

**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
FORMAL OPINION NO. 2004-165**

- ISSUE:**
1. What are the ethical responsibilities of a member of the California State Bar who uses outside contract lawyers to make appearances on behalf of the member's clients?
  2. What are the ethical responsibilities of the outside contract lawyer who makes the appearances?
- DIGEST:**
1. To comply with his or her ethical responsibilities, a member of the California State Bar who uses an outside contract lawyer to make appearances on behalf of the member's client must disclose to his client the fact of the arrangement between the member and the outside lawyer when the use of the outside lawyer constitutes a significant development in the matter. Whether the use of the outside lawyer constitutes a significant development will depend upon the circumstances in each situation. If, at the outset of the engagement, the member anticipates using outside lawyers to make appearances on behalf of the member's client, the member should address the issue in the written fee agreement with the client. If the member charges the outside lawyer's fees and costs to the client as a disbursement, the member must state the client's obligations for those charges in the written fee agreement. In addition, the member remains responsible to the client, which includes responsibility for competently supervising the outside lawyer. Finally, the member must comply with the ethical rules concerning competence, confidentiality, advertising, and conflicts of interest that apply to his or her role in any such arrangement.
  2. Like the member who uses an outside contract lawyer to make appearances, the outside contract lawyer must comply with the ethical rules concerning competence, confidentiality, advertising, and conflicts of interest that apply to his or her role in any such arrangement.

**AUTHORITIES**

**INTERPRETED:** Rules 1-400, 2-200, 3-110, 3-310, and 3-500 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6068 (e), 6068 (m), 6147, and 6148.

**STATEMENT OF FACTS**

Lawyer represents a number of clients in various litigation matters. Court Appearance Service ("CAS") is a service, operated by lawyers, which provides independent attorneys to law firms and sole practitioners on a contract basis. Lawyer has decided to use a CAS attorney to appear for Lawyer's clients in law and motion hearings, status conferences, depositions, and other matters. None of CAS's attorneys are members of Lawyer's law firm.<sup>1/</sup> CAS charges an hourly fee for the services of its attorneys who make such appearances.

CAS advertises its services with advertisements in newspapers and magazines directed to the legal profession, with flyers handed out at bar association meetings, with telephone directory advertisements, and by other means. The advertisements contain truthful information about the state-wide, 24-hour availability of the firm, the basis on which it charges for its services, its telephone number, and its e-mail address. The advertisements state that CAS attorneys make all types of court appearances, including motions and trials, and also will attend depositions and arbitrations. The advertisements also disclaim the existence of any attorney-client relationship between CAS or the lawyers whose services it provides, and the clients of the lawyers and law firms that hire CAS to provide legal services for those clients.

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<sup>1/</sup> The Committee does not address in this opinion the distribution of work within a law firm, but notes that some of the considerations stated herein may apply, depending upon the circumstances.

## DISCUSSION

### A. Lawyer's Ethical Duties

#### 1. Lawyer's Duty of Competence

Rule 3-110(A)<sup>2/</sup> states: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."<sup>3/</sup> Lawyer's satisfaction of this duty will be measured not just by his own performance, but also by the adequacy of Lawyer's supervision of the CAS lawyer; Lawyer's decision to delegate a task does not delegate his own duty of competent representation. As the discussion to rule 3-110 points out: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." Thus, even if Lawyer is not making the appearance, he still has a duty to supervise competently the CAS lawyer who is appearing in his stead.

What constitutes competence depends upon the facts. For example, Lawyer may retain CAS on short notice. Indeed, CAS advertises its ability to cover "emergencies" where the hiring lawyer learns at the last moment that he or she cannot make a particular hearing or appearance. This could lead to situations in which the CAS lawyer making the appearance does not have the time to learn what he or she may need to know to perform competently for that appearance. Similar concerns may arise if, in a hearing, the court addresses issues or matters which the CAS lawyer is not prepared to handle, or an outside lawyer is unable to perform other legal services competently.

