THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING & DEVELOPMENT

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DATE: May 26, 2006

TO: Members of the Board Committee on Regulation, Admissions & Discipline Oversight

FROM: Randall Difuntorum, Director, Professional Competence

RE: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California - Request for Public Comment

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EXECUTIVE SUMMARY

This agenda item requests Board Committee authorization to publish proposed amendments to the Rules of Professional Conduct for a 120 day public comment period. This agenda item also requests authorization to conduct a public hearing on the proposed amendments.

The proposed amendments are the first group of recommended rule revisions developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The Commission is assigned to conduct a thorough review of all of the rules and to recommend comprehensive amendments.

Board members with questions about this agenda item may contact Randall Difuntorum at (415) 538-2161.

ISSUE

The Board of Governors has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct.[1/] The amendments adopted by the Board are submitted to the Supreme Court for approval and upon approval become binding disciplinary standards for all members of the State Bar.[2/]

The State Bar's procedures for considering amendments to the Rules of Professional Conduct require publication for public comment. (Board Book, Tab 12, Section 4.) This agenda item

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[1/] Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State."

[2/] Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar."

requests authorization (1) to publish the Commission's proposed amendments for a 120 day public comment period and (2) to gather additional input by conducting a public hearing.

The last complete revision of the California rules occurred in the late1980's and it was at that time that the State Bar established its Special Commission for the Revision of the Rules of Professional Conduct ("the Commission"). In 2001, the State Bar reactivated the Commission, in part, to respond to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project for a systematic revision of the Model Rules of Professional Conduct. The Commission has now completed work on a group of 27 proposed new and amended rules and is ready to consider public comment on that group of amendments.

The Commission plans to complete its work by the end of 2008. This plan involves the issuance of four groups or batches of proposed rule amendments. (The Commission's public comment plan and time-line is set forth in Attachment 1.) Each of these batches would be separately considered and authorized for public comment by the Board Committee on Regulation, Admissions, and Discipline ("RAD"). If authorized, the proposed amendments presented in this agenda item would be the first of the four public comment groups. (The Commission's 27 individual proposed new or amended rules in Batch 1 are set forth in Attachment 2.)

Under the Commission's plan, after each of the four batches is issued by RAD and returned from public comment, the Commission would seek authorization to publish the entirety of the proposed amendments as a single, comprehensive work product for a final additional public comment period.[3/] By affording stakeholders and commentators an opportunity to study at one time all of the complex substantive and policy issues that are inherent in a comprehensive revision of the rules, the Commission hopes to optimize the public comment process.

RECOMMENDATION

The Commission recommends that you authorize the publication, for a 120 day public comment period, the proposed new and amended rules provided in Attachment 2. The Commission also recommends that you authorize a public hearing to obtain testimony on the proposed new and amended rules.

DISCUSSION

In the latter part of 2001, the Commission was reactivated and given the following charge:

> The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory

[3/] This re-distribution for further public comment of the entirety of the rules would follow any changes implemented by the Commission in response to each of the four initial public comment periods. Thus, the re-distribution will also satisfy the Board's procedural requirement that any material changes to an initial proposal must be circulated for an additional public period.

developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to multi-disciplinary practice, multi-jurisdictional practice, court facilitated *in propria persona* assistance, discrete task representation and other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the California Rules that:

1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
3) Promote confidence in the legal profession and the administration of justice; and
4) Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

In accordance with this charge, the Commission has been conducting regular meetings since January of 2002.[4/] At these meetings, the Commission has carried-out the deliberative process of its charge by analyzing the current California rules and the new ABA Model Rules and by considering the identified subject areas of emerging professional responsibility issues. Nearly all of the Commission's meeting time has been spent in open session and the Commission has welcomed visitors and liaisons who have monitored the Commission's work and who have contributed informal input.

To date, the Commission has considered about 40 of 60 items presently on its work inventory. The first batch of proposed rule amendments presented in this memorandum consists of 27 individual new or amended draft rules. In addition, this first batch of proposed rules includes three proposals that would have an impact on all of the rules and for convenience, these proposed amendments are referred to as "global" proposals or changes. A list of the 27 draft rules and the global proposals is set forth below. Following the list, a summary of the amendments is provided. The list indicates the page number for each individual rule summary. In Attachment 2, the clean text of each of the 27 draft rules is provided together with redline/strikeout versions that compare the text of each draft rule with the current rule and/or its ABA Model Rule counterpart.

[4/] The January 2002 issue of the *California Bar Journal* includes an article by Commission Chair Harry Sondheim announcing the reactivation of the Commission. The article discusses the initial 2002 request for public comment authorized by RAD to allow the Commission to solicit general comments identifying topics, concepts, or specific rules that fall within the Commission's charge and warrant consideration and study.

LIST OF PROPOSED NEW OR AMENDED RULES[5/]

Proposals for Global Changes:

1) Adoption of the ABA Model Rules rule numbering system (including the ABA Model Rules chapters but excluding a “Preamble and Scope” section);
2) Adoption of the ABA Model Rules format, structure and style; and
3) In general, using the term “lawyer” rather than “member” with the understanding that a precise definition of these respective terms is pending Commission consideration.

SUMMARY OF PROPOSED AMENDMENTS

Summary of Proposals for Global Changes:

1) Adoption of the ABA Model Rules rule numbering system (including the ABA Model Rules chapters but excluding a “Preamble and Scope” section).

The Commission recommends the adoption of the ABA Model Rules numbering system. The current rules are organized in a manner, and use a rule numbering system, that is unique to

[5/] Where applicable, the number of the current California Rule is in brackets.

California. The Commission's recommendation to abandon the current numbering system arises from an interest in promoting national uniformity as indicated in the Commission's charge. In addition, this recommended change is intended to facilitate comparison and contrast with the ABA Model Rules and the state variations of the ABA Model Rules that have been implemented across the country. The Commission believes that ease of comparison and contrast promotes understanding which, in turn, promotes compliance. While the current numbering system and organization has not proven to be defective, it does render it difficult to compare and contrast the California rules with the ABA Model Rules and the rules from other jurisdictions.

In some instances, the Commission adapted the ABA numbering system rather than strictly following it. The Commission considered, for example, the fact that the ABA numbering system places several disparate conflicts of interest rules in a single rule, ABA Model Rule 1.8; however, the current California rules have separate rules for its comparable provisions and the Commission has assigned separate rule numbers that are sequential and track the order of the subsections within ABA Model Rule 1.8. Thus, the rule on sexual relations with clients is ABA Model Rule 1.8(j) but the Commission's recommended rule number is Rule 1.8.10. The Commission believes that the legal profession in California has become accustomed to identifying certain rule topics, such as sexual relations with clients, as topics that warrant a separate rule, rather than a subpart of a broader rule. By tracking the sequence of the ABA numbering system, comparison and contrast remains readily accessible even though the ABA numbering system is not strictly followed in every instance.

Lastly, the Commission is not recommending adoption of a "Preamble" or "Scope" section. Instead, the Commission is recommending substantial amendments to current rule 1-100 which is the first rule in the California rules and, unlike the Model Rules' "Preamble" and "Scope" sections, succinctly addresses the purpose and scope of the rules. (See summary of proposed Rule 1.0.)

2) Adoption of the ABA Model Rules format, structure and style.

The Commission recommends adoption of the ABA Model Rules format, structure and style. Although the Commission does not necessarily regard the ABA "Restatement" format to be superior to the format of the current California rules, adoption of the ABA format is recommended to avoid unnecessary confusion in interpreting the recommended California versions of ABA Model Rules. Format and style differences carry the potential for inferences of substantive differences when no such differences are intended. While this has been a general approach used by the Commission, in some instances variations are recommended in rules where the specific style or format change does not pose risks of an erroneous perception of a substantive difference.

3) Use of the term "lawyer" rather than "member" with the understanding that a precise definition of each of these terms is pending Commission consideration.

The Commission recommends that the term "lawyer" be the general term used throughout the rules for designating the category of persons whose conduct is governed by the rules. This is a change from the current rules which generally uses the term "member." All practitioners should be governed by the rules when practicing law in California. The Commission believes that the term "member" may be an under-inclusive concept given the likely increase in authorized practice of law

in California by non-members. Although a precise definition of the term "lawyer" is pending development by the Commission, it is anticipated that the term will encompass all members of the State Bar as well as other persons authorized to practice law in California under, for example, California Rules of Court 964 through 967.

Summary of Each of the 27 Proposed New or Amended Rules:

In new rule number order, a summary is presented below describing the recommended amendments and, where applicable, identifying the key issues considered by the Commission for each of the proposed new or amended rules. Where applicable, the number of the current California rule is noted in brackets at the end of the rule title.

Rule 1.0 Purpose and Scope of the Rules of Professional Conduct [1-100]

Proposed Rule 1.0 amends current rule 1-100. (Refer to page 1 of Attachment 2 for a clean version of this draft rule and page 3 for a redline/strikeout version that shows changes to the current rule.) Rule 1.0 continues the description of the intended purpose and scope of the rules found in current rule 1-100. Rule 1.0 enumerates four purposes of the rules: (1) to protect the public; (2) to protect the interests of clients; (3) to protect the integrity of the legal system and to promote the administration of justice; and (4) to promote respect for, and confidence in, the legal profession. Rule 1.0 deletes the current rule 1-100 paragraphs addressing definitions and the geographic scope of the rules as the Commission plans to address these subjects in other rules.

A policy issue presented by Rule 1.0 is the deletion of the current rule 1-100 language stating that the rules shall not be "deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." In the place of this language, the Commission is recommending a statement that "[n]othing in the Rules or the comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others." The policy issue raised is whether this change in the rules might be interpreted to expand the civil liability of lawyers.

The Commission believes that the new language, as amplified by the discussion in proposed Comment [2], accurately reflects the existing case law in clarifying that: (1) a violation of a rule does not itself give rise to a civil cause of action for damages; and (2) a violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. The Commission studied the relevant case law and believes that the change would not expand the civil liability of lawyers. Moreover, the Commission believes that the language recommended for deletion is outdated and no longer consistent with case law, and would mislead members if retained in the rules.

Rule 1.0.1 Definition of the term "Law Firm" as used in the rules [1-100(B)(1)]

Proposed Rule 1.0.1 states a definition of the term "law firm" for purposes of the entire rules. (Refer to page 8 of Attachment 2 for a clean version of this draft rule and page 9 for a redline/strikeout version showing changes to the comparable ABA Model Rule.) Current rule 1-100 includes a paragraph setting forth definitions of five terms, including a definition of "law firm." The Commission

regards Rule 1.0.1 as a partial draft of a proposed new standalone rule that would include all of the definitions of special terms and phrases used throughout the rules; however, at present the only definition proposed is for the term "law firm." Other defined terms, including the other terms defined in current rule 1-100, are pending consideration by the Commission. The Commission considered whether a standalone definitions rule is desirable in light of the fact that certain rules will continue to have defined terms that are limited just to that particular rule. The Commission decided that there are a sufficient number of terms and phrases frequently used throughout the entire rules, like the term "law firm," to justify a standalone definitions rule.

The adoption of a standalone definitions rule would be consistent with the format and structure of the ABA Model Rules that place all global definitions in ABA Model Rule 1.0 (entitled "Terminology"). While the Commission endorses this format and structure, it has not numbered its proposed definitions rule as 1.0 because it believes the first rule in the California rules should be the rule stating the purpose and function of the Rules of Professional Conduct, with the very next rule being the definitions rule.

Substantively, Rule 1.0.1 would replace the current definition of "law firm" with a new definition that is patterned on the ABA's definition of "law firm," ABA Model Rule 1.0(c). Although the proposed definition of "law firm" would be patterned on the ABA Model Rule, the concepts covered by the definition are similar to current rule 1-100(B)(1).

Rule 1.1 Competence [3-110]

Proposed Rule 1.1 amends current rule 3-110 and continues the prohibitions on failing to act competently. (Refer to page 10 of Attachment 2 for a clean version of this draft rule, page 12 for a redline/strikeout version that shows changes to the current rule, and page 14 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) Comments [4] and [5] are drawn from ABA Model Rule 1.1 but the rule as proposed does not otherwise adopt the ABA Model Rule competence standard. The ABA standard differs from the California standard in that the ABA rule would permit discipline in any instance where a lawyer fails to render competent legal services. In contrast, the current California standard requires a finding that a member's lack of competence be an intentional, reckless, or repeated act. The Commission recommends retaining the current California standard in proposed Rule 1.1.

Rule 1.2.1 Counseling or Assisting the Violation of Law [3-210]

Proposed Rule 1.2.1 amends current rule 3-210 and continues the prohibition against a lawyer's counseling or advising a violation of law. (Refer to page 17 of Attachment 2 for a clean version of this draft rule, page 19 for a redline/strikeout version that shows changes to the current rule, and page 21 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) This rule is patterned on ABA Model Rule 1.2(d). While most of the rule text is drawn from the ABA Model Rule, the Commission's proposal retains the language in the current California rule expressly providing that violations of law include a violation of a rule or ruling of a tribunal. The Commission's proposal adopts and modifies several of the comments to the ABA Model Rule. In addition, new language not found in the ABA or current California rule is proposed in Comment [2]. This new

language provides guidance on the issue of a lawyer's handling of physical evidence of a crime and includes citation to relevant California Supreme Court cases.

Rule 1.4 Communication [3-500, 3-510]

Proposed Rule 1.4 combines and amends current rules 3-500 and 3-510. (Refer to page 23 of Attachment 2 for a clean version of this draft rule and page 26 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) As part of the Commission's effort to track the structure and format of the ABA Model Rules, proposed Rule 1.4 is patterned on ABA Model Rule 1.4 and brings together in a single rule concepts that are currently addressed in two separate California rules: (1) the general duty to keep a client informed of significant developments under current rule 3-500; and (2) the duty to communicate a settlement offer to a client under current rule 3-510. In doing so, some substantive components of the ABA Model Rule are recommended for adoption.

These changes include the proposed addition of the following express requirements: (1) that a lawyer promptly inform a client about any decision or circumstance that requires the client's informed consent under the rules; (2) that a lawyer reasonably consult with a client about the means by which to accomplish the client's objectives in the representation; and (3) that a lawyer consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance that is not permitted by the rules or other law. In addition, Comment [8] (re communications with impaired clients and with client organizations) to the proposed rule has been drawn from the ABA Model Rule 1.4.

Proposed Rule 1.4 also amends the current California standard on the provision of copies of significant documents to a client pursuant to rule 3-500. The Commission's proposal adds language that allows a lawyer to discharge the duty to share documentary information with a client either by permitting a client to inspect documents in the lawyer's possession or by providing copies through electronic or other means.

Lastly, following consideration of input from alternative dispute resolution (ADR) practitioners, the Commission's proposed Rule 1.4 includes a statement in Comment [2] that under certain circumstances a lawyer may also be obligated to communicate with a client concerning the opportunity to utilize ADR processes.

Rule 1.5.1 Financial Arrangements Among Lawyers [2-200]

Proposed Rule 1.5.1 amends current rule 2-200 and continues the restrictions on fee divisions among lawyers in different law firms and the prohibition against improper compensation paid to another lawyer for recommending employment by a client. (Refer to page 30 of Attachment 2 for a clean version of this draft rule, page 32 for a redline/strikeout version that shows changes to the current rule, and page 34 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) While this rule has been given an ABA rule number, most of the rule tracks the current California rule. This results from the Commission's recognition that California case law interpreting the current and prior California rules on this subject set a distinct California standard based upon public policy reasons that the Commission believes should be continued.

In terms of policy, the ABA standard requires that fee divisions among lawyers be commensurate with the lawyers' division of labor or assumption of responsibility. In contrast, the California standard does not impose this requirement and has been held to authorize "pure referral fee" agreements among lawyers who comply with the rule. The Commission recommends that this distinction continue based on the public policy rationale in the case law that favors a financial incentive for lawyers to refer clients to a competent practitioner so long as the client gives informed consent to the fee sharing arrangement.

The Commission, however, does recommend a substantive change in the current requirement that a client consent to any fee division. This change imposes a new timing requirement. As proposed, the rule would require that client consent be obtained at the time lawyers enter into an agreement to divide fees or as soon thereafter as reasonably practicable. A recent appellate decision suggests that this change in the standard would enhance the ability of a client to make a meaningful decision on whether to consent to a fee division arrangement. (*Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 17 Cal.Rptr.3d 486.)

Lastly, the Commission recommends a new requirement that the agreement entered into by the involved lawyers be a written agreement. The current California rule does not require a written agreement but the Commission believes that requiring a writing is appropriate (1) to facilitate the client protection intended by the other terms of the rule and (2) to limit disputes among lawyers.

Rule 1.8.8 Limiting Liability to Client [3-400]

Proposed Rule 1.8.8 amends current rule 3-400 and continues: (1) the prohibition against a lawyer contracting with a client to prospectively limit the lawyer's liability to the client for professional malpractice; and (2) the limitations imposed on a lawyer's settlement of a malpractice claim brought by a client. (Refer to page 37 of Attachment 2 for a clean version of this draft rule and to page 38 for a redline/strikeout version that shows changes to the current rule.) The Commission has given this rule an ABA rule number but overall the language of the rule is very similar to the current California rule. The substantive changes recommended by the Commission are: (1) expanding the rule to cover malpractice settlements with former clients as well as current clients; and (2) expressly excluding from the rule any situation in which the client or former client is represented by independent counsel in the settlement of a malpractice claim. Also, Comment [1] to the proposed rule is new and is adapted from Comment [15] to the comparable ABA rule, ABA Model Rule 1.8(h). This new comment explains the risk of overreaching present when a lawyer seeks to settle a malpractice claim with a client or former client.

