THE STATE BAR
OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE,
PLANNING & DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2167

DATE: June 29, 2007

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

FROM: Randall Difuntorum, Director, Professional Competence

RE: Commission for the Revision of the Rules of Professional Conduct: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California -- Request for release for public comment

---

EXECUTIVE SUMMARY

This agenda item requests Board Committee authorization to publish proposed amendments to the Rules of Professional Conduct for a 90-day public comment period. This agenda item also requests authorization to conduct a public hearing on the proposed amendments.

The proposed amendments are the second 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/]

[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."

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.) The Board Committee on Regulation, Admissions, and Discipline ("RAD") oversees the Commission's requests for public comment authorization. This agenda item requests authorization (1) to publish the Commission's proposed amendments for a 90-day public comment period and (2) to gather additional input by conducting a public hearing.

DISCUSSION

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 ABA Model Rules of Professional Conduct. Last June, the Commission completed work on a group of 27 proposed new and amended rules and upon consideration by RAD, those rules were distributed for public comment, which ended on October 16, 2006. During the State Bar's Annual Meeting in early October 2006 in Monterey, the Commission also held a public hearing to garner further public comment on the proposed rules. Since the public comment period ended, the Commission has worked to revise those rules in response to the public comment received. During this same time period, the Commission has completed work on the five rules that are the subject of its present request for public comment authorization. (Attachment 1 provides both the clean text of each proposed amended rule and the text in legislative style showing changes to the current California rule and, where appropriate, changes to an ABA Model Rule counterpart.)

The Commission plans to complete its work by the end of 2009. This plan anticipates the issuance of two more groups or batches of proposed rule amendments. Each of these batches would be separately considered and authorized for public comment by RAD. The Commission anticipates presenting its next batch (Batch 3) before the end of this year.

LIST OF PROPOSED NEW OR AMENDED RULES[3/]

[3/] The number of the current California Rule appears in brackets at the end of the rule title.

[4/] Refer to the page numbers of Attachment 1.

SUMMARY OF PROPOSED AMENDMENTS

Presented below is a summary of each of the five proposed amended rules. The rules are listed by their proposed new rule numbers that track the ABA Model Rules numbering system. The summaries include discussion of any key issues considered by the Commission.

Rule 1.8.3 Gifts from Client [4-400]

Proposed Rule 1.8.3 amends current rule 4-400. (Refer to: page 1 of Attachment 1 for a clean version of this draft rule; page 2 for a redline/strikeout version that shows changes to the current rule; and page 3 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Rule 1.8.3 continues the prohibition against a lawyer inducing a substantial gift from a client.

The amendments implement some substantive changes. Paragraph (a)(1) of the rule provides that an "attempt" to induce a gift is prohibited. This express prohibition against attempted violations is not found in the current rule. Adding the prohibition against attempted rule violations tracks the ABA Model Rule standard (see ABA Model Rule 8.4(a) which generally prohibits attempted rule violations). In paragraph (b), a new definition of "related persons" has been added, tracking the definition found in the California Probate Code. The amendments also include a prohibition against a lawyer preparing an instrument that gives the lawyer, or a person related to the lawyer, any substantial gift, unless the lawyer or other recipient is related to the client. The current rule's Discussion section was revised to include three comments that generally track the comments to ABA Model Rule 1.8(c) (see comments [6], [7], and [8] to ABA Model Rule 1.8). Where appropriate, the Commission has modified the comment language to refer to the California Probate Code.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client [4-210]

Proposed Rule 1.8.5 amends current rule 4-210. (Refer to: page 5 of Attachment 1 for a clean version of this draft rule; page 7 for a redline/strikeout version that shows changes to the current rule; and page 9 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Rule 1.8.5 continues the prohibition on a lawyer's payment of personal or business expenses of a prospective or existing client. ABA Model Rule 1.8(e) states a comparable prohibition against a lawyer "providing financial assistance to a client." As in both the Model Rule and current rule 4-210, proposed rule 1.8.5 includes an exception for *advancing* costs, the repayment of which may be contingent on the outcome of the client's matter.