At a minimum, Lawyer must adequately prepare the CAS lawyer for the appearance and the CAS lawyer must be competent to handle the appearance. In those situations where the CAS lawyer cannot be adequately prepared to represent the client in the appearance, Lawyer may not send the CAS lawyer to the appearance in his place, or permit him to provide other legal services.

The Committee recognizes that there may be some exigent circumstances in which Lawyer will have no choice other than to have another lawyer appear in his place. If, in these circumstances, the CAS lawyer making the appearance cannot be adequately prepared to represent the client competently on all the matters before the court, Lawyer should directly, or through the CAS lawyer, attempt to continue the matter or limit the scope of the appearance to matters which the CAS lawyer can be adequately prepared to handle competently.

#### 2. Lawyer's Duty To Inform His Clients

Rule 3-500 states: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Business and Professions Code section 6068 (m) states that an attorney has a duty "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." These authorities require Lawyer to inform his client that he has hired an outside lawyer or firm to make appearances on the client's behalf if the use of the outside lawyer or firm is a significant development.

As the Committee stated in California State Bar Formal Opn. No. 1994-138:

"Depending on the circumstances, rule 3-500 and Business and Professions Code section 6068 (m) will generally require the law office to inform the client that an outside lawyer is involved in the client's representation if the outside lawyer's involvement is a significant development. In general, a client is entitled to know who or what entity is handling that client's representation. However, whether use of an outside lawyer constitutes a significant development for purposes of rule 3-500 and Business and Professions Code section 6068 (m) depends on the circumstances of the particular case. Relevant factors, any one of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed; (ii) whether the new attorney will be performing a significant portion or aspect of the work; or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. (See L.A. Cty. Bar Assn.

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<sup>2/</sup> All rule references are to the Rules of Professional Conduct of the State Bar of California.

<sup>3/</sup> Rule 3-110(B) states: "For purposes of this rule 'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."

Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance.”<sup>4/</sup>

In addition to the foregoing factors, the Committee believes that the client’s reasonable expectation under the circumstances also is a consideration in determining whether the presence of a CAS lawyer in place of Lawyer is a significant development. If the client reasonably expects Lawyer to be present at the appearance, the use of a CAS lawyer in his place could be a significant development that would trigger the duty to inform the client.<sup>5/</sup>

### 3. Scope and Timing of Disclosure

When a duty to inform the client arises, whenever possible Lawyer should do so before a CAS lawyer makes an appearance on behalf of Lawyer’s client. When making this disclosure, the Lawyer should provide enough information to afford the client the opportunity to consider whether the client is comfortable with the proposed staffing arrangement, or whether the client would prefer an alternative arrangement.

In addition, if, at the outset of the engagement, Lawyer anticipates using CAS lawyers to appear in the client’s matter, Lawyer should address the issue in the written fee agreement with the client.<sup>6/</sup> (See L.A. Cty. Bar Assn. Formal Opn. No. 473 [“[T]he attorney bears the responsibility to be reasonably aware of the client’s expectations regarding counsel working on client’s matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation.”]; compare Cal. State Bar Formal Opn. No. 1994-138 at fn. 8 [“It would be prudent for the law firm to include the disclosure to the client in the attorney’s initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made.”].) If Lawyer charges CAS’s fees and costs to the client as a disbursement, Business and Professions Code sections 6147 and 6148 require Lawyer to state the client’s obligations for those charges in the written fee agreement, if contemplated at the time of the initial fee agreement, to the same extent as other costs charged to the client.