Rule 1.8.10 Sexual Relations With Client [3-120]

Proposed Rule 1.8.10 amends current rule 3-120 and continues the restrictions on a lawyer's sexual relations with a client. (Refer to page 39 of Attachment 2 for a clean version of this draft rule, page 41 for a redline/strikeout version that shows changes to the current rule, and to page 43 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) The Commission has given this rule an ABA rule number but overall the language of the rule is very similar to the current California rule. The substantive changes recommended by the Commission

are the addition of: (1) a consensual sexual relations exception that covers persons in a domestic relationship equivalent to the relationship between spouses; and (2) a new comment clarifying how the prohibition applies to in-house and outside corporate counsel in their sexual relations with the constituents of a client corporation.

Aside from these changes, the Commission is recommending that the current California standard be retained. The Commission considered but is not recommending that the standard in this rule be changed to track the comparable ABA Model Rule, Model Rule 1.8(j). The ABA rule is broader than the California standard because it generally prohibits any sexual relations that do not predate the initiation of the client-lawyer relationship. The narrower California standard generally prohibits sexual relations only if the sexual relations cause a lawyer to perform legal services incompetently. Thus, the ABA standard could be described as a bright-line, strict liability standard while the California standard includes a necessary element of incompetent legal services.

Rule 2.4 Lawyer as Third-Party Neutral

Proposed Rule 2.4 is a proposed new rule. The Commission recommends the adoption of a variation of ABA Model Rule 2.4 to regulate the conduct of lawyers who act as third party neutrals, such as a mediator or neutral arbitrator. (Refer to page 45 of Attachment 2 for a clean version of this draft rule and to page 47 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) Like the ABA rule, the Commission's proposed rule would require a lawyer serving as a third party neutral to inform unrepresented parties that the lawyer is not representing them. If the party does not understand the lawyer's role, the lawyer would be required to explain the lawyer's role as a third party neutral.

This proposed rule is a variation of ABA Model Rule 2.4 that incorporates by reference additional standards not specified in the ABA rule. In the ABA rule, the commentary states that a lawyer serving as a third party neutral may also be subject to various codes of ethics that are independent of the ABA Model Rules and then the commentary lists examples of such codes. Unlike the approach taken in the ABA rule which simply alerts lawyers to other potentially applicable standards of conduct, the Commission's proposed rule specifically incorporates selected provisions of the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Thus under the Commission's proposed new rule, a lawyer serving as a third party neutral would be subject to discipline for violating any of the selected standards incorporated in the rule. The Judicial Council standards selected by the Commission include provisions addressing conflicts of interest, confidentiality, *ex parte* communication and other standards that the Commission believes are relevant to the particular context of a lawyer, as opposed to a non-lawyer, serving as a third party neutral.

The Commission's regulatory strategy of setting a lawyer disciplinary standard by incorporating by reference provisions found outside of the Rules of Professional Conduct has precedence in the Rules of Professional Conduct and in the State Bar Act. Current rules 1-700 and 1-710 incorporate by reference selected provisions of the Code of Judicial Ethics (judicial disciplinary rules concerning lawyer conduct in judicial elections and service as a temporary judicial officer). Various State Bar Act sections refer to other statutes and expressly provide that violations of these statutes serve as

a cause for attorney discipline. Examples include: Business & Professions Code section 6103.6 re violation of specified Probate Code sections (provisions setting limits on compensation paid to an attorney-trustee); Business & Professions Code section 6106.6 re violation of specified Insurance and Penal Code sections (prohibitions on insurance fraud); and Business & Professions Code section 6106.7 re violation of specified Labor Code sections (the Miller-Ayala Athletes Agents Act).

Although the regulatory strategy of incorporating other standards as a basis for discipline under the Rules of Professional Conduct is sound and appropriate, the Commission hopes that the public comment process will elicit thoughtful input on the specific standards that have been selected and also the issue of potential implementation concerns. Regarding implementation concerns, the Commission has been informed that statutory mediation confidentiality may be a practical obstacle to normal State Bar enforcement procedures. However, the Commission believes that the policy issue of whether the rules should regulate lawyer conduct as neutrals is a threshold matter that deserves public comment and that implementation issues may be moot if the ultimate policy decision is to not use the rules to regulate lawyer conduct as neutrals.

Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator [1-710]

Proposed Rule 2.4.1 amends current rule 1-710 and continues the requirement that a lawyer serving as a temporary judicial officer must comply with Canon 6D of the Code of Judicial Ethics. (Refer to page 50 of Attachment 2 for a clean version of this draft rule and to page 51 for a redline/strikeout version that shows changes to the current rule.) The Commission is recommending no substantive changes to the current rule. The only changes made are for style and clarity. Also, a new Comment [3] has been added to cross reference the Commission's proposed new Rule 2.4 concerning lawyer conduct as a third party neutral in mediation and private arbitration.

Rule 2.4.2 Lawyer as Candidate for Judicial Office [1-700]

Proposed Rule 2.4.2 amends current rule 1-700 and continues the requirement that a lawyer who is a candidate for judicial office must comply with Canon 5 of the Code of Judicial Ethics. (Refer to page 52 of Attachment 2 for a clean version of this draft rule and to page 53 for a redline/strikeout version that shows changes to the current rule.) The Commission is recommending no substantive changes to the current rule. The only changes made are for style and clarity.

Rule 3.1 Meritorious Claims and Contentions [3-200]

Proposed Rule 3.1 amends current rule 3-200 and continues the prohibition against a lawyer bringing an action or continuing a proceeding that is unsupportable. (Refer to page 54 of Attachment 2 for a clean version of this draft rule, page 55 for a redline/strikeout version that shows changes to the current rule, and to page 57 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) This proposed amended rule replaces nearly all of the text of current rule 3-200 with the text of ABA Model Rule 3.1. The Commission believes that the policy and substance of the California rule and the ABA Model Rule are very similar and recommends

adoption of the ABA Model Rule language in the interest of national uniformity. However, the Commission has modified Comment [2] to address a relevant California case and to add references to Rule 11(b) of the Federal Rules of Civil Procedure and other relevant law in the State Bar Act and the Civil Code.

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

Proposed Rule 5.1 is a proposed new rule. The Commission recommends the adoption of a variation of ABA Model Rule 5.1 to address the managerial responsibility of supervisory lawyers for rule compliance by subordinate lawyers. (Refer to page 58 of Attachment 2 for a clean version of this draft rule and to page 60 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) The concept of a duty to supervise presently exists in current rule 3-110 as a component of a lawyer's duty to act competently. However, the expression of the existing duty to supervise is found only in a one sentence comment to rule 3-110 and in relevant disciplinary case law (some of these cases are noted in a string cite in the comment to rule 3-110). At present, lawyers must primarily rely on case law for direction as no rule articulates the duty to supervise in a manner that gives lawyers helpful guidance. The Commission believes that the fuller treatment of the duty to supervise found in ABA Model Rule 5.1 promotes compliance and ethical conduct by both supervisors and subordinates and for this reason, among others, the Commission recommends adoption of a variation of ABA Model Rule 5.1.

This proposed rule is a variation of ABA Model Rule 5.1 because the Commission deletes Comment [3] of the ABA rule concerning compliance measures that may differ depending upon the size and nature of a law firm. In addition, the rule is a variation because the Commission includes a comment not found in the ABA rule. That new comment addresses the potential for law firm compensation policies to induce violations of the rules.

Lastly, the Commission's recommendation to adopt proposed Rule 5.1 should not be evaluated in isolation as the Commission also is recommending the adoption of two other ABA Model Rules concerning supervisor-subordinate relationships. These two other ABA rules, Model Rule 5.2 and Model Rule 5.3, are recommended to be a part of the first group of public comment rules. As in the ABA Model Rules, the Commission views these rules as working in concert to address supervisor-subordinate issues.

Rule 5.2 Responsibilities of a Subordinate Lawyer

Proposed Rule 5.2 is a proposed new rule. The Commission recommends the adoption of a variation of ABA Model Rule 5.2 to address the responsibilities of a subordinate lawyer in balancing the duty to follow their supervisor's directions with their personal obligation to assure that their conduct is in compliance with ethical standards. (Refer to page 63 of Attachment 2 for a clean version of this draft rule and to page 64 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.)

As noted, the concept of a duty to supervise presently exists in current rule 3-110 as a component of a lawyer's duty to act competently and the Commission is recommending adoption of proposed new Rule 5.1 to serve as a standalone supervision rule for managing lawyers. However, because

the duty to supervise is imposed from the standpoint of the supervising lawyer in proposed new Rule 5.1, the Commission recommends adoption of proposed new Rule 5.2 to assure that subordinate lawyers fully understand the duty to supervise and have a rule that sets compliance standards from the subordinate lawyer's perspective. The complementary concepts of proposed new Rules 5.1 and 5.2 would implement needed symmetry in the duty to supervise with the goal of promoting an ethical law firm culture.

Proposed new Rule 5.2 is a variation of ABA Model Rule 5.2 because the Commission slightly modifies the rule text for clarity and also modifies the comments to the rule to provide a more focused discussion of the disciplinary exposure of a subordinate lawyer and the duty of a subordinate lawyer in circumstances where there may be an arguable question of professional duty.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

Proposed Rule 5.3 is a proposed new rule. The Commission recommends the adoption of a variation of ABA Model Rule 5.3 to address the managerial responsibility of supervisory lawyers to make reasonable efforts to assure that the conduct of non-lawyer assistants is compatible with the professional obligations of lawyers. (Refer to page 65 of Attachment 2 for a clean version of this draft rule and to page 67 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.)

As noted, the concept of a duty to supervise presently exists in current rule 3-110 as a component of a lawyer's duty to act competently and the Commission is recommending: (1) adoption of proposed new Rule 5.1 to serve as a standalone supervision rule for managing attorneys; and (2) adoption of proposed new Rule 5.2 as a complementary rule stating the duties of subordinate lawyers. The Commission's proposed new rule 5.3 is the third part of a three piece regulatory scheme established in the ABA Model Rules to comprehensively address supervisory responsibilities and issues in a law office and enhance compliance with the rules.

Proposed new Rule 5.3 is a slight variation of ABA Model Rule 5.3. With one possible exception, the only changes made by the Commission are non-substantive revisions for clarity and style. The one possible exception is the Commission's revision of Comment [2] to ABA Model Rule 5.3. At the end of this comment, the Commission adds language stating that supervisory lawyers covered by the rule include lawyers who possess managerial authority in corporate and government legal departments and legal service organizations as well as partners and other managing lawyers in private law firms.

Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member [1-311]

Proposed Rule 5.3.1 amends current rule 1-311 and continues the restrictions on a lawyer's employment of a disbarred, suspended, resigned, or involuntarily inactive member. (Refer to page 69 of Attachment 2 for a clean version of this draft rule and to page 72 for a redline/strikeout version that shows the changes to the current rule.) With a noteworthy exception, the changes made by the Commission are largely non-substantive revisions for clarity and style. One such non-substantive revision is the Commission's use of a cross reference to proposed Rule 5.5 (see

summary of proposed Rule 5.5.) in the place of the current rule 1-311 discussion paragraph that lists cases concerning activities which constitute the practice of law. The Commission recommends that the list of cases be amended and moved to the comments to the Commission's proposed Rule 5.5.

The one noteworthy revision that is a substantive change is the Commission's modification of paragraph (d). Like the current rule, paragraph (d) of the proposed amended rule requires that notice be served on the State Bar whenever a lawyer employs a disbarred, suspended, resigned, or involuntarily inactive member. The substantive change recommended by the Commission is to add language stating that the information contained in such notices shall be available to the public. Presently, the Commission understands that the information in the notices served on the State Bar is not made available to the public. The Commission believes that the policy of accountability and candor reflected in current rule 1-311 [5.3.1] militates in favor of changing this aspect of the rule. Consumers of legal services should be positioned to exercise an informed choice of counsel when researching State Bar member information. The fact that a member does or does not employ a disbarred, suspended, resigned, or involuntarily inactive member may be meaningful information to such consumers.

Rule 5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law [1-300]

Proposed Rule 5.5 amends current rule 1-300 and continues the prohibition on assisting a person or entity in the unauthorized practice of law or practicing law in a jurisdiction in violation of that jurisdiction's regulations. The structure and content of the rule is to some extent based upon ABA Model Rule 5.5. (Refer to page 75 of Attachment 2 for a clean version of this rule, page 78 for a redline/strikeout version that shows changes to the current rule, and to page 81 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) The ABA has substantially revised Model Rule 5.5 in response to the challenges presented by multijurisdictional practice ("MJP"). Because California has largely addressed MJP issues through revisions to the California Rules of Court, however, the Commission was constrained in adopting the entirety of the ABA language. Instead, the Commission recommends the approval of proposed Rule 5.5, which is an amalgam of current rule 1-300, ABA Model Rule 5.5, the California MJP Rules of Court and case law addressing the unauthorized practice of law.

Paragraph (a) tracks the language of ABA Model Rule 5.5(a) but also retains the language from current rule 1-300 expressly prohibiting a lawyer from assisting an organization, as well as an individual, in the unauthorized practice of law. It also adds an express requirement that the assistance be knowing. Other current rules contain this element (i.e., current rule 1-120 which provides that: "A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.") Some members of the Commission believe this element is implied in the current rule 1-300.

Paragraph (b), prohibiting practice of law by a non-admitted lawyer's systematic presence in California or improper holding out to the public, is based upon Model Rule 5.5(b), with revisions to paragraph (b)(1) to conform to the language used in the California MJP Rules of Court 966(c)(2) and 967(c)(2).

The subject matter of paragraphs (c) and (d) of ABA Model Rule 5.5, concerning inter alia temporary practice or practice by in-house corporate counsel, is for the most part covered by the California MJP Rules of Court 965-967 and so those paragraphs have not been included in proposed Rule 5.5. The commentary to proposed Rule 5.5, however, includes guidance on the topics covered by those paragraphs and specific cross-references to the relevant rules of court.

Comments [1] and [3] are based on comments [1] and [2] to ABA Model Rule 5.5, respectively. The remaining commentary to ABA Model Rule 5.5, related to paragraphs (c) and (d) of the rule, is not included.

Comment [2] has no counterpart in ABA Model Rule 5.5; it cross-references relevant rules of court and federal statutory and case law that permit lawyers not admitted to practice in California to practice before federal tribunals and administrative agencies in California. The remaining commentary to proposed Rule 5.5, Comments [4] to [7], offers guidance on what constitutes the unauthorized practice of law by citing to California cases. Comments [4] to [7] are intended to replace the practice of law cases that are listed in the first paragraph of the discussion to current rule 1-311 (re employment of disbarred, suspended, or involuntarily inactive members). As previously mentioned, a cross reference to the practice of law guidance in the comments to proposed Rule 5.5 has been placed in Comment [1] to proposed Rule 5.3.1.

Rule 5.6 Restrictions on a Lawyer's Right to Practice [1-500]

Proposed Rule 5.6 amends current rule 1-500 and continues the prohibition against a lawyer entering into an agreement that restricts the right of a lawyer to practice law, including agreements made in connection with the settlement of a lawsuit. (Refer to page 88 of Attachment 2 for a clean version of this draft rule, page 90 for a redline/strikeout version that shows changes to the current rule, and to page 93 for a redline/strikeout version showing changes to the comparable ABA Model Rule.) This rule is loosely patterned on ABA Model Rule 5.6. Some of the text of proposed paragraph (a) is drawn from the ABA Model Rule but all of proposed paragraph (b) and nearly all of the proposed commentary is new language developed by the Commission.

Substantively, the Commission's proposed new paragraph (b) serves, in part, as replacement language for some of the exception language in paragraph (A) of the current rule. Proposed new paragraph (b) sets forth the exception for restrictive agreements that are bona fide retirement agreements. The limits of this exception are expressly stated as well.

In large part, the new language in the rule and in the comments results from the Commission's consideration of case law developments, in particular the California Supreme Court's decision in *Howard v. Babcock* (1994) 6 Cal.4th 409 [7 Cal.Rptr.2d 867] concerning restrictive agreements among law firm principals that the Supreme Court has deemed permissible, as a policy matter, to accommodate the reasonable business interests of a law firm as a going concern. The guidance provided in the commentary relies heavily on references to case law. The Commission believes, however, that case law references are important for this area of regulation because the interpretation of the prohibition is tied closely to the specific factual settings at issue.

Introduction to the Proposed Rules on Lawyer Advertising - Proposed Rules 7.1 to 7.5:

A summary of each of the Commission's proposed rules on lawyer advertising follows this general introduction.

At present, the marketing of legal services by lawyers is regulated in California through current rule 1-400 and certain sections of the Business & Professions Code. (E.g., Bus. & Prof. Code, sections 6155, 6157 to 6159.2.) At its February 20, 2004 meeting, however, the Commission voted to explore the possibility of adopting the framework, if not the entire substantive content and language, of the ABA Model Rules of Professional Conduct, Chapter 7, which takes a multi-rule approach to regulating the marketing of legal services.

