require evidence of an agency relationship. *See Hutchins v. Mun. Ct. (People)* (1976) 61 Cal.App.3d 77, 90. The Firm should also ensure that the investigator does not engage in any deceptive means. *See, e.g.*,Cal. State Bar Form. Opn. 2012-186; San Diego County Bar Legal Ethics Committee Opn. 2011-2.

C. Disclosures to Potential Clients

It is possible that Firm may seek only statutory relief in the nature of a fee, fine or penalty against the company on behalf of its joint clients, rather than other damages, such as tort damages subject to more rigorous requirements of proof. If so, Firm must notify its potential clients of this fact and advise them to seek other advice or counsel if the client elects to pursue remedies other than the relief Firm proposes to seek on behalf of its clients. Otherwise, the initial communication may be misleading or deceptive under the CRPC and the State Bar Act.

Similarly, Firm may want a threshold number of clients before it commits to represent anyone because pursuing the case with a low number of clients may not make economic sense. If Firm will not represent anyone unless this threshold number of clients is reached, it must notify its potential clients of this fact in advance and advise them of any statutory deadlines that may preclude their claims should Firm declines to represent them. See *Flatt v. Superior Court* (1999) 9 Cal.4th 275. Additionally, Firm must keep its potential clients advised about whether or not it will take on their representation once any potential clients have indicated a willingness to be represented by Firm.

One issue that is not clearly addressed by the CRPC or State Bar Act is how Firm may present the issue of confidentiality in its contact with prospective clients. If the Firm informs prospective clients that their communications with Firm will be confidential, it should disclose that the communications may nevertheless be shared with other jointly represented clients. *See* Evid. C. § 962; and discussion *infra*, at Section II.B.

II. ENGAGEMENT AGREEMENT DISCLOSURES AND INFORMED CONSENT TO JOINT REPRESENTATION

A. Conflicts of Interest Among Individual Plaintiffs

CRPC 3-310 prohibits lawyers from representing multiple clients in a matter where the interests of the jointly represented clients actually or potentially conflict unless the clients consent to the representation after being advised in writing of the relevant circumstances and the reasonably foreseeably adverse consequences. To obtain each client's informed written consent to aggregate representation and waiver of potential conflicts of interest, the lawyers should disclose all potential conflicts arising from the aggregate representation and the disadvantages of the joint representation. CRPC 3-310(A)(1), (C)(1-2). In particular, litigation decisions may arise that require the lawyer to make decisions that could favor one client over another, such as the order of trial, where each plaintiff's claims may be tried separately. Other examples include, but are not limited to, the following:

- The severity of each client's damages may differ and the value of some clients' claims may significantly exceed the value of other client's claims;
- Some clients' damages may be more provable than others;
- Clients may differ on litigation strategy or on the issue of whether to settle on certain terms;
- One or more of the clients may instruct Firm in a manner that is contrary to the instructions of the other client(s);
- One or more of the clients may take a position or act in a manner that is prejudicial to the interests of the other client(s); and
- Joint representation may result in less vigorous advocacy or assertion of one particular client's individual or separate interests than if the lawyers were to represent only that particular client.

Even though such potential disagreements and foreseeable adverse consequences are common to many joint client relationships, attorneys are advised to avoid using form disclosure agreements for each engagement. Form waivers are not per se improper (*see* Cal. State Bar Form. Opn. No. 1989-115) and California law does not require that every possible consequence of a conflict be disclosed for consent to be valid (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606 ["[w]aiver of the consequences of potential conflict was not inadequate simply because neither the court nor the agreement undertook the impossible burden of explaining separately every conceivable ramification."]). However, California courts have invalidated joint clients' informed written consent due to the attorney's failure to adequately caution each joint client about the actual and specific risks associated with the particular joint representation. Violation of the conflict of interest rules may result in discipline (Bus. & Prof. C. §6077), disqualification, disgorgement of fees (*see Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 278; *Slovensky v. Friedman* (2006) 142

Cal.App.4th 1518, 1535), or liability for any related damage. Therefore, Firm should tailor its written disclosures in the engagement agreements to the type of matter being handled, the relationship between the specific joint clients, and the foreseeable adverse consequences in the particular joint representation.

In a multiple client representation, lawyers owe fiduciary obligations of loyalty to all of the jointly represented clients and cannot take sides or assert the interests of one client over the interests of the other in the litigation. *See Flatt, supra*, 9 Cal.4th at 282 ["An attorney's duty of loyalty to a client is not one that is capable of being divided . . ."]; Rest. 3d Law Governing Lawyers § 122, cmt. h (2000). Therefore, the Firm must disclose to each potential client at the onset that if they join the mass action, Firm may make decisions that will be in the best interests of the overall group of plaintiffs and not necessarily in the best interests of an individual client. [8] Rather than the lawyers vigorously asserting a single interest of an individual client on an issue, there will be a balancing of interests among the joint clients.