In addition to some clarifying amendments, there are a few substantive changes. One of the substantive changes would bring California's standard closer to the Model Rule standard by adding a new exception expressly allowing a lawyer to *pay* court costs and reasonable expenses of litigation on behalf of the lawyer's indigent client. (See new paragraph (a)(4) of proposed rule 1.8.5.) Another substantive change is the addition of a new paragraph (b) providing that the rule is not violated by a lawyer offering or giving a gift to a current client so long as the gift is not given in consideration of any promise, agreement, or understanding. The Commission's amendments also include a new comment explaining the competing policy concerns that are the basis for the rule (see Comment [1] to proposed rule 1.8.5). Other new comments clarify the definition of "costs" as used in the rule and provide cross-references to related rules.

Rule 1.8.11 Relationship with Other Party's Lawyer [3-320]

Proposed Rule 1.8.11 amends current rule 3-320. (Refer to page 11 of Attachment 1 for a clean version of this draft rule and to page 12 for a redline/strikeout version that shows changes to the current rule.) Like current rule 3-320, proposed Rule 1.8.11 addresses the conflict of interest arising when opposing lawyers are related or have some other significant interpersonal relationship. Rule 1.8.11 continues the requirement that a lawyer inform a client in writing if the lawyer knows that the lawyer representing the opposing party, or another person involved in the case, is the lawyer's spouse, parent, child or sibling, or lives with the lawyer, or is a client of the lawyer, or has an intimate personal relationship with the lawyer. While this rule has been given an ABA rule number, the rule more closely tracks the current California rule. Although the ABA Model Rules do not have a precise counterpart to this rule, Model Rule 1.7 generally requires informed client consent in circumstances where a lawyer's representation is materially limited by responsibilities to third persons or personal interests in the client's matter. Comment [11] to Model Rule 1.7, in part, states: "a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent." This ABA standard differs from the California standard because the ABA standard requires informed consent while the California standard only requires that the client be informed in writing.

The Commission's proposed amendments implement one significant material change to the standard in the current rule and the ABA Model Rule comment. The current rule and ABA comment cover only relationships with another "party's" lawyer. The Commission's amendments broaden the scope of the rule to cover other person's involved in the case or matter who are not parties. For example, the amended rule would cover a relationship with a lawyer who is representing a witness in the case. The Commission believes that the client protection that is afforded under the rule is appropriate in such circumstances despite the fact that the person represented is not a party.

Rule 1.8.12 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review [4-300]

Proposed Rule 1.8.12 amends current rule 4-300. (Refer to page 13 of Attachment 1 for a clean version of this draft rule and to page 14 for a redline/strikeout version that shows changes to the current rule.) Rule 1.8.12 continues the restrictions on a lawyer who purchases property at a foreclosure sale or other sale subject to judicial review. This proposed rule tracks the current California rule as there is no corresponding ABA Model Rule. The ABA rule number that has been assigned is one that places the rule into the category of conflicts of interest that for the most part involve conflicts between the personal and business interests of the client and the lawyer (see ABA Model Rule 1.8).

The Commission's amendments to this rule include a key change in substance and policy. Under existing law, the California Probate Code conflicts with rule 4-300 because the Probate Code allows a lawyer to participate in certain probate proceeding transactions that would otherwise be prohibited by the rule. The Probate Code sets forth procedures for an independent lawyer to review suspect transactions, provide appropriate legal advice and counsel, and then execute a "Certificate of Independent Review" (see California Probate Code section 9880 et. seq.). Through this procedure, the statutory scheme seeks to nullify the risk of undue influence and overreaching that is completely avoided under current rule 4-300's absolute prohibition. The Commission's amendments would resolve the conflict of law by amending the rule to permit the lawyer participation that is allowed under the Probate Code procedures. This exception to the rule's general prohibition is found in new paragraph (c) of proposed Rule 1.8.12 and it is amplified in a new comment to the rule stating, in part, that the Probate Code provisions must be "strictly followed in order to avoid a violation of the rule."