### 4. The Fee Arrangement between Lawyer and CAS

Rule 2-200 requires Lawyer to meet certain requirements when dividing a fee with another lawyer who is not his partner, associate, or co-shareholder.<sup>7/</sup> Rule 1-100(B)(4) defines an “associate” as “an employee or fellow

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<sup>4/</sup> Further, at least one court in California has held that informing the court of, and obtaining the client’s consent to a contract attorney’s appearing on behalf of the client ordinarily will be a prerequisite to the lawyer recovering fees. (*In re Wright* (C.D.Cal. Bkrcty. 2003) 290 B.R. 145.) The *Wright* court concluded that to recover fees for an appearance by a contract lawyer in a Chapter 13 bankruptcy case, the lawyer who hired the contract lawyer must not only inform the court in the application of the fact that the lawyer has used a contract lawyer, but also must “demonstrate that the client agreed to the use and billing rate of [the] contract attorney if the firm contemplated [his or her] use at the time that the firm was employed.” *Id.* at 156. Having determined the lawyer had failed to meet the foregoing requirements, the court denied the lawyer the fees requested for work performed by the contract lawyer. *Id.* at 157.

<sup>5/</sup> A recent opinion of the District of Columbia Bar suggested factors to consider in determining whether the use of a temporary lawyer is a material development that should be disclosed to the client, including the following: the length of time that the temporary attorney’s involvement is expected to last; any indication from the client that it desires to have a regular cadre of lawyers who will develop expertise on its matters; and the degree of responsibility of the temporary lawyer and the amount of supervision that the temporary lawyer will receive from the employing firm. District of Columbia Bar Legal Ethics Comm., Opn. 284.

<sup>6/</sup> Business and Professions Code sections 6147 and 6148 state when written fee agreements are required and what, at a minimum, they must contain. Section 6147, concerning contingency fee contracts, states at subsection (a)(2) that the contract shall include: “A statement as to how disbursements and costs incurred in connection with the prosecution of settlement of the claim will affect the contingency fee and the client’s recovery.” Section 6148, concerning cases not coming within Section 6147 where it is reasonably foreseeable that total expense to a client including attorney fees will exceed \$1,000, states at subsection (a)(1) that the contract shall include: “Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.”

<sup>7/</sup> Rule 2-200, in part, provides:

- (A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate

(continued...)

employee who is employed as a lawyer.” To the extent that CAS or the CAS lawyer is Lawyer’s employee when making the appearance, the rule’s requirements will not apply. If CAS or the CAS lawyer making the appearance is not Lawyer’s employee, Lawyer must comply with rule 2-200 if the compensation paid constitutes a division of the fee.

Whether CAS or its lawyers are employees of Lawyer when appearing on his behalf is a legal question which is beyond the Committee’s purview. In this opinion, the Committee assumes that CAS and its lawyers are not Lawyer’s employees. The question then becomes whether the hourly fee paid to CAS or the CAS lawyer is a division of Lawyer’s fee.<sup>8/</sup>

In California State Bar Formal Opn. No. 1994-138, the Committee articulated the following three-part test for determining whether a particular arrangement constitutes a division of fees under rule 2-200: (1) The amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If the payment meets all three criteria, no regulated division of fees has occurred. (See also, *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].)

Under the facts presented, the Committee believes that a division of fees does not occur if Lawyer pays CAS or the CAS lawyer an hourly rate which meets the foregoing criteria. Billing CAS’s fee as a cost, or as a separate identified entry, on Lawyer’s bill to his client, also would not constitute a regulated division of fees. In addition, there would be no division of fees if CAS or the CAS lawyer bills and is paid by the client directly.<sup>9/</sup>

#### 5. Lawyer's Duty To Protect Client Confidential Information

Business and Professions Code section 6068(e) states: “It is the duty of an attorney [t]o . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” The scope of the protection of client confidential information under Section 6068 (e) has been liberally applied. (See *People v. Singh* (1932) 123 Cal. App. 365 [11 P.2d 73].) The duty to preserve a client’s confidential information is broader than the protection afforded by the lawyer-client privilege. Confidential information for purposes of Section 6068 (e) includes any information gained in the engagement which the client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (Cal. State Bar Formal Opn. No. 1993-133.) The

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<sup>7/</sup> (...continued)

of, or shareholder with the member unless:

- (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
- (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