During the discussion leading to that vote, members of the Commission noted that the advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where national uniformity would be especially helpful to the courts, the public and practicing lawyers, particularly in light of the current widespread use of the Internet by lawyers to market legal services and the trend in many states, including California, toward allowing some form of MJP. Accordingly, after consideration of several drafts of proposed rules that used the ABA Model Rules as templates, the Commission approved proposed rules 7.1 to 7.5.

The Commission has made substantive revisions and additions to the ABA language, which are generally intended to bring the rules in line with current California rules and statutes concerning the marketing of legal services. Lastly, the Commission does not recommend the adoption of ABA Model Rule 7.6, a rule that very few states have adopted. ABA Model Rule 7.6 regulates political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge,

Rule 7.1 Communications Concerning the Availability of Legal Services [1-400]

Proposed Rule 7.1 contains the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. (Refer to page 96 of Attachment 2 for a clean version of this rule and to page 99 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) Although the rule is in the format and style of the Model Rules, it retains much of the substance of current rule 1-400:

- Paragraph (a) defines the term "communication," and imports paragraph (A) of rule 1-400 into Rule 7.1, with some revisions, including substituting "lawyer" for "member" and replacing the phrase "or other comparable written material" with the phrase, "domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing," to provide guidance on the kinds of communication, including electronic communications, regulated under the rule.
- Paragraph (c) imports current rule 1-400(D)(1)-(3) as new paragraphs (c)(1), (3) and (4).
- Paragraph (d) retains, with minor revisions, current rule 1-400(E), regarding the Board of Governors' authority to promulgate standards concerning lawyer marketing.
- The section entitled "Standards" that follows the commentary to proposed Rule 7.1 includes those standards the Commission recommends be retained as standards: current standards

(1), (2), (13), (14), (15) and (16) (to be retained as standards (1), (2), (3), (4), (5) and (6), respectively.) The Commission has made this recommendation on the advice of the Office of Chief Trial Counsel of the State Bar of California ("OCTC"). The Commission recommends that current standards (3), (4), (7) and (9) be deleted. The OCTC advised the Commission that the presumption of a standard was not necessary as the conduct covered under those standards violates proscriptions set forth in proposed rules 7.1(b), 7.3(a), or 7.3(b). Finally, the concepts in several of the current standards have been retained either as part of another rule or as part of the commentary to another rule (i.e., current standard (5) has been retained as proposed rule 7.3(c), with modifications to conform it to the language of Model Rule 7.3(c); current standard (6) has been retained, with modifications, as proposed rule 7.5(a); current standard (8) has been retained largely intact as the second sentence of proposed rule 7.5, Comment [2]; current standard (10) has been retained, with slight modifications, as proposed rule 7.2(b)(2); and current standard (12) has been retained as rule 7.2(c), with modifications to conform it to the language of Model Rule 7.2(c).

For the most part, the commentary to proposed Rule 7.1 is based upon the commentary to ABA Model Rule 7.1, with the exception of Comment [5], which is intended to avoid the misapprehension that the list of communications identified in paragraph (a)(1)-(4) is exclusive.

The Commission considered several concepts found in ABA Model Rule 7.1 or current rule 1-400 but recommends not including them at this time. They are:

- *Materiality of misrepresentation*. Unlike ABA Model Rule 7.1, proposed Rule 7.1 has not been limited to misrepresentations that are "material" for several reasons: (1) sections of the Business & Professions Code, e.g., section 6157, do not contain a "material" limitation; (2) federal advertising statutes proscribing misrepresentations are also not so limited; (3) the weighing in a disciplinary proceeding of public/client harm caused by misleading advertising would necessarily reflect due consideration of whether the content at issue is "material," whether or not the rule is expressly limited; and (4) a lawyer should not make misstatements, whether material or otherwise.
- *Definitions*. With the exception of the definition of "communication" in paragraph (a), the Commission recommends that the definitions for "solicitation" (currently in rule 1-400(B)), "advertise" (currently in Bus. & Prof. Code § 6157(c)), and "electronic medium" (currently in Bus. & Prof. Code § 6157(d)) not be included as these definitions, originally drafted in the early stages of legal marketing regulation to provide guidance to lawyers on the type of communications regulated, are no longer necessary.
- *Retention of communication requirement*. Both current rule 1-400(F) and previous versions of the Model Rules contain a requirement that a lawyer retain, for two years, a copy of any communication the lawyer had made in electronic or written media. The Commission agrees with the ABA Ethics 2000 Commission that the requirement "has become increasingly burdensome, and such records are seldom used for disciplinary purposes," (ABA Ethics 2000 Reporter's Explanation of Changes, Rule 7.2), and recommends that the retention requirement not be retained. The Commission notes that if this recommendation is accepted, the State Bar should consider a legislative proposal to repeal Business & Professions Code, section 6159.1, which requires the retention of advertisements for a period of one year.

Rule 7.2 Advertising [1-400]

Proposed Rule 7.2 specifically addresses advertising, a subset of "communication," which is covered under Rule 7.1. Advertising generally involves communications directed to the general public as opposed to direct communications with a specific, targeted individual or group of individuals, which is the subject of proposed Rule 7.3. For the most part, proposed Rule 7.2 tracks the language of ABA Model Rule 7.2, with revisions to broaden the scope of communications regulated under the rule or to conform the rule's language to the specific regulatory landscape in California. (Refer to page 102 of Attachment 2 for a clean version of this rule and to page 105 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.)

Paragraph (b) is new and is modeled on paragraph (b) of Model Rule 7.2 and provides four exceptions to the general prohibition against a lawyer giving anything of value to a person to recommend the lawyer's services. Paragraph (b) strikes a balance between loyalty to the client, which could be adversely affected by the payment of referral fees, and a lawyer's need to pay for the legitimate costs of marketing the lawyer's legal services. As noted, (see summary of proposed Rule 7.1), current standard (10) has been retained, with slight modifications, as proposed Rule 7.2(b)(2); and current standard (12) has been retained as rule 7.2(c), with modifications to conform it to the language of ABA Model Rule 7.2(c).

The commentary to proposed Rule 7.2 is largely based on the commentary to Model Rule 7.2, with some of the language streamlined or deleted for brevity, and other language revised to conform to the current California regulatory landscape (e.g., Comments [7] and [9].)

Lastly, several interested parties recommended the exclusion of lawyers or law firms that engage in group advertising from the requirements of paragraph (c) that every advertisement include the name of a lawyer or law firm responsible for the advertisement and the office address of the responsible lawyer or law firm. The Commission, however, recommends the adoption of the Model Rule language unchanged. Any burden that may be imposed by requiring the inclusion of this information is outweighed by (i) the importance to a person considering which lawyer to retain of being able to learn where the lawyer is located and (ii) the importance to the State Bar of being able to identify and contact the person responsible for a misleading or false advertisement.

Rule 7.3 Direct Contact with Prospective Clients [1-400]

Proposed Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. The rule regulates not only solicitations of individuals by in-person, telephonic or electronic contact, (paragraph (a)), but also direct targeted mailings, (paragraph (b).) Advertising, which involves communications to the general public, is addressed in proposed Rule 7.2. For the most part, proposed Rule 7.3 tracks the language of Model Rule 7.3, with some revisions that retain language now found in current rule 1-400. (Refer to page 109 of Attachment 2 for a clean version of this rule and to page 112 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) The Commission concluded the current rule 1-400 language was necessary either to avoid concerns about the rule's constitutionality or to provide better guidance concerning the kinds of conduct prohibited under the rule.

Of particular note is the prohibition in paragraph (a) of solicitation by "real-time electronic contact," which the ABA added during Ethics 2000 to protect prospective clients from electronic solicitations that could occur on the Internet. Unlike e-mail, which allows the recipient time for reflection on the available alternatives before making a decision, the interactivity and immediacy of response in real-time electronic communication such as that afforded by Chat Rooms or Instant Messaging, presents the same dangers as those involved in real-time telephone contact. Notwithstanding the addition of this language, proposed Rule 7.3 retains the substance of current rule 1-400(C). Paragraph (b)(3), which is taken from current rule 1-400(B)(2)(b), has no counterpart in ABA Model Rule 7.3. However, this provision complements the prohibition on communicating with a person represented by counsel. (Rule 2-100).

As noted, (see summary of proposed Rule 7.1), current standard (5) has been retained as proposed rule 7.3(c), with modifications to conform it to the language of Model Rule 7.3(c).

The commentary to proposed Rule 7.3 is largely based on the commentary to Model Rule 7.3, with some of the Model Rule language streamlined and deleted for brevity and clarity, and other language revised to conform it to the aforementioned language revisions to the rule itself.

Lastly, as noted, (see summary of proposed Rule 7.1), the Commission recommends not including a definition of "solicitation" in rule 7.3, as now appears in current rule 1-400 (B).

Rule 7.4 Communication of Fields of Practice and Specialization [1-400]

Proposed Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. For the most part, proposed Rule 7.4 tracks the language of Model Rule 7.4, with revisions to conform the rule to the specific regulatory landscape in California or to include the concept of limiting one's practice to a particular substantive area. (Refer to page 116 of Attachment 2 for a clean version of this rule and to page 117 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) For example, paragraph (d) is a slight modification of current rule 1-400(D)(6), with changes implemented to conform to existing California rules and statutes.

The Commission determined that the provisions of rule 7.4 are self-explanatory and do not require commentary to explicate them. Accordingly, the Commission does not recommend adoption of the comments to Model Rule 7.4.

Rule 7.5 Firm Names and Letterheads [1-400]

Proposed Rule 7.5 sets out basic rules governing the use of firm names and letterheads. For the most part, proposed Rule 7.5 tracks the language of Model Rule 7.5. (Refer to page 119 of Attachment 2 for a clean version of this rule and to page 120 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.) Paragraph (a) covers the concept contained in current standard (6). Paragraph (d) of Model Rule 7.5 was revised to incorporate the language currently found in standard (7).

The commentary to proposed Rule 7.5 is largely based on the commentary to Model Rule 7.5, with some of the Model Rule language streamlined or deleted for brevity. In addition, the second sentence of comment [2] contains the concept in current standard (8).

Rule 8.1 False Statement Regarding Application for Admission to Practice [1-200]

Proposed Rule 8.1 amends current rule 1-200 and continues: (1) the prohibition against an omission or false statement of a material fact by an applicant for admission to practice law; and (2) the related prohibition against a lawyer making a false statement of material fact in connection with any applicant's application for admission to practice law. (Refer to page 121 of Attachment 2 for a clean version of this draft rule and to page 122 for a redline/strikeout version that shows changes to the current rule.) The Commission has given this rule an ABA rule number but the substance and the language of the rule is closer to the current California rule than the ABA rule.

In this rule, the Commission recommends a substantive change to the prohibition applicable to a lawyer's conduct. The change is to delete the standard in the current rule focusing on a lawyer's actions that "further an application for admission" of an unqualified applicant and replace it with a standard that is narrowly tailored to prohibit false statements made by a lawyer in connection with another's application for admission to practice law. In making this substantive change, the Commission also recommends deletion of the provision in the current rule that expressly permits a lawyer to serve as attorney of record for an applicant in an admissions proceeding. This language becomes unnecessary under the Commission's proposed narrowing of the prohibition to restrict a lawyer's false statements.

Aside from these changes, most of the revisions recommended by the Commission are intended to clarify the two distinct prohibitions contained in this rule. Specifically, the prohibition addressing an applicant's conduct has been modified to explicitly state that it applies to an applicant's "own application for admission." Similarly, the prohibition addressing a lawyer's conduct has been modified to explicitly state that it applies to a lawyer's statements made in connection with "another person's application for admission."

Lastly, the Commission has added new commentary listing examples of the various types of admission to practice law governed by the rule. The examples listed include the new California MJP Rules of Court as well as admission *pro hac vice,* and registration as a foreign legal consultant.

Rule 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline [1-110]

Proposed Rule 8.1.1 amends current rule 1-110 and continues the requirement that a lawyer comply with the terms and conditions attached to agreements made in lieu of discipline, probation, or reprovals. (Refer to page 124 of Attachment 2 for a clean version of this draft rule and to page 125 for a redline/strikeout version that shows changes to the current rule.) No substantive changes are recommended to the current rule. The Commission's recommended revisions are intended for brevity and clarity. For example the deletion of the last two lines of the current rule are regarded as surplusage and potentially confusing. For guidance, a new comment has been added alerting

lawyers about provisions in the State Bar Act and the Rules of Court that are similar to the proposed rule in requiring compliance with conditions of discipline.

Rule 8.3 Reporting Professional Misconduct [1-500(B)]

Paragraph (a) of proposed Rule 8.3 is a proposed new rule stating that a lawyer may, but is not required to, report violations of the rules or the State Bar Act. Paragraph (b) of proposed Rule 8.3 amends current rule 1-500(B) and continues the prohibition against a lawyer offering or entering into an agreement which precludes the reporting of rule violations. (Refer to page 126 of Attachment 2 for a clean version of this draft rule and to page 127 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.)

Regarding the proposed permissive standard on the reporting of ethical violations, the Commission's recommendation departs from the mandatory standard found in ABA Model Rule 8.3. Although the Commission agrees with the concept that self-regulation of the legal profession requires every lawyer's vigilance on ethical violations, the Commission generally disagrees with the proposition that there are circumstances where a lawyer should be subject to discipline for failing to report another person's ethical violations. Primarily because of the likely impact such reporting would have on client interests, any reporting obligation should be permissive and left to the exercise of a lawyer's professional judgment. This view is implemented in paragraph (a) of proposed Rule 8.3. To clarify this discretionary standard, the Commission recommends new comments explaining that: (1) permissive reporting is subject to limits imposed by other rules or law, such as the duty of confidentiality or the standards governing the lawyer's assistance program; and (2) the rule is not intended to abrogate a lawyer's self-reporting duties under the State Bar Act.
Regarding the amendments to current rule 1-500(B), the Commission has moved that rule to the Commission's proposed new Rule 8.3 because it relates to the general topic of reporting ethical violations. Moving the rule and implementing non-substantive style changes are the only revisions made to current rule 1-500(B). No substantive change is intended by these revisions.

Rule 8.4 Misconduct [1-120]

Proposed Rule 8.4 amends current rule 1-120 and continues the prohibition against a lawyer knowingly assisting, soliciting, or inducing any violation of the rules or the State Bar Act. In addition, proposed Rule 8.4 is a proposed new rule to the extent that it would adopt many of the provisions of ABA Model Rule 8.4. (Refer to page 129 of Attachment 2 for a clean version of this draft rule and to page 131 for a redline/strikeout version that shows changes to the comparable ABA Model Rule.)

Regarding the amendments to current rule 1-120, the Commission has moved that rule to the Commission's proposed new Rule 8.4 to be consistent with the ABA's inclusion of its comparable rule as a part of ABA Model Rule 8.4. Moving the rule and implementing non-substantive style changes are the only revisions made to current rule 1-120. No substantive change is intended by these revisions.

Proposed Rule 8.4 also represents the Commission's recommendation to adopt a variation of ABA Model Rule 8.4. ABA Model Rule 8.4 is a collection of various misconduct provisions. Some of

these provisions have conceptual counterparts in the current rules or State Bar Act. (For example, compare ABA Model Rule 8.4(c) [fraud, dishonesty, and deceit constitutes misconduct by an attorney] with State Bar Act Business & Professions Code §6128, subd. (a) [attorney deceit or collusion prohibited] and with current rule 5-200(A) [requirement that attorneys only use means that are consistent with truth].) While there may be some degree of overlap with existing California standards, the Commission believes that these provisions should be adopted in the interest of national uniformity.

Other provisions in ABA Model Rule 8.4 have no counterpart in the current rules or the State Bar Act. The prohibition against improper influence of a government agency or official and the prohibition against assisting violations of judicial conduct rules are two rules which would be new to the Rules of Professional Conduct. Adoption of these new provisions are recommended because the Commission believes such misconduct should be a basis for discipline under the rules.

Proposed Rule 8.4 is a variation of ABA Model Rule 8.4 due to three primary differences. First, the Commission's proposal deletes the language in the ABA rule that prohibits "attempts" to violate the Rules of Professional Conduct. The Commission believes that attempted rule violations is an area of lawyer conduct that California has addressed on an individual rule basis and one which is tied closely to the facts of a particular matter. Accordingly, the Commission does not recommend adoption of a generalized rule.

Second, the Commission's proposal adds the concept of moral turpitude to its version of ABA Model Rule 8.4. In many states, the adoption of ABA Model Rule 8.4 has replaced the concept of moral turpitude as an arcane and obsolete disciplinary standard. In California, however, the concept of moral turpitude is codified in statute and steeped in case law. Thus, the Commission believes it is appropriate to include moral turpitude in proposed Rule 8.4 to assure that lawyers are aware that the concept of moral turpitude remains a basis for discipline notwithstanding the adoption of the ABA's misconduct rule.