In addition to providing the potential clients with a proposed, written retention agreement disclosing reasonably foreseeable adverse consequences, a lawyer should also communicate with the potential clients about the representation and the provisions in the proposed agreement. This communication between the attorney and clients provides an opportunity to address any questions or issues before moving forward with the relationship, which ultimately lends assurance that each client's consent to the joint representation is informed. Further, though it is clear that Firm must discuss with each potential client the risks involved in the proposed joint representation, Firm should also discuss the benefits and the alternative possibility of separate representation. It is a good risk management practice for an attorney to advise potential clients to seek an independent lawyer's review of the agreement before he or she consents to the representation and signs the agreement. This advice should also be included in the written engagement agreement.

As discussed in section II.D, a lawyer cannot obtain a client's advance consent to waive his or her right to settle or the right to decline to participate in an aggregate settlement. *See* ABA Formal Opn. 06-438; Model Rule 1.8(g); *see also* CRPC 3-310(D) and 3-510. However, advance consent to other future conflict(s) is not necessarily prohibited. *See* Cal. State Bar Form. Opn. 1989-115; Proposed CRPC 1.7, Comment 10; *Visa U.S.A., Inc. v. First Data Corp.* (N.D. Cal. 2003) 241 F.Supp.2d 1100, 1107.

In limited circumstances, California courts have upheld advance waivers obtained from joint clients for the purpose of identifying which of the joint clients the attorney will continue to represent in the event that an actual conflict develops between them making continued joint representation impermissible. *See, e.g.*, *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1301-1302 [9]; *Visa U.S.A., Inc., supra*, 241 F.Supp.2d at 1105-1107; California Formal Opinion 1989-115. To our knowledge, advance waivers have not been applied by the California courts in the context of an attorney's representation of a large group of clients. In this context, it will likely be more difficult to identify the joint client(s) the attorney will continue to represent in the event of an actual conflict of interest, and to specifically identify and disclose potential conflicts with sufficient detail to withstand future scrutiny. Of course, rather than seeking such an advance waiver, Firm may elect to advise potential clients in the engagement agreement that Firm will not advise or represent any of the joint clients in connection with any future claim or defense that any one client may have against another client.

Although conflicts between multiple clients are inherent in most joint representations, and do not necessarily prohibit joint representation if informed, written consent to such conflicts can be obtained from each client, some conflicts, such as the right to settle, cannot be waived by consent. *See* CRPC 3-310, Discussion; ABA Model Rule 1.7, Comments [14]-[17]; *see also State Comp. Insur. Fund v. Drobot* (C.D. Cal. 2016) 192 F.Supp.3d 1080. Thus, even if Firm initially, reasonably believed that the contemplated joint representation was viable under the applicable ethical rules and other relevant law, once the potential clients are identified, the conflict analysis must be revisited before entering into a joint attorney-client relationship. If Firm cannot obtain informed, written consent from each of the potential joint clients as required, the representation of the potential client who refuses to consent must be declined. Conflicts arising during the representation will be addressed in Part 2 of this opinion.

B. Confidentiality

An attorney owes clients a fiduciary duty of confidentiality. CRPC 3-100; Bus. & Prof. C. § 6068(e); *Anderson v. Eaton* (1930) 211 Cal. 113, 116. Bus. & Prof. C. § 6068(e)(1) requires that an attorney "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." In cases of joint representation, although the attorney owes the joint clients a duty of confidentiality as to third parties, there is generally no duty of confidentiality or attorney-client privilege between or among the joint clients. *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1294; *Croce v. Superior Court* (1937) 21 Cal.App.2d 18, 20; *see also* Cal. Evid. C. § 962; CRPC 3-310, Discussion. At the same time, Firm has a duty to communicate and keep all clients "reasonably informed about significant developments relating to the employment or representation …" CPRC 3-500; Bus. & Prof. C. §6068(m).

Therefore, communications made between any one of the joint clients and the lawyers, which are relevant to the joint representation, are subject to disclosure to the other clients, even in the absence of express consent to the disclosure. *See Anten v. Superior Court* (2015) 233 Cal.App.4th 1254, 1259-1260. Failure to address this issue at the onset of the relationship could create complications later in the representation. Accordingly, the lawyer should disclose in the engagement agreement that any information communicated to or received by the lawyer from one client will not be kept confidential and withheld from the other clients if it is significant to the common interest of all joint clients.