<sup>8/</sup> Compare Los Angeles County Bar Association Formal Opn. No. 473 at fn. 5 (stating that “[t]he use of attorneys who are ‘employees’, whether full or part time, does not trigger the requirements of Rule 2-200(A) since such employee attorneys are ‘associates’ as defined in rule 1-100(B)(4)” but also stating, “[t]his opinion does not address the question of and we express no opinion as to whether an independent contractor is an employee for purposes of Rule 2-200(A) or an outside attorney.”); see also Los Angeles County Bar Association Formal Opn. No. 457 (paralegal may receive occasional bonuses without implicating rule 1-320 barring sharing legal fees with non-lawyers); Los Angeles County Bar Association Formal Opn No. 467 (discussing timing of disclosure to and consent of client, under rule 2-200); and Los Angeles County Bar Association Formal Opn. No. 470 (concluding that payment of a year-end bonus to an of counsel attorney who is not a partner, associate, or shareholder of firm and whose relationship with firm consists primarily of reciprocal referral of business, is regulated by rule 2-200).

<sup>9/</sup> Notwithstanding the Committee’s conclusion that rule 2-200, requiring the client’s consent to a fee division, would not ordinarily apply in situations where Lawyer has used a contract appearance attorney, members should be aware that local court rules may require such consent as a prerequisite to receiving court-awarded fees. (See, e.g., *In re Wright*, *supra*, 290 B.R. at 155-156 (holding that a fee application must inform the court of the use of a contract lawyer, as well as demonstrate that the client has consented to the use and fee rate of the contract lawyer.)) The same court also held that a lawyer who uses a contract lawyer to make an appearance may not recover a sum over the amount paid to the contract lawyer unless the lawyer specifically requests the sum in the fee application and discloses the basis for the increased amount. *Id.* at 156.

duty has been applied even when the facts are already part of the public record or where there are other sources of information. (See L.A. Cty. Bar Assn. Formal Opn. Nos. 267 & 386.)

Competent representation of Lawyer's clients at the appearance may require Lawyer to reveal, and identify as confidential, his clients' confidential information to the CAS lawyer handling the appearance. While the duty to preserve a client's confidential information is broad in its scope, it nevertheless permits a lawyer to provide confidential information to members of a lawyer's staff who are involved in the client's representation when made to further the client's interests in a particular matter. (See, e.g., L.A. Cty. Bar Assn. Formal Opn. Nos. 374 & 423 [lawyers may use outside contractor data processors for client billings and the like so long as contractors informed of and agree to keep client information confidential; occasionally information may be so sensitive that it cannot be disclosed to any outside agency, and lawyer must make that determination prior to any disclosure].)

The Committee believes that similar kinds of disclosures may be made to a lawyer retained to appear in a client's matter, provided that precautions are taken to assure that the information imparted to the appearing lawyer is held in confidence.

Depending on the structure of CAS and the nature of its internal working arrangements, the attorney supplied by CAS inadvertently might disclose client secrets to CAS or to other CAS attorneys. The CAS attorney should take steps reasonably designed to avoid this. See California State Bar Formal Opn. No. 1997-150.

## B. CAS Lawyer's Duties

### 1. CAS Lawyer's Ethical Duties to Lawyer's Client

CAS's flyers and other advertising material disclaim any attorney-client relationship between CAS or its employees, and the clients of lawyers such as Lawyer. This disclaimer, however, does not by itself prevent the existence of an attorney-client relationship or the CAS attorney's assumption of ethical duties to Lawyer's client. Indeed, the facts presented here support finding an attorney-client relationship would exist between Lawyer's client and a CAS lawyer.