Third, the Commission's proposal adds a new provision addressing lawyer statements or conduct that manifest bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation. Consistent with the Commission's charge to assess developments in attorney professional responsibility that have occurred since the last comprehensive revision of the rules in the late 1980's, the Commission considered the partial repeal of State Bar Act Business & Professions Code §6068, subd. (f). In 2001, the legislature deleted the part of that section which imposed a duty of an attorney to abstain from having "an offensive personality." This change in the statutory duties of attorneys was made in response to a Ninth Circuit decision which held that the language was unconstitutionally void for vagueness. (See *U.S. v. Wunsch* (9th Cir.. 1996) 84 F.3d 110.) In consideration of this partial repeal of a longstanding duty of an attorney, the Commission recommends the addition of a new rule narrowly tailored to address statements and conduct that manifest impermissible bias. By regulating specifically identified attorney speech and conduct, as opposed to an attorney's "personality," the Commission believes that the rule will survive facial challenge on the ground of vagueness. The Commission also notes that current rule 2-400 ("Prohibited Discriminatory Conduct in a Law Practice") states a similar prohibition against impermissible bias in the management and operation of a law practice, and that this rule has not been held unconstitutional.

Lastly, the comments to proposed new Rule 8.4 are a variation of the comments to ABA Model Rule 8.4. The two main differences are the addition of: (1) a discussion of the California common law disciplinary concept of "other misconduct warranting discipline" which includes citations to California Supreme Court decisions that explain the type of conduct that is covered by this concept (such as wilful failure to file a federal income tax return); and (2) citations addressing the concept of moral turpitude.

LENGTH OF PUBLIC COMMENT PERIOD AND PROPOSED PUBLIC HEARING

The Commission recommends a public comment period of 120 days. This longer comment period is desirable given the complex, substantive nature of the Commission's proposal and the sheer volume of proposed new or amended rule language.

The Commission also recommends that a public hearing be authorized to gather input in the form of testimony on the proposed rules. The anticipated in-person interaction between representatives of the Commission and the commentators in a public hearing forum will enhance the public comment received.

EFFECTIVE DATE OF PROPOSAL

Amendments to the Rules of Professional Conduct become operative only after they have been adopted by the Board and approved by the Supreme Court. The instant proposal accounts for only a portion of the Commission's ongoing comprehensive study. Please refer to Attachment 1 for a description of the Commission's multi-part public comment plan and project time-line. In accordance with that time-line, the Commission's complete recommendation for rule amendments is anticipated to be presented to the Board for adoption in 2008, and if adopted thereafter to the Supreme Court for approval.

In submitting the rule amendments to the Supreme Court, it is further anticipated the State Bar would request that the Supreme Court set an operative date for the amended rules that would afford a six month lead time to allow the State Bar to publicize the new rules.

FISCAL AND PERSONNEL IMPACT

The fiscal and personnel impact that will result from authorizing the requested public comment distribution and public hearing is anticipated to be absorbed by the presently budgeted funds and the staff of the Office of Professional Competence.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Board Committee on Regulation, Admissions and Discipline Oversight agree with the proposed recommendation, adoption of the following resolution would be appropriate.

> **RESOLVED**, that the Board Committee on Regulation, Admissions and Discipline Oversight authorizes staff to make available for public comment for a period of 120 days, the proposed new or amended Rules of Professional Conduct prepared by the Special Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is
>
> **FURTHER RESOLVED**, that staff is authorized to conduct a public hearing on the proposed new or amended Rules of Professional Conduct; and its
>
> **FURTHER RESOLVED**, this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

ATTACHMENT 1

Rules Revision Commission
Public Comment Plan & Time-Line

Public Comment Plan & Time-Line

(rev. 11/21/05)

I. The Batches:

There will be 4 batches of public comment proposals (PC). The first 3 batches will be current CA Rules. The 4th batch will be the ABA Model Rules that have no CA counterpart and also miscellaneous state rules. Here's the breakdown of the batches.

1st PC Batch (All CA Rules)
1-100, 1-110, 1-120, 1-120X, 1-200, 1-300 (includes: 5.3; 5.5), 1-310 (includes: 5.1; 5.2; 5.4; also covers 1-600), 1-311, 1-400 (includes; 7.1; 7.2; 7.3; 7.4; 7;5), 1-500; 1-700; 1-710; 1-720; 2-200; 3-110; 3-120; 3-200; 3-210; 3-400; 3-500; 3-510 and 5.7.
Public Comment Period: 120-days (w/ 30-day lead time); First Quarter of 2006; estimated deadline of August 15, 2006. **Public Hearing:** July, 2006, in San Francisco

The above covers 29 individual draft rule amendment proposals. Of these 29 draft rules, 26 have been tentatively approved (draft rule 1-300, covering 5.3 and 5.5, should be approved at the Commission's December 2005 meeting; draft rule 5.7 also is recommended for the December 2005 agenda). This 1st PC batch includes the following potentially controversial matters: ABA rule format; 1-100 (issue of scope of rules and use in non-disciplinary contexts); 1-120X (speech regulation); 1-311 (continuation of the rule); 1-400 (move to track ABA); 1-720 (standards for private ADR); 2-200 (timing of the req. for client consent); and 5.7 (ancillary business/dual occupation/fiduciary).

2nd PC Batch (All CA Rules)
2-100, 2-300, 2-400, 3-300 (includes: 1.8(a); 1.8(d); 1.8(i)), 3-310 (includes: 1.7; 1.8(f); 1.8(g); 1.8(k); 1.9; 1.10; 1.11), 3-320; 3-600; 4-200; 4-210; 4-300; and 4-400.
Public Comment Period: 90-days; Third Quarter of 2006; estimated deadline of November 23, 2006. **Public Hearing:** October, 2006, in Los Angeles

The above covers 19 individual draft rule amendment proposals. Of these 19 draft rules, none have been tentatively approved. This 2nd PC batch includes the following potentially

controversial matters: 2-100 (public officer exception); 3-310 (move to track ABA, addition of "(c)(4)," imputed conflicts rule); and 3-600 (no whistle-blower for gov't or otherwise).

3rd PC Batch (All CA Rules)
3-100, 3-700, 4-100, 5-100, 5-110, 5-120, 5-200, 5-210, 5-220, 5-300, 5-310, 5-320 and 1.14 (T&E Proposal).
Public Comment Period: 90-days; First Quarter of 2007; estimated deadline of June 7, 2007. **Public Hearing:** May, 2007, in Sacramento

The above covers 13 individual draft rule amendment proposals. Of these 13 draft rules, none have been tentatively approved. This 3rd PC batch includes the following potentially controversial matters: 3-100 (possible move toward MR 1.6); 3-700 and 4-100 (issue of advance fees); 5-120 (trial publicity); 1.14 (T&E Proposal).

4th PC Batch (ABA MR's w/ no CA Counterpart & Misc. State Rules)
1.2(a), 1.2(b), 1.2(c), 1.18, 2.1, 2.3, 3.3(b), 3.3(c), 3.4(d), 3.5(d), 3.9, 4.1, 4.3, 4.4, 6.1, 6.2, 6.3, 6.4, 6.5, 8.2(a), 8.3, 8,5 and an as yet undermined group of miscellaneous state rules.
Public Comment Period: 90-days; Third Quarter of 2007; estimated deadline of October 18, 2007. **Public Hearing:** September, 2007, in San Diego

The above covers (at least) 22 individual draft rule amendment proposals. Of these 22 draft rules, none have been tentatively approved. Some of these rules (i.e., 1.2(a)) may be taken-up in connection with CA rules and would drop-out of this 4th PC Batch. This 4th PC batch includes the following potentially controversial matters: 1.18 (prospective clients); 3.3(b) (disclosure of fraud to a tribunal); 3.4(d) (duties in discovery); and 6.1 (pro bono).

This 4 batch approach to public comment places the bulk of the Commission's work (and most of the controversial matters) in the first and second batch. This is because the Commission likely will need more time to accomplish post-public comment drafting on these rules. It is hoped that the matters included in the third and forth batch will move faster and require less post-public comment drafting (3-100, 3-700 and 4-100 probably will be exceptions). However, the pace is an aggressive one, as indicated in the below time-line.

II. The Time-Line:

Batch No. 1 will be distributed for a 120-day period with an official 30-day lead time notice. Batch No. 2 will be distributed for a 90-day period with no lead time notice, other than

general notice that Batch No. 2 is scheduled for RAD consideration (e.g., the usual 2-weeks prior Board Committee agenda notice). Similarly, Batch No. 3 and Batch No. 4 will be distributed for 90-day periods.

PC Batch No. 1 = First Quarter of 2006 (target: RAD's March 17, 2006 mtg in LA)
The estimated public comment deadline (including a 30-day lead time notice) on this batch is August 15, 2006.

PC Batch No. 2= Third Quarter of 2006 (target: RAD's August 25, 2006 mtg in LA) The estimated public comment deadline on this batch is November 23, 2006. (This could be adjusted to end after the Thanksgiving holiday.)

PC Batch No. 3= First Quarter of 2007 (target: RAD's March 9, 2007 mtg in LA)
The estimated public comment deadline on this batch is June 7, 2007.

PC Batch No. 4= Third Quarter of 2007 (target: RAD's July 20, 2007 mtg in LA)
The estimated public comment deadline on this batch is October 18, 2007.

A final 90-day public comment distribution of the Commission's entire recommendation (all of the proposed rules) is scheduled for the First Quarter of 2008, targeting a February RAD meeting (the Board's 2008 calendar is not yet posted). The public comment deadline on this final distribution would fall in May or June of 2008.

Regarding public hearings, a single hearing would be scheduled for each batch as follows.

PC Batch No. 1 = July 2006 (in the SF bay area)
PC Batch No. 2= October 2006 (in the greater LA area)
PC Batch No. 3= May 2007 (in Sacramento)
PC Batch No. 4= September 2007 (in San Diego)
Final/All Rules= March 2008 (in the SF bay area)

The public hearings are to be held in various metropolitan centers with the hope that commentators in outlying locales could come to a nearby metropolitan area. In addition, the Commission could attempt to schedule some of its regular meetings in outlying areas such as Butte County, Kern County, and etc....

III. Multitasking:

To complete its work in an efficient manner, the Commission must multitask by reviewing public comment and doing post-public comment drafting while, at the same time, proceeding with its work to complete a study of rules not yet considered.

The public comment period on PC Batch No. 1 will begin in March 2006. This gives the Commission two meeting days (December 2, 2005 and February 3, 2006) to complete all of the work to tentatively approve the rules included in this first batch. This seems doable.

PC Batch No. 2 must be ready for RAD submission in August 2006, so this gives the Commission five meeting days (April 21-22, 2006, June 9, 2006, and July 21-22, 2006) to complete all of the work on these rules while also starting on the PC Batch No. 3 rules. With the possible exception of the conflicts rules, this seems doable.

The deadline on PC Batch No. 1 will arrive in August 2006. The Commission must assign the drafting teams on those rules to review the comments received and to recommend any re-drafting. It is at this point that the Commission must multitask. The members must work to complete the PC Batch No. 3 rules while also performing post-public comment drafting. The PC Batch No. 3 rules must be ready for RAD submission by March 2007. Based on the Commission's typical annual meeting schedule, there will be about five meeting days to accomplish this goal. This will be a challenge. I am assuming that post-public comment drafting assignments on Batch No. 1 rules may have to yield to the priority of achieving tentative approval of the PC Batch No. 3 rules. However, the post-public comment work on PC Batch No. 1 should be completed in early 2007. This is because the Commission will need to shift gears and turn its sights on the review of public comment received on PC Batch No. 2.

The deadline on PC Batch No. 2 will arrive in November 2006. So, by the time that the PC Batch No. 3 rules are out for comment in March 2007, the Commission needs to be finished re-drafting Batch No. 1 rules and moving to the post-public comment drafting of the Batch No. 2 rules. During this same period, the second quarter of 2007, the Commission must also tentatively approve all of the PC Batch No. 4 rules. The PC Batch No. 4 rules must be ready to go in July 2007. This will be challenging, especially since the PC Batch No. 4 rules has an X-Factor of unknown state rules that may be controversial and time consuming.

While the PC Batch No. 4 rules are out for comment, the Commission must again switch gears and move to the post-public comment consideration of the Batch No. 3 rules. This will occur in the third or forth quarter of 2007 as the deadline on the PC Batch No. 3 rules is June 2007.

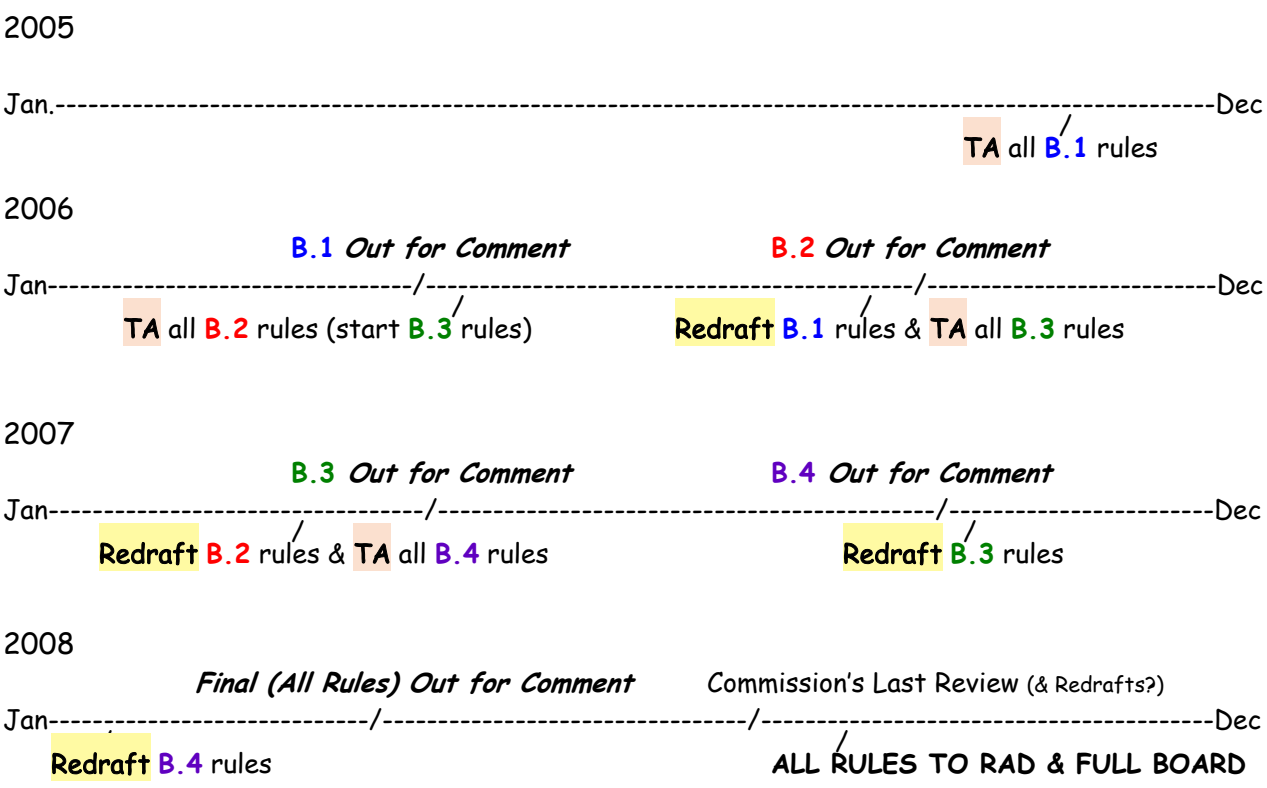
The deadline on the PC Batch No. 4 rules is October 2007. Thus, early in the first quarter of 2008, all of the post-public comment work on the Batch 4 rules and, in addition, all other straggling rules not yet redrafted from prior batches, must be completed. The final, comprehensive public comment period likely will begin late February 2008. Any rule drafts materially changed following the batches stage of public comment are highlighted for this final distribution.

When the final, comprehensive public comment period ends around May 2008, the Commission

will have its last look at the entirety of the rules with the goal of a third quarter (August) submission to RAD and full Board for adoption. (If material redrafts are required, then further public comment may be required before submission.)

IV. A Rough Visual

("B" = Batch; "**TA**" = Tentatively Approve; "**Redraft**" = Post-Public Comment Work)



ATTACHMENT 2

Rules Revision Commission
Proposed New & Amended Rules of Professional Conduct

TABLE OF CONTENTS/CROSS-REFERENCE CHART

TABLE OF CONTENTS/CROSS-REFERENCE CHART

***Note: These drafts use references in brackets [ ] to indicate rules that have not been approved by the Commission.**

PROPOSED RULE (CLEAN VERSION)

Rule 1.0: Purpose and Scope of the Rules of Professional Conduct

(a) Purpose: The purposes of the following Rules are:

(1) To protect the public;

(2) To protect the interests of clients;

(3) To protect the integrity of the legal system and to promote the administration of justice; and

(4) To promote respect for, and confidence in, the legal profession.

(b) Scope of the Rules:

(1) These Rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these Rules, regulate the conduct of lawyers and are binding upon all members of the State Bar and all other lawyers practicing law in this state.

(2) A willful violation of these Rules is a basis for discipline.

(3) Nothing in these Rules or the comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Comments: The comments following the Rules do not add obligations to the Rules but provide guidance for interpreting and practicing in compliance with the Rules.

(d) Title: These Rules are the “California Rules of Professional Conduct."