Significant information of common interest may include, for example, the scope of each plaintiff's injuries as this information may affect the distribution of any recovery obtained as part of a global settlement. In that circumstance, even if the revealing client asks the attorney to keep significant information secret, the attorney would likely be obligated to share that significant information with the other joint client(s). CPRC 3-500; Bus. & Prof. C. §6068(m). However, if the information provided to the attorney by one client is not significant to the joint representation, the lawyer should acknowledge his or her duty to maintain such information in confidence and should not disclose it to the other joint clients without obtaining prior written consent. Lawyers should be especially cautious about disclosing highly sensitive information of an individual plaintiff, such as medical or privacy protected information, if it is not significant to the joint representation.

As in any joint representation, Firm should also disclose at the onset that in the event of a formal dispute between the clients, or between the client(s) and lawyer(s), the attorney-client privilege generally will not protect from discovery the communications between each of the clients and the lawyers. Cal. Evid. C. §§958, 962; *Anten*, *supra*,233 Cal.App.4th at 1260.

C. Apportionment of Fees and Costs Among Clients

In a multiple client representation, the apportionment of fees and costs can present unique problems, such as whether or not the costs are shared by the clients. Each client's responsibility for fees and costs must be disclosed in writing at the onset of the relationship (Bus. & Prof. C. §§ 6147(a), 6148(a) & (b)), and fees must not be unconscionable (CRPC 4-200(A)).

Requiring each client to pay his or her own fees and/or costs can be impractical, hard to track, and difficult to fairly apportion. [10] On the other hand, an agreement to evenly share fees and/or costs presents different problems. In some cases, the costs directly related to each client may vary widely. An agreement to equally share such costs could also create potential conflicts of interest between clients with different claim amounts. For example, how might an attorney apportion the cost of an expert witness in a personal injury action where each joint client has different injuries and the expert testimony is more relevant to some clients' claims than others? The conflicts concerning payment could be exacerbated in a situation where little or no recovery is obtained.

To avoid actual conflicts and future disputes, Firm should identify the apportionment method to be used for attorney's fees and costs that is most conducive to the circumstances of the particular matter and clients involved. Firm must disclose in the engagement agreement all reasonably foreseeable conflicts relating to fee and cost apportionment and must obtain each client's informed, written consent to the method selected. Again, the more detailed the initial disclosure, the less susceptible it will be to attack, disagreement or dissatisfaction.

D. Aggregate or Lump Sum Settlements

Settlements received on behalf of joint clients often will not be allocated among the various plaintiffs, but instead will be a unitary or global settlement that must be divided among them. Thus, every dollar distributed to one client means one less dollar for the other client(s). CRPC 3-310(D) prohibits a lawyer from entering into an aggregate settlement of claims of multiple clients without the informed consent of each client. [11] Part 2 of our opinion will address the application of CRPC 3-310(D) and the ethical issues surrounding the division of settlement proceeds among joint clients. However, as an initial matter, the engagement agreement must disclose the reasonably foreseeable risk that a dispute will arise concerning the joint clients' willingness to accept an aggregate settlement offer. *See* Comment 13 to ABA Model Rule 1.8(g). [12] The engagement agreement should further explain the restriction on aggregate settlements under CRPC 3-310(D).

Importantly, as mentioned above, the engagement agreement cannot require the client's advance consent to waive their right to settle or the right to avoid aggregate settlements. Thus, provisions in the engagement agreement attempting to obtain consent for aggregate settlement decisions by majority or super-majority vote, election of a "litigation steering committee," or appointment of the lawyer as "attorney-in-fact," would not be permissible under the current (or Proposed) CRPC.

E. Withdrawal

Withdrawal or termination of representation is governed by CRPC 3-700 which, (i) may require the lawyers to obtain the permission from the court if an action has been filed; and, (ii) is only permissible if Firm has taken "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with CRPC 3-700(D) (client files and property), and complying with applicable laws and rules." CRPC 3-700 (A)(2). This subject will be discussed in detail in Part 2 of this opinion. However, Firm should disclose in the retention agreement that each client has the absolute right to terminate Firm regardless of what the other joint clients may decide. Please note that once an action has been filed, the court's permission may be required.

Firm should also disclose in the engagement agreement that in the event of a dispute among the clients in which the lawyers cannot continue to competently represent the divergent interests of all of the clients (*See* CRPC 3-110), such as where one or more plaintiffs dissent from a proposed settlement, the lawyers may need to withdraw from the representation of all or some of the clients (See discussion *infra*, at Section II.A.). Firm should further disclose at the onset the adverse consequences to the client in the event the Firm is required to withdraw.