In general, except where a court appoints a lawyer to represent a client, a lawyer-client relationship arises by virtue of an express or implied contract. (E.g., Cal. State Bar Formal Opn. No. 2003-161.) In *Responsible Citizens et al., v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756], the court suggested that "one of the most important facts involved in finding an attorney-client relationship is 'the expectation of the client based on how the situation appears to a reasonable person in the client's position.'" (*Id.* at p. 1734.) See, *Streit v. Covington & Crowe* (2000), 82 Cal.App.4th 441 [98 Cal.Rptr.2d 193] [an attorney-client relationship is formed by an attorney making a single appearance at a court hearing at the request and in the place of the attorney of record, whether with or without compensation] and *In re Brindle* (1979) 91 Cal.App.3d 660, 671 [154 Cal.Rptr. 563, 572] [making a court appearance on a party's behalf creates a strong presumption that an attorney-client relationship has been formed]. While the existence of a lawyer-client relationship is a question of law (*Responsible Citizens*, 16 Cal.App.4th at 1733), in the Committee's opinion the appearance by a CAS attorney in a representational capacity on behalf of lawyer's client constitutes such a relationship for purposes of analyzing his or her ethical duties.<sup>10/</sup> By making an appearance for Lawyer's client, the CAS attorney steps into Lawyer's shoes to provide legal services to Lawyer's client, and in doing so, the CAS attorney undertakes the ethical duties that arise from an attorney-client relationship.<sup>11/</sup>

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<sup>10/</sup> In this opinion the Committee does not address whether the CAS lawyer's provision of other kinds of legal services, but not any appearance on behalf of lawyer's client, can create an attorney-client relationship between the CAS lawyer and Lawyer's client. (Compare *In re Brindle*, cited in the text above, to *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 534-535] [no attorney-client relationship found in case involving real estate exchange transaction where interests of contracting parties who retained the lawyer to prepare documents for the exchange were *adverse* to the interests of the opposing contracting parties who claimed an attorney-client relationship with lawyer].)

<sup>11/</sup> The situation here is distinguishable from those discussed in California State Bar Formal Ethics Opn. No. 2003-161, where the Committee concluded that a lawyer could effectively disclaim the *inadvertent* formation of an attorney-client relationship by stating that she will not or cannot represent a person seeking her services, and then not doing anything, such as providing legal advice, that would contradict that intent. California State Bar Formal Opn. No. 2003-161, at note 1 (citing to *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]); *id.* at page 6 (discussing *Gionis*.) Here, notwithstanding the CAS disclaimer concerning the formation of an attorney-client relationship, the CAS attorney has willingly provided legal services to Lawyer's client by acting in a representative capacity in appearing on behalf of Lawyer's client in court. Under such circumstances, CAS's disclaiming the formation of an attorney-client relationship is ineffective.

Moreover, regardless of whether the specific legal services provided by the CAS lawyer establishes an attorney-client relationship, the CAS disclaimer would not allow an attorney to avoid those ethical duties that can arise in the absence of an attorney-client relationship.<sup>12/</sup> This Committee long has recognized that the ethical duties will attach when a lawyer's relationship with a person or entity creates an expectation that the lawyer owes a duty of fidelity or when the lawyer has acquired confidential information in such a capacity. (Cal. State Bar Formal Opn. No. 1981-63; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1046-1047 [197 Cal.Rptr. 232] ["One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter."].)

Among the ethical duties of the CAS lawyer, whether or not an attorney-client relationship is found to exist, are the duties to comply with the law and rules governing conflicts of interest. These conflicts rules include rule 3-310(E), which states: "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." In *Allen v. Academic Games League of America, Inc.* (C.D. Cal. 1993) 831 F.Supp. 785, the court applied rule 3-310(E) even in the absence of a lawyer-client relationship. The court reasoned that the policies underlying the California Rules of Conduct – "to protect the public and promote respect and confidence in the legal professional"<sup>13/</sup> – were present, and allow a lawyer to avoid disqualification merely because the lawyer had not been a lawyer when the disqualifying events arose would undermine public confidence in the profession. (*Id.* at 788-789.) Accordingly, the court disqualified both the lawyer and his firm.

This Committee applied a similar rationale in California State Bar Formal Opn. No. 1981-63 in concluding that a City Council member's law firm could not represent tort litigants against the City even if the City consented. Here, even if it were held that the CAS lawyer did not have an attorney-client relationship with Lawyer's client, the policies underlying the California Rules of Conduct would allow application of Rule 3-310(E) to a CAS lawyer who obtains confidential information regarding Lawyer's client in connection with providing services for that client. Rule 3-310(E) would preclude the CAS lawyer, without first obtaining that client's consent, from accepting the representation of a new client in matter in which the confidential information could be used or disclosed for the benefit of the new client against the wishes or interest of Lawyer's client. (See also Cal. State Bar Formal Opn. No. 2003-161, Part III.)