Comment

[1] The Rules of Professional Conduct are Rules of the Supreme Court of California regulating lawyer conduct in this state. (See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418 [25 Cal Rptr.2d 80]. The Rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to Business and Professions Code sections 6076 and 6077. The Supreme Court of California has inherent power to regulate the practice of law in California, including the power to admit and discipline lawyers practicing in this jurisdiction. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801]; *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525, 542-543 [28 Cal.Rptr.2d 617] and see Business and Professions Code section 6100.)

[2] The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106

Cal.Rptr. 489].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]; *Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355].) Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. (See, *Stanley v. Richmond*, supra, 35 Cal.App.4th at p. 1086; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of the rule may have other non-disciplinary consequences. (See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc*. (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party).)

[3] These Rules are not the sole basis of lawyer regulation. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other statutes, rules of court, and the opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted for guidance on proper professional conduct. Ethics opinions of other bar associations may also be considered to the extent they relate to rules and laws that are consistent with the rules and laws of this state.

[4] Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code section 6077.)

[5] These Rules govern the conduct of members of the State Bar in and outside this state, except as members of the State Bar may be specifically required by a jurisdiction in which they are lawfully practicing to follow rules of professional conduct different from these Rules. These Rules also govern the conduct of other lawyers practicing in this state, but nothing contained in these Rules shall be deemed to authorize the practice of law by such persons in this state except as otherwise permitted by law. For the disciplinary authority of this state and choice of law, see Rule [8.5].

COMPARISON TO CURRENT CA RULE

Rule ~~1-100~~ 1.0: Purpose and Scope of the Rules of Professional Conduct~~, in General~~

~~(A) Purpose and Function.~~

~~The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been~~

(a) Purpose: The purposes of the following Rules are:

(1) To protect the public;

(2) To protect the interests of clients;

(3) To protect the integrity of the legal system and to promote the administration of justice; and

(4) To promote respect for, and confidence in, the legal profession.

(b) Scope of the Rules:

~~(1)~~ These Rules, together with any standards adopted by the Board of Governors of the State Bar of California ~~and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors~~ pursuant to these ~~r~~Rules ~~shall be~~, regulate the conduct of lawyers and are binding upon all members of the State Bar and all other lawyers practicing law in this state.~~.~~

~~For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.~~

~~The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof.Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~

~~These rules are not intended to create new civil causes of action.~~

(2) A willful violation of these Rules is a basis for discipline.

~~(3)~~ Nothing in these ~~r~~Rules ~~shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.~~or the comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

~~(B) Definitions.~~

~~(1) "Law Firm" means:~~

~~(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~

~~(b) a law corporation which employs more than one lawyer; or~~

~~(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~

~~(d) a publicly funded entity which employs more than one lawyer to perform legal services.~~

~~(2) "Member" means a member of the State Bar of California.~~

~~(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

~~(4) "Associate" means an employee or fellow employee who is employed as a lawyer.~~

~~(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~

~~(C) Purpose of Discussions.~~

~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to~~

~~(c)~~ Comments: The comments following the Rules do not add obligations to the Rules but provide guidance for interpreting ~~the rules~~ and practicing in compliance with the Rules. ~~them.~~

~~(D) Geographic Scope of Rules.~~

~~(1) As to members:~~

~~These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.~~

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

~~(E) These rules may be cited and referred to as "Rules~~

(d) Title: These Rules are the "California Rules of Professional Conduct." ~~of the State Bar of California."~~

~~Discussion~~Comment

[1] The Rules of Professional Conduct are ~~intended to establish the standards for members for purposes of discipline (See~~ Rules of the Supreme Court of California regulating lawyer conduct in this state. (See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418 [25 Cal Rptr.2d 80]. The Rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to Business and Professions Code sections 6076 and 6077. The Supreme Court of California has inherent power to regulate the practice of law in California, including the power to admit and discipline lawyers practicing in this jurisdiction. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801]; *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525, 542-543 [28 Cal.Rptr.2d 617] and see Business and Professions Code section 6100.)

[2] The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) ~~The fact that a member has engaged in conduct that may be contrary to these rules does not automatically~~Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a ~~civil cause of action. (See~~ cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]; *Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355].) ~~These rules are not intended to supercede existing law relating to members in~~Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary ~~contexts. (See, e.g.,~~ context. (See, *Stanley v. Richmond*, supra, 35 Cal.App.4th at p. 1086; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of the rule may have other non-disciplinary consequences. (See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (~~motion for~~ disqualification ~~of counsel due to a conflict of interest~~); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc*. (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (~~disqualification of member appropriate remedy for improper~~ communication with represented party).) ~~adverse party). Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~

[3] These Rules are not the sole basis of lawyer regulation. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other statutes, rules of court, and the opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted for guidance on proper professional conduct. Ethics opinions of other bar associations may also be considered to the extent they relate to rules and laws that are consistent with the rules and laws of this state.

[4] Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code section 6077.)

[5] These Rules govern the conduct of members of the State Bar in and outside this state, except as members of the State Bar may be specifically required by a jurisdiction in which they are lawfully practicing to follow rules of professional conduct different from these Rules. These Rules also govern the conduct of other lawyers practicing in this state, but nothing contained in these Rules shall be deemed to authorize the practice of law by such

persons in this state except as otherwise permitted by law. For the disciplinary authority of this state and choice of law, see Rule [8.5].

PROPOSED RULE (CLEAN VERSION)

Rule 1.0.1: Terminology

Law Firm Definition

"Law firm" means a lawyer or lawyers in a law partnership, professional law corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.

Comment

[1] Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a law firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a law firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[2] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a law firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliate corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

~~Model Rule 1.0(c).~~ Rule 1.0.1: Terminology

Law Firm Definition

~~(c) "Firm" or "law~~"Law firm" ~~denotes~~means a lawyer or lawyers in a ~~private firm,~~ law partnership, professional law corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.

Comment

[~~2~~1] Whether two or more lawyers constitute a law firm ~~within paragraph (c)~~ can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a law firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a law firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[~~3~~2] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a law firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliate~~d~~ corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[~~4~~3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

PROPOSED RULE (CLEAN VERSION)

Rule 1.1: Competence

(a) A lawyer shall not intentionally, recklessly, 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 1) diligence, 2) learning and skill, and 3) 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 may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

Comment

[1] This Rule requires that a lawyer act with reasonable diligence and promptness in representing a client.

[2] The duties set forth in this Rule include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [229 Cal.Rptr. 101, 714 P.2d 1239]; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525, 695 P.2d 1066]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834, 685 P.2d 1185]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670, 635 P.2d 163]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577]. See also Rules 5.1 and 5.3.)

[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person.

[5] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

[6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.

COMPARISON TO CURRENT CA RULE

Rule ~~3-110. Failing to Act Competently~~1.1: Competence

(a) A ~~member~~lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(b) For purposes of this ~~r~~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.

(c) If a ~~member~~lawyer does not have sufficient learning and skill when the legal service ~~is~~s are undertaken, the ~~member~~lawyer may nonetheless ~~perform such services competently~~provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believe~~d~~s to be competent, ~~or~~ 2) ~~by~~ acquiring sufficient learning and skill before performance is required~~.~~

~~Discussion:~~

, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

Comment

[1] This Rule requires that a lawyer act with reasonable diligence and promptness in representing a client.

[2] The duties set forth in ~~r~~this Rule ~~3-110~~ include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452 [229 Cal.Rptr. 101, 714 P.2d 1239]; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525, 695 P.2d 1066]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834, 685 P.2d 1185]; Crane v. State Bar (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670, 635 P.2d 163]; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577]. See also Rules 5.1 and 5.3.)

[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person.

[5] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

[6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.

COMPARISON TO ABA MODEL RULE

Rule 1.1: Competence

~~A lawyer shall~~

(a) A lawyer shall not intentionally, recklessly, 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 1) diligence, 2) learning and skill, and 3) 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 may nonetheless provide competent representation ~~to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.~~by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

Comment

~~Legal Knowledge and Skill~~

~~[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.~~

~~[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate~~

[1] This Rule requires that a lawyer act with reasonable diligence and promptness in representing a client.

[2] The duties set forth in this Rule include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452 [229 Cal.Rptr. 101, 714 P.2d 1239]; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525, 695 P.2d 1066]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834, 685 P.2d 1185]; Crane v. State Bar (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670, 635 P.2d 163]; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577]. See also Rules 5.1 and 5.3.)

[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a ~~wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.~~

~~[3] In an emergency a lawyer may give advice or assistance in a matter in which~~matter as to which the lawyer knows or reasonably should know that the lawyer does not have ~~the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest~~, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies ~~as well to~~to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person~~. See also Rule 6.2.~~

~~Thoroughness and Preparation~~

~~[5] Competent handling of~~.

[5] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

[6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter ~~includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the~~

standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

PROPOSED RULE (CLEAN VERSION)

Rule 1.2.1: Counseling or Assisting the Violation of Law

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, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law, rule or ruling of a tribunal.

Comment

[1] This Rule prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law or ruling of a tribunal with the intent of facilitating or encouraging the conduct. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, by itself, make a lawyer a party to the course of action. There is a critical distinction 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.

[2] This Rule is intended to apply not only to the prospective conduct of a client but also to the interaction between the lawyer and client and to the specific legal service sought by the client from the lawyer. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the lawyer. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the lawyer negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].

[3] A lawyer is required to avoid assisting a client where the lawyer knows of the client's improper course of action and whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the client's wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believes was legally proper but later discovers is criminal or fraudulent. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Bus. & Prof. Code § 6068, subdivision (e)(1). Subject to Bus. & Prof. Code § 6068, subdivision (e)(1), the lawyer must take such actions as appear to the lawyer to be in the best lawful interest of the client, including counseling the client to take corrective or remedial action. 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 Rule [1.16].

[4] The last clause of this Rule authorizes a lawyer to 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. The Rule recognizes that determining the validity or interpretation of a statute, regulation or other law or ruling of a tribunal in good faith may require a course of action involving disobedience of the statute, regulation or other law or ruling of a tribunal, or

of the interpretation placed upon it by governmental authorities. In addition, a lawyer may properly advise a client on the consequences of violating a law, rule or ruling of a tribunal 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.

[5] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

COMPARISON TO CURRENT CA RULE

Rule ~~3-210. Advising~~1.2.1: Counseling or Assisting the Violation of Law

A ~~member shall not advise the~~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~~ unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule,~~, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law, rule or ruling of a tribunal.

~~Discussion:~~ **Comment**

[1] This Rule prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law or ruling of a tribunal with the intent of facilitating or encouraging the conduct. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, by itself, make a lawyer a party to the course of action. There is a critical distinction 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.

[2] This Rule is intended to apply not only to the prospective conduct of a client but also to the interaction between the ~~member~~lawyer and client and to the specific legal service sought by the client from the ~~member~~lawyer. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the ~~member~~lawyer. (See People v. Meredith (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the ~~member~~lawyer negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See People v. Pic'l (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].

[3] A lawyer is required to avoid assisting a client where the lawyer knows of the client's improper course of action and whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the client's wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believes was legally proper but later discovers is criminal or fraudulent. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Bus. & Prof. Code § 6068, subdivision (e)(1). Subject to Bus. & Prof. Code § 6068, subdivision (e)(1), the lawyer must take such actions as appear to the lawyer to be in the best lawful interest of the client, including counseling the client to take corrective or remedial action. 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 Rule [1.16].

[4] The last clause of this Rule authorizes a lawyer to 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. The Rule recognizes that determining the validity or interpretation of a statute, regulation or other law or ruling of a tribunal in good faith may require a course of action involving disobedience of the statute, regulation or other law or ruling of a tribunal, or of the interpretation placed upon it by governmental authorities. In addition, a lawyer may properly advise a client on the consequences of violating a law, rule or ruling of a tribunal 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.

[5] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

~~Model~~ Rule 1.2~~(d)~~.1: Counseling or Assisting the Violation of Law

~~(d)~~ A lawyer shall not counsel a client to engage, or assist a client~~,~~ in conduct that the lawyer knows is criminal ~~or~~, fraudulent or a violation of any law, rule, or ruling of a tribunal, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law~~.~~, rule or ruling of a tribunal.

Comment

~~*Criminal, Fraudulent and Prohibited Transactions*~~

~~[9] Paragraph (d)~~ [1] This Rule prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud~~. This prohibition, however, does not preclude the~~ or to violate any rule, law or ruling of a tribunal with the intent of facilitating or encouraging the conduct. However, this rule does not prohibit a lawyer from giving a~~n honest~~ good faith opinion about the ~~actual~~foreseeable consequences ~~that appear likely to result from~~of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself, make a lawyer a party to the course of action. There is a critical distinction 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.

[~~10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The~~2] This Rule is intended to apply not only to the prospective conduct of a client but also to the interaction between the lawyer and client and to the specific legal service sought by the client from the lawyer. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the lawyer. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the lawyer negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].

[3] A lawyer is required to avoid assisting ~~the client, for example, by drafting or delivering~~a client where the lawyer knows of the client's improper course of action and whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent ~~or by suggesting~~; nor may the lawyer counsel how ~~it~~ the client's wrongdoing might be concealed. ~~A~~ The lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposed was~~believes is legally proper but ~~then~~later discovers is criminal or fraudulent. ~~The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a).~~ In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Bus. & Prof. Code § 6068, subdivision (e)(1). Subject to Bus. & Prof. Code § 6068, subdivision (e)(1), the lawyer must take such actions as appear to the lawyer to be in the best lawful interest of the client, including counseling the client to take corrective or remedial action. 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 Rule 1.16. ~~withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.~~

~~[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.~~

~~[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.~~

[4] The last clause of ~~paragraph (d)~~this Rule authorizes a lawyer to 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. The rule recognizes that determining the validity or interpretation of a statute ~~or~~, regulation or other law or ruling of a tribunal in good faith may require a course of action involving disobedience of the statute ~~or~~, regulation or other law or ruling of a tribunal, or of the interpretation placed upon it by governmental authorities. In addition, a lawyer may properly advise a client on the consequences of violating a law, rule or ruling of a tribunal 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.

[~~13~~5] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

PROPOSED RULE (CLEAN VERSION)

Rule 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules or the State Bar Act;

(2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably informed about significant developments relating to the representation;

(4) promptly comply with reasonable client requests for information necessary to keep the client reasonably informed as required by paragraph (a)(3);

(5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed as required by paragraph (a)(3), which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and

(6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall promptly communicate to the lawyer's client:

(1) All terms and conditions of any offer made to the client in a criminal matter; and

(2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

Comment

[1] This Rule is not intended to change a lawyer's duties to his or her clients. (See Bus. & Prof. Code, §6068, subd. (m), (n).)

[2] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might

be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in an abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.

[3] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

[4] As used in paragraph (c), "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral.

[6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously indicated that the proposal will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)].

[7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.

[8] A lawyer ordinarily should provide to the client the information that would be appropriate for a comprehending and responsible adult. However, it can be impractical to inform the client fully according to this standard, for example, when the client is a child or suffers from diminished capacity. See Rule [1.14]. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its

members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule [1.13]. The lawyer may arrange a system of limited or occasional reporting with the client when many routine matters are involved.

[9] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. This Rule is not intended to require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is also not intended to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the lawyer. Compare Rule [1.16, comment ___].

[10] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

COMPARISON TO ABA MODEL RULE

Rule 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent~~, as defined in Rule 1.0(e),~~ is required by these Rules or the State Bar Act;

(2) reasonably consult with the client about the means by which to accomplish the client's objectives ~~are to be accomplished~~in the representation;

(3) keep the client reasonably informed about ~~the status of~~significant developments relating to the ~~matter~~representation;

(4) promptly comply with reasonable client requests for information necessary to keep the client reasonably informed as required by paragraph (a)(3);

(5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed as required by paragraph (a)(3), which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and

(6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall promptly communicate to the lawyer's client:

(1) All terms and conditions of any offer made to the client in a criminal matter; and

(2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

Comment

[1] ~~Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.~~

~~Communicating with Client~~

~~[2] If these Rules require that~~This Rule is not intended to change a lawyer's duties to his or her clients. (See Bus. & Prof. Code, §6068, subd. (m), (n).)

[2] Whether a particular ~~decision about the~~development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in an abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation ~~be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions~~is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client ~~have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel~~concerning the opportunity to engage in alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.

[3] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

[4] As used in paragraph (c), "client" includes a person who possesses the authority to accept an offer of settlement ~~in a civil controversy or a proffered plea bargain in a criminal case must promptly~~or plea, or, in a class action, all the named representatives of the class.

[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral.

[6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer

to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of itsthe substance unlessof a written offer of a settlement in a civil matter if the client has previously indicated that the proposal will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2), and there has been no change in circumstances that requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and. See Rule 1.2(a).

[7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.

[8] A lawyer ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best

~~interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).~~

~~[6] Ordinarily,~~provide to the client the information ~~to~~that would be ~~provided is that~~ appropriate for ~~a client who is~~ a comprehending and responsible adult. However, ~~fully informing~~it can be impractical to inform the client fully according to this standard ~~may be impracticable~~, for example, whe~~re~~n the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. ~~Where many routine matters are involved,~~The lawyer may arrange a system of limited or occasional reporting ~~may be arranged~~ with the client when many routine matters are involved.