CONCLUSION

In sum, Firm may ethically undertake joint representation of a large group of clients against the same defendant in one action provided Firm complies with the California Rules of Professional Conduct, State Bar Act provisions, and fiduciary duties described above. Although these standards do not differ in the context of mass tort litigation, the standards will be more difficult to apply in light of the large number of clients and potential conflicts of interest among them. Firm must be cautious to follow advertising rules and avoid improper solicitation of potential clients. Before undertaking a joint representation, lawyers are advised to carefully evaluate the ethical challenges that exist or may arise between and among the potential clients in the specific matter at hand. Unless adequate written disclosures can be made to each potential client as required to obtain written consent, joint representation should not be undertaken.

Footnotes

1. California's Proposed New and Amended California Rules of Professional Conduct were adopted by the Board of Trustees at its November 17, 2016 and March 9, 2017 meetings. On March 30, 2017, the State Bar submitted the proposed rules to the California Supreme Court. As of the effective date of this opinion, the California Supreme Court had not yet approved the proposed rules. Rule amendments adopted by the Board of Trustees of the State Bar of California do not become operative unless and until they are approved by the Supreme Court. Applicable proposed rules identified in this opinion are for informational purposes only.

2. "Case law has defined joint clients as two or more persons who have retained the [same] attorney on a matter of common interest to all of them…" *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 223.

3. Whether those rules should apply is a different issue that the Committee is not opining on here.

4. The advertising and solicitation restrictions set forth in Bus. &Prof. C. section 6157 *et seq.* and CRPC 1-400 may be limited to the extent they impede on the rights protected under the California and United States Constitutions, including the rights of freedom of speech and freedom of press. "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading" (*Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 US 626, 638); "(c)ommercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York* (1980), 447 U. S. 557, 566.

5. Although CRPC 1-400 does not address electronic communications, consistent with American Bar Association ("ABA") Model Rule 7.3, Proposed CRPC 7.3 specifies that "real-time electronic contact" is treated in the same manner as in-person or telephone solicitations, which are impermissible. *See* ABA Model Rule 7.3(a)-(c), Comments [1]-[3]. "Real-time electronic contact" is not defined in either the Proposed CRPC or the Model Rules. However, based on the reasoning stated in Cal. State Bar Form. Opn. 2001-155, emails, like regular mail, afford the potential clients the time to analyze and reflect upon the content of the communication before responding, if at all, and, thus, would likely not be considered a real-time electronic communication in violation of Proposed CRPC 7.3.

6. See also Cal. State Bar Form. Opn. 2004-166 [attorney's communications with prospective clients in a mass disaster victims Internet chat room are not "in person" solicitations under CRPC 1-400(B); however, such communications violate CRPC 1-400 (D)(5), which bans transmittal of communications that intrude or cause duress, and would also be a presumed violation of Standard (3) to CRPC 1-400].

7. See Bus. & Prof. C. § 6158.3. Note: Electronic advertising found by the State Bar to violate the statutes is subject to a safe harbor provision: if the communication is withdrawn within 72 hours of a notice from the State Bar, a complainant alleging a violation of the electronic media advertising provisions (Business and Prof. C. §§ 6158, 6158.1 or 6158.3) may not take further action against that lawyer. Bus. & Prof. C. §6158.4(b)(1).

8. As discussed in Section II.D, each client has the autonomous right to settle.

9. In *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1301-1302, the court held disqualification of attorney in a lawsuit between the attorney's former joint clients should have been denied because the joint client had signed a detailed advance waiver that identified the party with whom the conflict arose, and the joint client subsequently reaffirmed his consent while represented by separate counsel, agreeing not to disqualify law firm from representing the other identified joint client "notwithstanding any adversity that may develop." The court found that the advance waiver in that case was detailed and broad enough to cover the law firm's representation of one joint client in an action against the other. The Committee cautions that advance waivers involve a fact-specific inquiry that should be evaluated on a case-by-case basis.

10. Although the case may be handled on a contingent basis, Firm will still likely need to address cost allocation issues in the engagement agreement.

11. Proposed CRPC 1.8.7 addresses the prohibition against aggregate settlement of the claims of or against the multiple clients unless each client gives informed written consent.

12. Comment 13 to ABA Model Rule 1.8(g) ["Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent."].

13. *See* ABA Formal Opn. 06-438 [Model Rule 1.8(g) "protects a client's right in all circumstances to have the final say in deciding whether to accept or reject an offer of settlement."]; The Tax Authority, Inc. v. Jackson-Hewitt, Inc., 898 A.2d 512 (N.J. 2006); In re Hoffman, 883 So.2d 425, 433 (La. 2004) ["Unanimous informed consent by lawyer's clients is required before an aggregate settlement may be finalized. The requirement of informed consent cannot be avoided by obtaining client consent in advance. . ."].

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