The Committee concluded that the reasoning of *Allen v. Academic Games League of America, Inc.*, *supra*, 831 F.Supp. 785, and of California State Bar Formal Opn. No. 1981-63 apply equally to a CAS attorney who makes an appearance on behalf of Lawyer's client. Whether or not the CAS attorney is found to have formed an attorney-client relationship, he owes other ethical duties to Lawyer's client, including the duty to comply with conflict of interest rules, and the duties to maintain the confidence and to preserve the secrets of Lawyer's client.

## 2. CAS's Advertising and Soliciting For Work on Behalf of Its Lawyers

As noted above, in its advertising CAS disclaims any attorney-client relationship with Lawyer's clients, which suggests that Lawyer will be its only "client." The Committee has concluded, however, that by appearing as a lawyer on behalf of Lawyer's client, CAS lawyers assume the ethical duties of a lawyer to Lawyer's clients. To the extent that CAS's promotional materials suggest that such a relationship does not exist, they mislead attorney-recipients of the materials regarding the nature and implications of the service CAS is providing. This raises the issue of whether CAS's advertising, which is directed only to lawyers, violates any of the ethical duties of CAS lawyers.

California has both a rule, Rule 1-400, and a statute, Business and Professions Code sections 6157-6158.7, that regulate lawyer advertising. Business and Professions Code section 6106, which imposes discipline for acts involving moral turpitude, dishonesty or corruption, is also relevant to this inquiry.

Rule 1-400 (Advertising and Solicitation) states in relevant part:

"(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

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<sup>12/</sup> See California State Bar Formal Opn. No. 2003-161, Part II. Accord, Utah State Bar Ethics Advisory Opinion Committee Opn. No. 96-12 and Kansas Ethics Opn. No. 93-08.

<sup>13/</sup> See Rule 1-100(A).

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(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof;

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(D) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public . . .”

In its promotional materials CAS advertises its lawyer’s availability to make various types of appearances for a fee. Such statements are “communications” subject to rule 1-400 if they are “directed to any former, current, or prospective client.”<sup>14/</sup> Further, rule 1-400 is explicit that its coverage includes not just communications made by a lawyer, but also communications made on behalf of the lawyer, such as by CAS. This inclusion within the ambit of rule 1-400 of communications made on behalf of a lawyer is based on agency concepts (see *Belli v. State Bar* (1974) 10 Cal.3d 824, 837 and 840 [112 Cal.Rptr. 527]).

The Committee previously opined in California State Bar Formal Opn. No. 1981-61, however, that lawyer-to-lawyer communications do not come within the scope of the predecessor to rule 1-400 if the communications seek professional employment *through* the assistance or recommendations of the recipient attorney, or even if the communication seeks professional employment *by* the recipient attorney. The Committee reasoned that the predecessor of rule 1-400 is intended to prevent fraud, undue influence, and other abuses to which lay persons might be subject. Consequently, the rule should not apply to lawyer-to-lawyer communications because lawyers are unlikely to be affected by such vexatious conduct. Thus, to the extent the CAS advertising is directed to lawyers, it is not governed by rule 1-400.<sup>15/</sup>

This, however, does not end the inquiry. Since the Committee’s issuance of opinion no. 1981-61, the legislature in 1993 enacted Business and Professions Code sections 6157-6157.4, which overlap rule 1-400 in also prohibiting false, misleading, and deceptive advertisements. Then in 1994 the legislature amended portions of sections 6157-6157.4 and enlarged their scope with the addition of new sections 6158-6158.7, which deal with advertising by electronic media. These sections, however, do not provide a definitive answer to whether they encompass CAS’s advertising to lawyers.