~~Withholding Information~~

[~~7~~9] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. ~~Thus~~ For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. ~~Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.~~

This Rule is not intended to require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is also not intended to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the lawyer. Compare Rule 1.16, comment ___.

[10] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

PROPOSED RULE (CLEAN VERSION)

Rule 1.5.1: Financial Arrangements Among Lawyers

(a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:

(1) The lawyers enter into a written agreement to divide the fee;

(2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and

(3) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees.

(b) Except as permitted in paragraph (a) of this Rule or Rule [1.17], a lawyer shall not compensate, give, or promise anything of value to another lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to another lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer's law firm shall not of itself violate this Rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Comment

[1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2 536]; State Bar Formal Opn. 1994-138.

[2] Paragraph (a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.

[3] Paragraph (a) is intended to require both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client, and that may not be addressed

adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

[5] This Rule is not intended to apply to a division of fees pursuant to court order.

[6] This Rule is not intended to subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).

[7] Under Rule [1.5], a lawyer cannot enter into an agreement for, charge or collect an illegal or unconscionable fee. Under Rule [1.5] a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

[8] This Rule differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer, that each lawyer assume joint responsibility for the representation or that the client consent to the participation of the lawyers involved as required in Model Rule 1.5(e)(1) & (2).

Rule ~~2-200~~1.5.1: Financial Arrangements Among Lawyers

(~~A~~a) ~~A member~~Lawyers who are not in the same law firm shall not divide a fee for legal services ~~with a lawyer who is not a partner of, associate of, or shareholder with the member~~ unless:

(1) The lawyers enter into a written agreement to divide the fee;

(~~1~~2) The client has consented in writing ~~thereto after a full disclosure has been made in writing~~, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of ~~such~~the division; ~~-~~and

(~~2~~3) 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~~.

(~~B~~b) Except as permitted in paragraph (~~A~~a) of this ~~r~~Rule or ~~r~~Rule ~~2-300~~[1.17], a ~~member~~lawyer shall not compensate, give, or promise anything of value to ~~any~~another lawyer for the purpose of recommending or securing employment of the ~~member~~lawyer or the ~~member's~~lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the ~~member~~lawyer or the ~~member's~~lawyer's law firm by a client. A ~~member's~~lawyer's offering of or giving a gift or gratuity to ~~any~~another lawyer who has made a recommendation resulting in the employment of the ~~member~~lawyer or the ~~member's~~lawyer's law firm shall not of itself violate this ~~r~~Rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Comment

[1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2 536]; State Bar Formal Opn. 1994-138.

[2] Paragraph (a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.

COMPARISON TO CURRENT CA RULE

[3] Paragraph (a) is intended to require both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client, and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

[5] This Rule is not intended to apply to a division of fees pursuant to court order.

[6] This Rule is not intended to subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).

[7] Under Rule [1.5], a lawyer cannot enter into an agreement for, charge or collect an illegal or unconscionable fee. Under Rule [1.5] a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

[8] This Rule differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer, that each lawyer assume joint responsibility for the representation or that the client consent to the participation of the lawyers involved as required in Model Rule 1.5(e)(1) & (2).

COMPARISON TO ABA MODEL RULE

Rule 1.5.1: Financial Arrangements Among Lawyers

(~~e~~a) ~~A division of a fee between l~~Lawyers who are not in the same law firm ~~may be made only if:~~shall not divide a fee for legal services unless:

~~(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;~~

~~(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and~~

~~(3) the total fee is reasonable.~~

(1) The lawyers enter into a written agreement to divide the fee;

(2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and

(3) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees.

(b) Except as permitted in paragraph (a) of this Rule or Rule 1.17, a lawyer shall not compensate, give, or promise anything of value to another lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to another lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer's law firm shall not of itself violate this Rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Comment

[1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2 536]; State Bar Formal Opn. 1994-138.

[2] Paragraph (a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not

in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.

[3] Paragraph (a) is intended to require both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client, and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

[5] This Rule is not intended to apply to a division of fees pursuant to court order.

[6] This Rule is not intended to subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in Paragraph (a).

~~[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. and In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.~~

[7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

[~~8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.~~

[8] This Rule differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer, that each lawyer

assume joint responsibility for the representation or that the client consent to the participation of the lawyers involved as required in Model Rule 1.5(e)(1) & (2).

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.8: Limiting Liability to Client

A lawyer shall not:

(a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or

(b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:

(1) represented by independent counsel concerning the settlement; or

(2) advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Comment

[1] This Rule prohibits lawyers from settling claims and potential claims for malpractice without complying with the requirements of the Rule. In view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing to seek independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

[2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity. [Placeholder for cross-reference to Task Force's proposed Rule Of Professional Conduct re disclosing insurance coverage].

[3] Paragraph (b) addresses only particular aspects of agreements that limit a lawyer's liability to a client or former client. It is not intended to override any obligation the lawyer might have under other law.

[4] This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a lawyer from reasonably limiting the scope of the lawyer's representation. (See Rule [1.2].)

COMPARISON TO CURRENT CA RULE

Rule ~~3-400~~1.8.8: Limiting Liability to Client

A ~~member~~lawyer shall not:

(a) Contract with a client prospectively limiting the ~~member's~~lawyer's liability to the client for the ~~member's~~lawyer's professional malpractice; or

(b) Settle a claim or potential claim for the ~~member's~~lawyer's liability to ~~the~~a client or former client for the ~~member's~~lawyer's professional malpractice, unless the client ~~is informed in writing that the client may~~or former client is either:

(1) represented by independent counsel concerning the settlement; or

(2) advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

~~Discussion:~~ **Comment**

[1] This Rule prohibits lawyers from settling claims and potential claims for malpractice without complying with the requirements of the Rule. In view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing to seek independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

[2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; Lawrence v. Walzer & Gabrielson (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity. [Placeholder for cross-reference to Task Force's proposed Rule Of Professional Conduct re disclosing insurance coverage].

[3] Paragraph (b) addresses only particular aspects of agreements that limit a lawyer's liability to a client or former client. It is not intended to override any obligation the lawyer might have under other law.

[4] This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a ~~member~~lawyer from reasonably limiting the scope of the ~~member's employment or~~lawyer's representation. (See Rule [1.2].)

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.10: Sexual Relations With Client

(a) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(b) A lawyer shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the lawyer has sexual relations if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter.

(c) Paragraphs (b)(1) and (b)(2) shall not apply to sexual relations between lawyers and their spouses or persons in an equivalent domestic relationship, or to ongoing consensual sexual relations which predate the initiation of the lawyer-client relationship.

(d) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Comment

[1] This Rule is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all

client matters, a lawyer must keep clients' interests paramount in the course of the lawyer's representation.

[2] When the client is an organization, this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See Rule [1.13].)

[3] Although paragraph (c) excludes representation of certain clients from the scope of this Rule, the exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including Rule 1.1 and Rule [re: conflicts of interest].

COMPARISON TO CURRENT CA RULE

Rule 1.8.10: ~~3-120~~ Sexual Relations With Client

(~~A~~a) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(~~B~~b) A ~~member~~lawyer shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the ~~member~~lawyer has sexual relations if such sexual relations cause the ~~member~~lawyer to perform legal services incompetently in violation of ~~rule 3-110.~~ Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter.

~~(C) Paragraph (B~~ (c) Paragraphs (b)(1) and (b)(2) shall not apply to sexual relations between ~~members~~lawyers and their spouses or persons in an equivalent domestic relationship, or to ongoing consensual sexual ~~relationships~~relations which predate the initiation of the lawyer-client relationship.

(~~D~~d) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

~~Discussion:~~**Comment**

[1] This Rule ~~3-120~~ is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all

client matters, a ~~member is advised to~~lawyer must keep clients' interests paramount in the course of the ~~member's~~lawyer's representation.

~~For purposes of this rule, if~~[2] When the client is an organization, ~~any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)~~ this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See Rule [1.13].)

[3] Although paragraph (~~C~~c) excludes representation of certain clients from the scope of ~~r~~this Rule ~~3-120~~, ~~such~~the exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including ~~rule 3-110.~~ Rule 1.1 and Rule [re: conflicts of interest].

~~Rule 1.8(j) Conflicts of Interest; Current Clients; Specific Rules~~ Rule 1.8.10: Sexual Relations With Client

(a) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(b) A lawyer shall not ~~have~~:

(1) Require or demand sexual relations with a client ~~unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.~~ incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the lawyer has sexual relations if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter.

(c) Paragraphs (b)(1) and (b)(2) shall not apply to sexual relations between lawyers and their spouses or persons in an equivalent domestic relationship, or to ongoing consensual sexual relations which predate the initiation of the lawyer-client relationship.

(d) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

Comment

~~*Client-Lawyer Sexual Relationships*~~

[1] This Rule is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between ~~lawyer~~an attorney and client is a fiduciary ~~one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical~~

~~obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because~~relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a lawyer must keep clients' interests paramount in the course of the lawyer's representation. ~~lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.~~

~~[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).~~

[2] When the client is an organization, ~~paragraph (j) of~~ this Rule ~~prohibits~~is applicable to a lawyer for the organization (whether inside counsel or outside counsel) ~~from having a~~who has sexual ~~relationship~~relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization~~''~~'s legal matters. (See Rule 1.13.)

[3] Although paragraph (c) excludes representation of certain clients from the scope of this Rule, the exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including Rule 1.1 and Rule [re:conflicts of interest].

Rule 2.4: Lawyer as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

(c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.5 [impartiality, conflicts of interest, disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], 1620.8 [marketing], and 1620.9 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs. A lawyer serving as a third-party neutral in a mediation shall also comply with Rule 1620.4 [confidentiality] of those Standards.

(d) A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], 12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, neutral arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other

law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. See Comment [6] and Comment [7].

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. *Cho v. Superior Court* (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct and the State Bar Act.

[6] Paragraph (c) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council mediator standards whenever the lawyer is serving as a third-party neutral in a mediation or settlement conference. As indicated in paragraph (c), Rule 1620.4 [confidentiality] of the mediator standards is intended to apply to a lawyer serving in a mediation but it is not intended to apply to a lawyer serving in a settlement conference (see Evidence Code section 1117 and Rule 222 of the California Rules of Court).

[7] Paragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[9] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

COMPARISON TO ABA MODEL RULE

Rule 2.4: Lawyer ~~Serving~~ as Third-~~p~~Party Neutral.

(a) A lawyer serves as a third-party neutral when the lawyer ~~assists~~is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

(c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.5 [impartiality, conflicts of interest, disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], 1620.8 [marketing], and 1620.9 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs. A lawyer serving as a third-party neutral in a mediation shall also comply with Rule 1620.4 [confidentiality] of those Standards.

(d) A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], 12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, neutral arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other

law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the ~~Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution~~Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. See Comment [6] and Comment [7].

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. ~~The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.~~

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. ~~The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.~~ Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. *Cho v. Superior Court* (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct~~. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.~~ and the State Bar Act.

[6] Paragraph (c) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council mediator standards whenever the lawyer is serving as a third-party neutral in a mediation or settlement conference. As indicated in paragraph (c), Rule 1620.4 [confidentiality] of the mediator standards is intended to apply to a lawyer serving in a mediation but it is not intended to apply to a lawyer serving in a settlement conference (see Evidence Code section 1117 and Rule 222 of the California Rules of Court).

[7] Paragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[9] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4.1: Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator.

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

Comment

[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

COMPARISON TO CURRENT CA RULE

Rule ~~1-710~~2.4.1: ~~Member~~Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator.

A ~~member~~lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject ~~under~~to Canon 6D of the Code of Judicial Ethics ~~to Canon 6D~~, shall comply with the terms of that canon.

~~Discussion~~**Comment**

[1] This ~~r~~Rule is intended to permit the State Bar to discipline ~~members~~lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.

[2] Nothing in this R~~r~~ule ~~1-710~~ shall be deemed to limit the applicability of any other rule or law.

[3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

PROPOSED RULE (CLEAN VERSION)

Rule 2.4.2: Lawyer as Candidate for Judicial Office

(a) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.

(b) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election or appointment. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer commences to become a candidate for judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with paragraph (a) shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first, or when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

Discussion:

[1] This Rule applies to lawyers who are candidates for election to judicial office and to lawyers who have applied for appointment to judicial office. (See California Code of Judicial Ethics, Canon 5B.)

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

COMPARISON TO CURRENT CA RULE

Rule ~~1-700 Member~~2.4.2: Lawyer as Candidate for Judicial Office

(~~A~~a) A ~~member~~lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.

(~~B~~b) For purposes of this ~~r~~Rule, "candidate for judicial office" means a ~~member~~lawyer seeking judicial office by election or appointment. The determination of when a ~~member~~lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A ~~member~~lawyer commences to become a candidate for judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A ~~member's~~lawyer's duty to comply with paragraph (~~A~~a) shall end when the ~~member~~lawyer announces withdrawal of the ~~member's~~lawyer's candidacy or when the results of the election are final, whichever occurs first, or when the ~~member~~lawyer advises the appointing authority of the withdrawal of the ~~member's~~lawyer's application.

Discussion:

[1] This ~~r~~Rule applies to ~~members~~lawyers who are candidates for election to judicial office and to ~~members~~lawyers who have applied for appointment to judicial office. (See California Code of Judicial Ethics, Canon 5B.)

[2] Nothing in ~~r~~this Rule ~~1-700~~ shall be deemed to limit the applicability of any other rule or law.

PROPOSED RULE (CLEAN VERSION)

Rule 3.1: Meritorious Claims and Contentions

(a) A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

(b) A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law and fact that is not frivolous. See, e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958 [87 P.3d 802, 12 Cal.Rptr.3d 54.] See also Business and Professions Code section 6068, subdivision (c) and (g), Civil Code sections 128.5, 128.6 and 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

[4] Subject to Comment [3] and Rule [3.8, paragraph (a)] addresses the duties of lawyers when bringing or defending proceedings of all kinds, including appellate and writ proceedings.

~~Rule 3-200. Prohibited Objectives of Employment~~ **Rule 3.1: Meritorious Claims and Contentions**

~~A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:~~

~~(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or~~

~~(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.~~

(a) A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

(b) A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification~~,~~ or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law and fact that is not frivolous. See, e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958 [87 P.3d 802, 12 Cal.Rptr.3d 54.] See also Business and Professions Code section 6068, subdivision (c) and (g), Civil Code sections 128.5, 128.6 and 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

COMPARISON TO CURRENT CA RULE

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

[4] Subject to Comment [3] and Rule [3.8, paragraph (a)] addresses the duties of lawyers when bringing or defending proceedings of all kinds, including appellate and writ proceedings.

COMPARISON TO ABA MODEL RULE

Rule 3.1: Meritorious Claims and Contents

(a) A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

(b) A lawyer for the defendant in a criminal proceeding, ~~or~~or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause~~,~~ but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients~~'~~' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law and fact that is not frivolous. See, e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958 [87 P.3d 802, 12 Cal.Rptr.3d 54.] See also Business and Professions Code section 6068, subdivision (c) and (g), Civil Code sections 128.5, 128.6 and 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

[4] Subject to Comment [3] and Rule 3.8, paragraph (a) addresses the duties of lawyers when bringing or defending proceedings of all kinds, including appellate and writ proceedings.

PROPOSED RULE (CLEAN VERSION)

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) is intended to apply to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a law firm. Paragraph (b) is intended to apply to lawyers who have supervisory authority over the work of other lawyers in a firm. Paragraph (c) is intended to impose personal responsibility on a lawyer for the acts of another lawyer in the law firm. See also Rule 8.4(a). Paragraphs (a), (b) and (c) of this Rule create independent bases for discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the law firm will conform to the Rules of Professional Conduct. Such policies and procedures include, for example, those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[3] Paragraphs (a) and (b) are also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules. See Rule [2.1] and Rule 8.4(a).

[4] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, may be vicariously responsible for the conduct of the other lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, both the supervisor and the subordinate have a duty to correct the resulting misapprehension the resulting misapprehension if doing so is consistent with the lawyer's duty not to disclose confidential information under Business & Professions Code section 6068, subdivision (e)(1).

[5] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[6] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[7] This Rule is not intended to alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

COMPARISON TO ABA MODEL RULE

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer''s violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) ~~applies~~is intended to apply to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (~~c~~Law Firm definition). This includes members of a partnership ~~and~~, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in ~~the~~ a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a law firm. Paragraph (b) ~~applies~~is intended to apply to lawyers who have supervisory authority over the work of other lawyers in a firm. Paragraph (c) is intended to impose personal responsibility on a lawyer for the acts of another lawyer in the law firm. See also Rule 8.4(a). Paragraphs (a), (b) and (c) of this Rule create independent bases for discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the law firm will conform to the Rules of Professional Conduct. Such policies and procedures include, for example, those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

~~[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small~~

~~firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.~~

~~[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).~~

~~[5] Paragraph (c)(2) defines the duty of~~

[3] Paragraphs (a) and (b) are also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules. See Rule 2.1 and Rule 8.4(a).

[4] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, ~~as well a~~and a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, may be vicariously responsible for the conduct of the other lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. ~~Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.~~ Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer~~'~~'s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, both the supervisor ~~as well as~~and the subordinate has~~s~~ve a duty to correct the resulting misapprehension the resulting misapprehension if doing so is consistent with the lawyer's duty not to disclose confidential information under Business & Professions Code section 6068, subdivision (e)(1).

[~~6~~5] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[~~7~~6] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer~~'~~'s conduct is a question of law beyond the scope of these Rules.

~~[8]~~[7] ~~The duties imposed by this Rule on managing and supervising lawyers do not~~ This Rule is not intended to alter the personal duty of each lawyer in a law firm to ~~abide by~~comply with the Rules of Professional Conduct. See Rule 5.2(a).

PROPOSED RULE (CLEAN VERSION)

Rule 5.2: Responsibilities of a Subordinate Lawyer

(a) A lawyer shall comply with the Rules of Professional Conduct and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] A lawyer under the supervisory authority of another lawyer is not by the fact of supervision excused from the lawyer's obligation to comply with the Rules of Professional Conduct or the State Bar Act. Although a lawyer is not necessarily relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules. See Rule 8.4(a). For example, if a subordinate signed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under the Rules of Professional Conduct or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the arguable question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

COMPARISON TO ABA MODEL RULE

Rule 5.2: Responsibilities of a Subordinate Lawyer

(a) A lawyer ~~is bound by~~shall comply with the Rules of Professional Conduct and the State Bar Act notwithstanding that the lawyer act~~ed~~s at the direction of another lawyer or other person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer~~'~~'s reasonable resolution of an arguable question of professional duty.

Comment

[1] A lawyer under the supervisory authority of another lawyer is not by the fact of supervision excused from the lawyer's obligation to comply with the Rules of Professional Conduct or the State Bar Act. Although a lawyer is not necessarily relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether ~~a lawyer had the knowledge required to render conduct a violation of the Rules.~~the lawyer has violated the Rules. See Rule 8.4(a). For example, if a subordinate ~~filed~~signed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document~~'~~'s frivolous character.

[2] When lawyers in a supervisor~~-~~-subordinate relationship encounter a matter involving professional judgment as to ~~ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If~~the lawyers' responsibilities under the Rules of Professional Conduct or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. ~~However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a~~ Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. ~~For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable~~ If the subordinate lawyer believes that the supervisor's proposed resolution of the ~~question should protect~~arguable question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate ~~professionally if the resolution is subsequently challenged.~~is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the ~~person's~~nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they ~~do~~may not have legal training ~~and are not subject to professional discipline~~.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (~~b~~a) applies to lawyers ~~who have supervisory authority over the work of a nonlawyer.~~ with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

PROPOSED RULE (CLEAN VERSION)

Rule 5.3.1: Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(a) For the purposes of this Rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Member" means a member of the State Bar of California.

(3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d); and

(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the practice of law.

(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The information contained in such notices shall be available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.

(e) A lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall promptly serve upon the State Bar written notice of the termination.

Comment

[1] For discussion of the activities that constitute the practice of law, see Rule 5.5, comment [4].

[2] Paragraph (d) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a lawyer's client is an organization, then the written notice required by paragraph (d) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule [1.13].)

[3] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], 983.1 [appearances by military counsel], 983.2 [certified law students], 983.4 [out-of-state attorney arbitration counsel program] and 988 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

COMPARISON TO CURRENT CA RULE

Rule ~~1-311~~5.3.1: Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(~~A~~a) For the purposes of this Rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Member" means a member of the State Bar of California.

~~2~~(3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(~~c~~d)(1), or California Rule of Court 958(d); ~~-~~and

~~3~~(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(~~B~~b) A ~~member~~lawyer shall not employ, associate professionally with, or aid a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the ~~member's~~lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; ~~-~~or

(6) Engage in activities which constitute the practice of law.

(~~C~~c) A ~~member~~lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the ~~active member~~lawyer who will appear as the representative of the client.

(~~D~~d) Prior to or at the time of employing a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the ~~member~~lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (~~B~~b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The ~~member~~information contained in such notices shall be available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The ~~member~~lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the ~~member's~~lawyer's employment ~~with~~by the client.

(~~E~~e) A ~~member~~lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(~~F~~f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the ~~member~~lawyer shall promptly serve upon the State Bar written notice of the termination.

~~DISCUSSION~~***Comment***

[1] For discussion of the activities that constitute the practice of law, see ~~*Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 P. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].) Paragraph (D~~Rule 5.5, comment [4].

[2] Paragraph (d) is not intended to prevent or discourage a ~~member~~lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a ~~member's~~lawyer's client is an organization, then the written notice required by paragraph (~~D~~d) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See ~~r~~Rule [1.13].)

[3] Nothing in ~~r~~this Rule ~~1-311~~ shall be deemed to limit or preclude any activity engaged in pursuant to Rules ~~983, 983.1, 983.2, and 988~~964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], 983.1 [appearances by military counsel], 983.2 [certified law students], 983.4 [out-of-state attorney arbitration counsel program] and 988 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

PROPOSED RULE (CLEAN VERSION)

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

Guidance on what constitutes the practice of law

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. The purpose of prohibiting the unauthorized practice of

law is to protect the public and the administration of justice from the provision of legal services by unqualified persons or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work as provided in Rule 5.3. Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies.

[4] In California, the definition of the "practice of law" has evolved through case law and is generally understood to include the following:

(a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)

(b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)

(c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 626, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-

lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services they may provide in California.

COMPARISON TO CURRENT CA RULE

Rule ~~1-300~~5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(~~A~~ a) A ~~member~~ lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction ~~where to do so would be~~ in violation of the ~~regulations~~ regulation of the legal profession in that jurisdiction; or

(2) ~~aid any person or entity in~~ knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(~~B~~b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

Guidance on what constitutes the practice of law

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the provision of legal services by unqualified persons or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work as provided in Rule 5.3. Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies.

[4] In California, the definition of the "practice of law" has evolved through case law and is generally understood to include the following:

(a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)

(b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)

(c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 626, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services they may provide in California.

COMPARISON TO ABA MODEL RULE

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer admitted to practice law in California shall not ~~:~~

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction~~,~~; or ~~assist another in doing so~~

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in ~~this jurisdiction~~California shall not:

(1) except as authorized by these Rules or other law, establish ~~an~~or maintain a resident office or other systematic ~~and~~or continuous presence in ~~this jurisdiction~~California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in ~~this jurisdiction.~~ California.

~~(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:~~

~~(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;~~

~~(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;~~

~~(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or~~

~~(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.~~

~~(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:~~

~~(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or~~

~~(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.~~

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. ~~A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis.~~ Paragraph (a) ~~applies~~prohibits to~~he~~ unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person~~.~~ in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

Guidance on what constitutes the practice of law

[~~2~~3] The definition of the practice of law is established by law and varies from one jurisdiction to another. ~~Whatever t~~ The ~~definition, limiting~~purpose of prohibiting the unauthorized practice of law is to ~~members of the bar~~ protect~~s~~ the public ~~against rendition~~and the administration of justice from the provision of legal services by unqualified persons~~. This Rule does not~~ or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of ~~paraprofessionals~~para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work~~. See Rule 5.3.~~ as provided in Rule 5.3. ~~[3] A lawyer may provide~~ Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of ~~the~~ law~~; for example,~~, including claims adjusters, employees of financial or commercial

institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies. ~~Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.~~

~~[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).~~

[4] In California, the definition of the "practice of law" has evolved through case law and is generally understood to include the following:

(a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)

(b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)

(c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 626, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-

lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services they may provide in California.

~~[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.~~

~~[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.~~

~~[7] Paragraphs (c) and (d) apply to lawyers who are admitted California when actually not admitted or otherwise entitled to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.~~

~~[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.~~

~~[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the~~

lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant

~~connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.~~

~~[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.~~

~~[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.~~

~~[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.~~

~~[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.~~

~~[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).~~

~~[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).~~

~~[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.~~

Rule 5.6: Restrictions on a Lawyer's Right to Practice

(a) A lawyer shall not offer or enter into:

(1) A partnership, shareholder, operating, employment or other similar agreement that restricts the right of a lawyer to practice law after termination of the relationship; or

(2) Any other agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts any lawyer's right to practice law.

(b) Notwithstanding paragraph (a)(1) of this Rule or unless otherwise proscribed by law, a lawyer may offer or enter into an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in or employment by that law firm if the lawyer competes with that law firm after such termination, provided that:

(1) The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and

(2) The affected compensation will be paid solely from future firm revenues, and not from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan.

Comment

[1] Paragraph (a)(1) permits a restrictive covenant in a law corporation, partnership or employment agreement that provides that a lawyer who is a law corporation shareholder, partner or associate shall not have a separate practice during the existence of the relationship. However, upon termination of the relationship (whether voluntary or involuntary), the lawyer is free to practice law without any contractual restriction except in the case of retirement from the active practice of law or as further noted below.

[2] Paragraph (b)'s exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under American Bar Association Model Rule 5.6 have identified the factors enumerated in paragraphs (b)(1) and (b)(2) as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman* (D.C. 1998) 715 A.2d 127, 136-137 (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C.* (Iowa 1999) 599 N.W.2d 677, 682 (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service ... clearly qualifies as a retirement plan"); *Miller v. Foulston, Siefkin, Powers & Eberhardt* (Kan. 1990) 246 Kan. 450, 458 [790 P.2d 404] (payments made to former partners who satisfy age, longevity or

disability requirements "[f]it squarely within the exception of [the ethics rule]"). Significantly, these authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to the Rule. See also *Neuman v. Atkman*, supra, 715 A.2d at 136 (retirement benefits come "entirely from firm profits that post-date the withdrawal of the partner"); Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg* (Iowa 1990) 461 N.W.2d 598, 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison, Mahoney & Miller* (Mass. 1997) 426 Mass. 253, 257-258 [687 N.E.2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord, Day & Lord* (NY 1989) 75 N.Y.2d 95, 100 [550 N.E.2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits).

[3] While this Rule bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that former Rule 1-500 does not per se prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80]. The Court's rationale for permitting such agreements is that "an agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." Id. at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. Id. at 419, 425. See also *Haight, Brown & Bonesteel v. Sup. Ct.* (1991) 234 Cal.App.3d 963, 969-971 [285 Cal.Rptr. 845] (former Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal. App. 4th 1096 [47 Cal.Rptr.2d 650] (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court* (1988) 201 Cal. App. 3rd 777 [247 Cal.Rptr. 624] (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).

[4] This Rule is not intended to prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093 (governing agreements regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practice as authorized by Business & Professions Code sections 16602 et seq. (governing agreements not to compete in connection with dissolution of or dissociation from partnership); see also Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 et seq. may violate former Rule 1-500).

Rule ~~1-500 Agreements Restricting a Member's Practice~~ 5.6: Restrictions on a Lawyer's Right to Practice

(a) ~~(A) A member shall not be a party to or participate in offering or making an~~ A lawyer shall not offer or enter into:

(1) A partnership, shareholder, operating, employment or other similar agreement that restricts the right of a lawyer to practice law after termination of the relationship; or

(2) Any other agreement, whether in connection with the settlement of a lawsuit or otherwise, ~~if the agreement~~ that restricts ~~the~~any lawyer's right ~~of a member~~ to practice law. ~~, except that this rule shall not prohibit such an agreement which:~~

~~(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~

~~(2) Requires payments to a member upon the member's retirement from the practice of law; or~~

~~(3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~.

(b) Notwithstanding subparagraph (A)(1) of this Rule or unless otherwise proscribed by law, a lawyer may offer or enter into an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer afterthat lawyer's membership in or employment by that law firm if the lawyer competes with that law firm after such termination, provided that:

(1) The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and

(2) The affected compensation will be paid solely from future firm revenues, and not from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan.

~~(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.~~

~~Discussion~~ **Comment**

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is~~

~~prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

[1] Paragraph (a)(1) permits a restrictive covenant in a law corporation, partnership~~,~~ or employment agreement~~. The~~ that provides that a lawyer who is a law corporation shareholder, partner~~,~~ or associate ~~may agree~~shall not ~~to~~ have a separate practice during the existence of the relationship~~;~~. However, ~~however,~~ upon termination of the relationship (whether voluntary or involuntary), the ~~member~~lawyer is free to practice law without any contractual restriction except in the case of retirement from the active practice of law or as further noted below.

[2] Paragraph (a)'s exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under American Bar Association Model Rule 5.6 have identified the factors enumerated in paragraphs (a)(1) and (a)(2) as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman* (D.C. 1998) 715 A.2d 127 at 136-137 (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C.* (Iowa 1999) 599 N.W.2d 677 at 682 (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service ... clearly qualifies as a retirement plan"); *Miller v. Foulston, Siefkin, Powers & Eberhardt* (Kan. 1990) 246 Kan. 450 at 458 [790 P.2d 404] (payments made to former partners who satisfy age, longevity or disability requirements "[f]it squarely within the exception of [the ethics rule]"). Significantly, these authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to the Rule. See also *Neuman v. Atkman*, supra, 715 A.2d at 136 (retirement benefits come "entirely from firm profits that post-date the withdrawal of the partner"); Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg* (Iowa 1990) 461 N.W.2d 598 at 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison, Mahoney & Miller* (Mass. 1997) 426 Mass. 253 at 257-258 [687 N.E.2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord, Day & Lord* (NY 1989) 75 N.Y.2d 95 at 100 [550 N.E.2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits).

[3] While this Rule bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that former Rule 1-500 does not per se prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock* (1994) 6 Cal. 4th 409 at 425 [7 Cal.Rptr.2d 867]. The Court's rationale for permitting such

agreements is that "an agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." Id. at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. Id. at 419, 425. See also *Haight, Brown & Bonesteel v. Sup. Ct.* (1991) 234 Cal.App.3d 963 at 969-971 [285 Cal.Rptr. 845] (former Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal. App. 4th 1096 [47 Cal.Rptr.2d 650] (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court* (1988) 201 Cal. App. 3rd 777 [247 Cal.Rptr. 624] (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).

[4] This Rule is not intended to prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093 (governing agreements regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practice as authorized by Business & Professions Code sections 16602 et seq. (governing agreements not to compete in connection with dissolution of or dissociation from partnership); see also Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 et seq. may violate former Rule 1-500).

COMPARISON TO ABA MODEL RULE

Rule 5.6: Restrictions on a Lawyer's Right to Practice

(a) A lawyer shall not ~~participate in offering~~offer or ~~making~~enter into:

(~~a~~1) ~~a~~ A partnership, shareholder~~s~~, operating, employment~~,~~ or other similar ~~type of~~ agreement that restricts the right of a lawyer to practice law after termination of the relationship~~, except an agreement concerning benefits upon retirement; or~~; or

~~(b) an agreement in which a restriction on the~~(2) Any other agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts any lawyer's right to practice law ~~is part of the settlement of a client controversy~~.

(b) Notwithstanding paragraph (a)(1) of this Rule or unless otherwise proscribed by law, a lawyer may offer or enter into an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in or employment by that law firm if the lawyer competes with that law firm after such termination, provided that:

(1) The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and

(2) The affected compensation will be paid solely from future firm revenues, and not from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan.

Comment

[1] ~~An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.~~[1] Paragraph (a)(1) permits a restrictive covenant in a law corporation, partnership or employment agreement that provides that a lawyer who is a law corporation shareholder, partner or associate shall not have a separate practice during the existence of the relationship. However, upon termination of the relationship (whether voluntary or involuntary), the lawyer is free to practice law without any contractual restriction except in the case of retirement from the active practice of law or as further noted below.

[2] ~~Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.~~ Paragraph (b)'s exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under American Bar Association Model Rule 5.6 have identified the factors enumerated in paragraphs

(b)(1) and (b)(2) as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman* (D.C. 1998) 715 A.2d 127 at 136-137 (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C.* (Iowa 1999) 599 N.W.2d 677 at 682 (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service ... clearly qualifies as a retirement plan"); *Miller v. Foulston, Siefkin, Powers & Eberhardt* (Kan. 1990) 246 Kan. 450 at 458 [790 P.2d 404] (payments made to former partners who satisfy age, longevity or disability requirements "[f]it squarely within the exception of [the ethics rule]"). Significantly, these authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to the rule. See also *Neuman v. Atkman*, supra, 715 A.2d at 136 (retirement benefits come "entirely from firm profits that post-date the withdrawal of the partner"); Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg* (Iowa 1990) 461 N.W.2d 598 at 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison, Mahoney & Miller* (Mass. 1997) 426 Mass. 253 at 257-258 [687 N.E.2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord, Day & Lord* (NY 1989) 75 N.Y.2d 95 at 100 [550 N.E.2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits).

[3] ~~This Rule does not apply to prohibit restrictions that may be included in the terms of of the sale of a law practice pursuant to Rule 1.17.~~While this Rule bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that former Rule 1-500 does not per se prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock* (1994) 6 Cal. 4th 409 at 425 [7 Cal.Rptr.2d 867]. The Court's rationale for permitting such agreements is that "an agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." Id. at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. Id. at 419, 425. See also *Haight, Brown & Bonesteel v. Sup. Ct.* (1991) 234 Cal.App.3d 963 at 969-971 [285 Cal.Rptr. 845] (former Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal. App. 4th 1096 [47 Cal.Rptr.2d 650] (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court* (1988)

201 Cal. App. 3rd 777 [247 Cal.Rptr. 624] (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).

[4] This Rule is not intended to prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093 (governing agreements regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practiceas authorized by Business & Professions Code sections 16602 et seq. (governing agreements not to compete in connection with dissolution of or dissociation from partnership); see also Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 et seq. may violate former Rule 1-500).