On the one hand, sections 6157-6158.7, unlike rule 1-400, are not by their express language limited to communications to a “former, present, or prospective client.” Thus, they arguably would apply to any false, misleading, or deceptive advertisement directed to a lawyer by CAS on behalf of CAS lawyers.

On the other hand, a review of sections 6157-6158.7 suggests that, like rule 1-400, it is intended to deal only with advertising to former, present, or prospective clients despite the absence of that limiting language in those sections. As the Committee reasoned in opinion no. 1981-61, the purpose of restrictions on lawyer advertising is to protect the public, and not to protect other lawyers who can be presumed able to protect themselves. This conclusion is

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<sup>14/</sup> See California State Bar Formal Opn. No. 1995-143, which distinguishes between communications and in-person or telephonic solicitations. A communication is a message made by the lawyer concerning the availability for professional employment directed to prospective clients, and can be found when a message is merely directed to potential clients regardless of whether such message is ever actually received by any potential client, for example, when transmitted by electronic media advertising.

<sup>15/</sup> As stated in California State Bar Formal Opn. No. 1981-61, this analysis assumes that if Lawyer delivers the CAS advertising materials to his client, he is not doing so as the agent of the CAS lawyer. That opinion also suggests that even though the predecessor of rule 1-400 does not apply to lawyer-to-lawyer advertising, abuses can be redressed. See for example, Business and Professions Code sections 6067, 6068(a), and 6106.

reinforced by the legislative findings that accompanied the 1994 amendments and expansion of those sections. The legislature found, among other things, that: “(d) *Members of the public* may be ill-informed or unaware of their legal rights which if not timely exercised, may be lost, (e) *The public* has a need for accurate and truthful information about the availability of legal counsel, the nature of the services lawyers offer, and the prices lawyers charge for services, including routine and standardized legal services.” (Sec. 1 of Stats. 1994, c. 711 (A.B.3659) (emphasis added)). Given this legislative concern with the truthfulness of information provided to the public, it is possible that CAS advertisements directed to lawyers do not come within the scope of sections 6157-6158.7.<sup>16/</sup> Moreover, even if the CAS advertisements could be viewed as being directed to Lawyer’s client, Lawyer, who makes the hiring decision, would act as a buffer and filter between CAS and the client to protect against the fraud, undue influence, and other potential abuses.<sup>17/</sup>

In light of the foregoing considerations, it is the Committee’s opinion that sections 6157-6158.7, like rule 1-400, do not apply to lawyer-to-lawyer advertising. Nevertheless, because no court has interpreted the regulatory scope of sections 6157-6158.7, and, given the absence of rule 1-400’s limiting language, lawyers should be aware that sections 6157-6158.7 might be held to apply to the CAS advertisements directed to lawyers. Accordingly, any false, misleading, or deceptive statement, such as CAS’s disclaimer of any attorney-client relationship between it or CAS lawyers and Lawyer’s clients, might potentially subject CAS lawyers to the civil and disciplinary consequences set out in sections 6158.4 and 6158.7.

## CONCLUSION

Contract attorney services, and individual lawyers providing contract legal services to lawyers, may provide cost-effective alternatives to consumers of legal services. In using these services, those lawyers hiring the contract attorneys must comply with the ethical rules concerning the disclosure to the client of significant developments in the representation. Both those lawyers doing the hiring and those lawyers who are hired must comply with the ethical rules concerning competence, confidentiality, advertising, and conflicts of interest that apply to their respective roles in any such arrangement.

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

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<sup>16/</sup> This opinion does not address whether and under what circumstances CAS or its lawyers may limit the scope of their engagement with Lawyer’s clients to avoid assuming the duties described in this opinion. The Committee recognizes that there may be circumstances when such a limitation on the scope of the engagement is possible. Such a situation, however, is not presented in this inquiry.

<sup>17/</sup> Lawyer would, of course, have a duty to exercise due care in retaining a CAS lawyer to make an appearance on behalf of Client or subject himself to potential liability. (Rule 3-110, Discussion; *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [177 Cal.Rptr. 670, 672]; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354 [267 Cal.Rptr. 114, 119.]