PROPOSED RULE (CLEAN VERSION)

Rule 7.1: Communications Concerning the Availability of Legal Services

(a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or

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

(4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.

(b) A lawyer shall not make a false or misleading communication as defined herein.

(c) A communication is false or misleading if it:

(1) Contains any untrue statement; or

(2) Contains any misrepresentation of fact or law; or

(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or

(4) Omits 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.

(d) The Board of Governors of the State Bar may formulate and adopt standards as to communications which will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] Rule 7.1 is also intended to prohibit truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.

[5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not intended to be exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[6] *See also* Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Standards

Pursuant to Rule 7.1(d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such

as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”

(3) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.

(4) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

(5) A “communication” which states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(6) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

COMPARISON TO ABA MODEL RULE

Rule 7.1: Communications Concerning ~~a Lawyer's Services~~ the Availability of Legal Services

(a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or

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

(4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.

(b) A lawyer shall not make a false or misleading communication ~~about the lawyer or the lawyer's services.~~ as defined herein.

(c) A communication is false or misleading if it ~~contains~~:

(1) Contains ~~a material~~ any untrue statement; or

(2) Contains any misrepresentation of fact or law~~, or omits a~~; or

(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or

(4) Omits to state any fact necessary to make the ~~statement considered as a whole not materially misleading.~~statements made, in the light of circumstances under which they are made, not misleading to the public.

(d) The Board of Governors of the State Bar may formulate and adopt standards as to communications which will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications about ~~a lawyer's~~the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer~~'~~'s services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] ~~T~~Rule 7.1 is also intended to prohibit truthful statements that are misleading ~~are also prohibited by this Rule.~~ A truthful statement is misleading if it omits a fact necessary to make the lawyer~~'~~'s communication considered as a whole not materially misleading. ~~A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.~~

[3] An advertisement that truthfully reports a lawyer~~'~~'s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client~~'~~'s case. Similarly, an unsubstantiated comparison of the lawyer~~'~~'s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may ~~preclude a finding that a statement is likely to create~~avoid creating unjustified expectations or otherwise ~~mislead~~misleading a prospective client.

[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.

[5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not intended to be exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[6] *See also* Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Standards

Pursuant to Rule 7.1(d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.

(4) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

(5) A "communication" which states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(6) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule 7.2: Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any medium, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;

(3) pay for a law practice in accordance with Rule [1.17]; and

(4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] [RESERVED]

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. *But see* Rule 7.3(a) concerning real-time electronic communications with prospective clients.

[4] Neither this Rule nor Rule 7.3 is intended to prohibit communications authorized by law.

Paying Others to Recommend a Lawyer

[5] Notwithstanding Rule 1-320(C)'s general prohibition on a lawyer giving or promising anything of value to a representative of a communication medium in return for publicity of the lawyer, paragraph (b)(1), allows a lawyer to pay for advertising and communications permitted by this Rule, including but not limited to the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. *See* Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] Paragraph (b)(2) is intended to permit a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code, section 6155(c). Paragraph (b)(2) is also intended to permit a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. *See* Business & Professions Code, section 6155, and rules and regulations pursuant thereto. *See also* Rule [5.4(a)(4)].

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. *See* Rules 5.3 and [5.4]. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. *See* Rule [5.4 (c)]. A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. *See also* Rule 1.5.1(b). Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule [re: conflicts of interest]. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule is not intended to restrict referrals or divisions of revenues or net income among lawyers within a

law firm comprised of multiple entities. Divisions of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. *See also* Business & Professions Code, section 6155, subdivision (h). *See also* Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.

COMPARISON TO ABA MODEL RULE

Rule 7.2: Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through ~~written, recorded or electronic communication~~any medium, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer~~'~~'s services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a ~~not-for-profit or~~ qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service ~~that has been approved by an appropriate regulatory authority; and~~ established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;

(3) pay for a law practice in accordance with Rule 1.17~~.~~; and

(4) refer clients to another lawyer or ~~a nonlawyer professional~~non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this ~~r~~Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] ~~To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~[RESERVED]

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services

and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] ~~Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly,~~This Rule permits advertising by electronic media, ~~such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a~~including but not limited to television, radio and the Internet. *But see* Rule 7.3(a) concerning real-time electronic ~~exchange that is not initiated by the~~communications with prospective client~~s~~.

[4] Neither this Rule nor Rule 7.3 is intended to prohibit~~s~~ communications authorized by law~~, such as notice to members of a class in class action litigation~~.

Paying Others to Recommend a Lawyer

[5] ~~Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however~~Notwithstanding Rule [1-320(C)'s] general prohibition on a lawyer giving or promising anything of value to a representative of a communication medium in return for publicity of the lawyer, paragraph (b)(1), allows a lawyer to pay for advertising and communications permitted by this Rule, including but not limited to the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. *See* Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] ~~A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits~~Paragraph (b)(2) is intended to permit a lawyer to pay

the usual charges of a ~~not-for-profit or qualified lawyer referral service. A~~group or pre-paid legal service plan exempt from registration under Business & Professions Code, section 6155(c). Paragraph (b)(2) is also intended to permit a lawyer to pay the usual charges of a qualified lawyer referral service ~~is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as~~established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral ~~services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)~~service in California. *See* Business & Professions Code, section 6155, and rules and regulations pursuant thereto. *See also* Rule 5.4(a)(4).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. *See* Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] ~~A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional~~Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. *See ~~Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the~~* Rule 5.4(c). A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to ~~the other lawyer or nonlawyer professional~~another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. *See also* Rule 1.5.1(b). Conflicts of interest created by ~~such~~ arrangements made pursuant to paragraph (b)(4) are governed by Rule [re: conflicts of interest]~~1.7~~. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule ~~does~~is not intended to restrict referrals or divisions of revenues or net income among lawyers within a law firm~~s~~ comprised of multiple entities. Divisions of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. *See also* Business & Professions Code, section 6155, subdivision (h). *See also* Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.

Rule 7.3: Direct Contact with Prospective Clients

(a) A lawyer shall not by in person, telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or

(3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

(d) Not withstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in person, telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The

prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.

[4] There is far less likelihood that abuse will occur when the person contacted is a lawyer, a former client, or one with whom the lawyer has a prior close personal or family relationship, or in situations in which the lawyer is not motivated by pecuniary gain. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1), or (iv) is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of paragraph (b)(3) is prohibited.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a *bona fide* group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

[7] The requirement in paragraph (c) that certain communications be marked “Advertising Material” or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) is also not intended to apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules [5.4] and 8.4(a).

COMPARISON TO ABA MODEL RULE

Rule 7.3: Direct Contact with Prospective Clients

(a) A lawyer shall not by in person, ~~live~~ telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for ~~the lawyer's~~ doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress ~~or harassment~~, compulsion, intimidation, threats, or vexatious or harassing conduct; or

(3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.

(c) Every written ~~or~~, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words ~~"Advertising Material"~~ "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in person ~~or live~~, telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the

layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person ~~or~~, ~~live~~ telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written ~~and recorded~~ communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.~~

[3] The use of general advertising and written~~, recorded~~ or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, ~~live~~ telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. ~~The contents of direct in person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

[4] There is far less likelihood that abuse will occur when the person contacted is a lawyer ~~would engage in abusive practices against an individual who is~~, a former client, or one with whom the lawyer has a prior close personal or family relationship, or in situations in which the lawyer is not motivated by ~~considerations other than the lawyer's~~ pecuniary gain. ~~Nor is there a serious potential for abuse when the person contacted is a lawyer.~~ Consequently, the general prohibition in ~~Rule 7.3~~paragraph (a) and the requirements of ~~Rule 7.3~~paragraph (c) are not applicable in those situations. ~~Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of 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.~~

[5] ~~But e~~Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion,

intimidation, threats, or vexatious or ~~harassment~~harassing conduct within the meaning of ~~Rule 7.3~~paragraph (b)(2), ~~or which~~(iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ~~Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)~~paragraph (b)(1), or (iv) is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of paragraph (b)(3) is prohibited.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. ~~This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~

[7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) is also not intended to apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

~~[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule~~.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to

inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).

PROPOSED RULE (CLEAN VERSION)

Rule 7.4: Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.

(b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation;

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is a certified specialist in a particular field of law, unless:

(1) the lawyer holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and

(2) the name of the certifying organization is clearly identified in the communication.

COMPARISON TO ABA MODEL RULE

Rule 7.4: Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.

(b) A lawyer ~~admitted~~registered to ~~engage in~~practice patent ~~practice~~law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;~~.~~

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that ~~a~~the lawyer is a certified ~~as a~~ specialist in a particular field of law, unless:

(1) the lawyer ~~has been certified~~holds a current certificate as a specialist ~~by an organization that has been approved by an appropriate state authority or that has been~~issued by the Board of Legal Specialization, or any other entity accredited by the ~~American Bar Association~~State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and

(2) the name of the certifying organization is clearly identified in the communication.

~~**Comment**~~

~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit~~

~~organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

Rule 7.5: Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer may state or imply that the lawyer has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

Comment

[1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

COMPARISON TO ABA MODEL RULE

Rule 7.5: Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) ~~L~~A lawyer~~s~~ may state or imply that ~~they practice in a partnership or other organization only when that is the fact.~~ the lawyer has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

Comment

[1] A firm may be designated by the names of all or some of its ~~members~~lawyers, by the names of deceased ~~members~~lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." ~~A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use~~ Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It ~~may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it~~ is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

PROPOSED RULE (CLEAN VERSION)

Rule 8.1: False Statement Regarding Application for Admission to Practice Law

(a) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.

(b) A lawyer shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.

(c) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear *pro hac vice;* and any similar provision relating to admission or certification to practice law.

Comment

[1] A person who makes a false statement in connection with that person's own application for admission to practice law may, *inter alia*, be subject to discipline under this Rule after that person has been admitted.

[2] The examples in paragraph (c) are illustrative. As used in paragraph (c), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 983; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 983.1; an application to register as a certified law student under Rule of Court 983.2; proceedings for certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 964 and related State Bar Rules; certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 983.4, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 988 and related State Bar Rules.

[3] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule 5-200.

COMPARISON TO CURRENT CA RULE

Rule ~~1-200~~8.1: False Statement Regarding Application for Admission to ~~the State Bar~~Practice Law

(~~A~~a) A ~~member~~n applicant for admission to practice law shall not knowingly make a false statement ~~regarding a~~of material fact or knowingly fail to disclose a material fact in connection with ~~an~~that person's own application for admission ~~to the State Bar~~.

~~(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.~~ (b) A lawyer shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.

~~(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.~~ (c) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear *pro hac vice;* and any similar provision relating to admission or certification to practice law.

~~Discussion~~ Comment

~~For purposes of rule 1-200 "admission" includes readmission.~~ [1] A person who makes a false statement in connection with that person's own application for admission to practice law may, *inter alia*, be subject to discipline under this Rule after that person has been admitted.

[2] The examples in paragraph (c) are illustrative. As used in paragraph (c), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 983; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 983.1; an application to register as a certified law student under Rule of Court 983.2; proceedings for certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 964 and related State Bar Rules; certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 983.4, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 988 and related State Bar Rules.

[3] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the

responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule 5-200.

PROPOSED RULE (CLEAN VERSION)

Rule 8.1.1: Compliance with Conditions of Discipline and Agreements In Lieu of Discipline

A lawyer shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovals.

Comment

[1] Other provisions also require a lawyer to comply with conditions of discipline. (See e.g. Bus. & Prof. Code §6068(k) & (l); Cal. Rule of Court 956(b).)

~~Rule 1-110. Disciplinary Authority of the State Bar~~**Rule 8.1.1: Compliance with Conditions of Discipline and Agreements In Lieu of Discipline**

~~A member~~ A lawyer shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovals~~ or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 956, California Rules of Court.~~

Comment

[1] Other provisions also require a lawyer to comply with conditions of discipline. (See e.g. Bus. & Prof. Code §6068(k) & (l); Cal. Rule of Court 956(b).)

Rule 8.3: Reporting Professional Misconduct

(a) A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act unless precluded by the lawyer's duties to a client, or a former client, or by law.

(b) A lawyer shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these Rules.

Comment

[1] In deciding whether to report a violation of these Rules or the State Bar Act, a lawyer may consider among other things whether the violation raises a substantial question as to honesty, trustworthiness or fitness as a lawyer.

[2] This Rule is not intended to allow a lawyer to report a violation of these Rules or the State Bar Act if doing so would violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068, subdivision (e), or would prejudice the interests of the lawyer's client, or would involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.

[3] This Rule is not intended to abrogate a lawyer's obligations to report conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, subdivision 6068(o).)

COMPARISON TO ABA MODEL RULE

Rule 8.3: Reporting Professional Misconduct

(a) A lawyer ~~who knows that another lawyer has committed~~may, but is not required to, report to the State Bar a violation of these Rules ~~of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority~~or the State Bar Act unless precluded by the lawyer's duties to a client, or a former client, or by law.

(b) A lawyer ~~who knows that a judge has committed~~shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these Rules. ~~applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.~~

~~(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.~~

Comment

[1] ~~Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of~~ In deciding whether to report a violation of these Rules or the State Bar Act, a lawyer may consider among other things whether the violation raises a substantial question as to honesty, trustworthiness or fitness as a lawyer. ~~the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.~~

[2] ~~A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.~~ This Rule is not intended to allow a lawyer to report a violation of these Rules, or the State Bar Act if doing so would violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068, subdivision (e), or would prejudice the interests of the lawyer's client, or would involve the unauthorized disclosure of information received by athe lawyer or judgein the course of participating in an approved lawyer's assistance program.

[3] ~~If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this~~

~~Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.~~This Rule is not intended to abrogate a lawyer's obligations to report conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, subdivision 6068(o).)

~~[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.~~

~~[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such confidentiality an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.~~

PROPOSED RULE (CLEAN VERSION)

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;

(b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;

(e) knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation, if prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not constitute a violation of this Rule.

(f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or

(g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Under paragraph (a), a lawyer is subject to discipline for a violation of these Rules, and for knowingly assisting or inducing another to do so or do so through the acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

[2] Paragraph (a) is also intended to apply to the acts of entities. (See, e.g., Bus. & Prof. Code, sections 6160 - 6172 (Law Corporations); Bus. & Prof. Code, section 6155 (Lawyer Referral Services).)

[3] Regarding paragraph (b), many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. To the extent that criminal acts involving "moral turpitude" might be construed to include offenses concerning some matters of personal morality such as adultery and comparable offenses, such acts have no specific connection to fitness for the practice of law.

[4] Regarding paragraph (b), a lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & 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 e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[5] Regarding paragraph (b), a lawyer may be disciplined for acts of moral turpitude which constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

[6] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[8] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6100 et seq.), and the published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

[9] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2.1. The provisions of Rule 1.2.1 concerning a good faith challenge to the validity, scope, meaning or application of a law, rule or ruling of a tribunal apply to challenges of legal regulation of the practice of law.

COMPARISON TO ABA MODEL RULE

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) ~~violate or attempt to violate the Rules of Professional Conduct,~~ knowingly assist in, solicit, or induce ~~another to do so,~~any violation of these Rules or ~~do so through~~ the ~~acts of another~~State Bar Act;

(b) commit a criminal act that involves moral turpitude or 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 misrepresentation;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;

(e) knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation, if prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not constitute a violation of this Rule.

(~~e~~f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these r~~R~~ules ~~of Professional Conduct~~ or other law; or

(~~f~~g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] ~~Lawyers are~~Under paragraph (a), a lawyer is subject to discipline ~~when they violate or attempt to violate~~for a violation of these r~~R~~ules ~~of Professional Conduct,~~, and for knowingly ~~assist~~assisting or ~~induce~~inducing another to do so or do so through the acts of another, as when ~~they~~a lawyer requests or instructs an agent to do so on the lawyer's behalf. ~~Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.~~

~~[2] Many~~ [2] Paragraph (a) is also intended to apply to the acts of entities. (See, e.g., Bus. & Prof. Code, sections 6160 - 6172 (Law Corporations); Bus. & Prof. Code, section 6155 (Lawyer Referral Services).)

[3] Regarding paragraph (b), many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. ~~Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to~~

~~fitness for the practice of law.~~ Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. ~~A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.~~ To the extent that criminal acts involving "moral turpitude" might be construed to include offenses concerning some matters of personal morality such as adultery and comparable offenses, such acts have no specific connection to fitness for the practice of law.

[4] Regarding paragraph (b), a lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & 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 e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[5] Regarding paragraph (b), a lawyer may be disciplined for acts of moral turpitude which constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

[6] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age~~,~~ or sexual orientation ~~or socioeconomic status~~, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of ~~this rule~~paragraph (b).

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[8] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6100 et seq.), and the published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

~~[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.~~[9] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2.1. The provisions of Rule 1.2.1 concerning a good faith challenge to the validity, scope, meaning or application of a law, rule or ruling of a tribunal apply to challenges of legal regulation of the practice of law.