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation [2-400]

Proposed Rule 8.4.1 amends current rule 2-400. (Refer to page 15 of Attachment 1 for a clean version of this draft rule and to page 17 for a redline/strikeout version that shows changes to the current rule.) Rule 8.4.1 continues and expands the prohibition against a lawyer engaging in unlawful discrimination in the management of a law practice. This proposed rule tracks the current California rule as there is no precise counterpart in the ABA Model Rules (compare ABA Model Rule 8.4(d) which generally prohibits a lawyer from engaging in conduct that is "prejudicial to the administration of justice"). The ABA rule number that has been assigned is one that places the rule in the category of rules adopted to maintain the integrity of the legal profession.

The Commission's amendments to this rule include two key substantive changes. The first change is the deletion of language in the current rule that limits the prohibition to acts that occur in the hiring, promoting, discharging, or otherwise determining the conditions of employment in the law practice; or accepting or terminating client representations (see current rule 2-400 (B)(1) and (B)(2)). By deleting this language, the Commission's amendments would slightly expand the rule to cover acts of unlawful discrimination in the operation of a law practice that might not be readily characterized as discrimination against employees or discrimination in client retention. For example, under the current rule acts of discrimination against a volunteer intern or a representative of a vendor might be construed to be outside of the rule due to the existing limiting language.

The second key substantive change is the addition of language indicating that the rule's prohibition applies "whether or not the lawyer is a partner or shareholder or serves in a management role" (see paragraph (b) of proposed Rule 8.4.1). The language of prohibition found in the current rule applies only to the "management or operation of a law practice" and is silent on whether the rule applies to misconduct committed by non-managerial lawyers. The Commission considered the origin and purpose of the rule and determined that the rule should be revised to explicitly apply to misconduct by non-managerial lawyers. It should be noted, however, that the proposed rule continues the prosecutorial condition found in the current rule which provides that no discipline may be initiated under the rule "unless and until a tribunal of competent jurisdiction, other than [the State Bar Court], shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred" (see paragraph (c) of proposed Rule 8.4.1). The Commission considered deleting this condition but there was no consensus to make the change.

The Commission also considered but did not adopt an amendment to current rule 2-400 that would have greatly expanded the prohibition to reach any conduct in the "practice of law" rather than just conduct in the management of a law practice. The Commission's action in rejecting this broad expansion of the rule was based partly on its separate decision to recommend adoption of a

California counterpart to ABA Model Rule 8.4. As circulated for public comment last year, the Commission's proposed Rule 8.4 provides that it is misconduct for a lawyer to "knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation," where such words or conduct are prejudicial to the administration of justice.

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. It is anticipated that the Commission's final comprehensive report and recommendation will be presented to the Board for adoption in 2009, 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.

IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

Authorization of public comment and a public hearing on the Commission's proposed rules will not have an impact on the Board Book or Administrative Manual.

RULE AMENDMENTS

No rule amendments are implemented by the Board Committee's action to authorize public comment. Only after consideration of public comments received and following anticipated adoption by the Board and approval by the Supreme Court, would this matter effectuate amendments to the Rules of Professional Conduct of the State Bar of California.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Regulation, Admissions and Discipline Oversight Committee approve the request to release the Commission's proposed amended Rules of Professional Conduct, 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 90-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

TABLE OF CONTENTS/CROSS-REFERENCE CHART

PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA (BATCH 2)

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.3 [4-400] Gifts From Client

(a) A lawyer shall not:

(1) induce or attempt to induce a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,

unless the lawyer or other recipient of the gift is related to the client.

(b) For purposes of this Rule, related persons include a spouse, registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Comment

[1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce or attempt to induce a substantial gift from a client except where the lawyer is related to the client as set forth in paragraph (a). (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.

[3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

COMPARISON TO CURRENT CA RULE

Rule 1.8.3 [4-400~~.~~] Gifts From Client

(a) A ~~member~~lawyer shall not:

(1) induce or attempt to induce a client to make a substantial gift, including a testamentary gift, to the ~~member or to the member's parent, child, sibling,~~lawyer or ~~spouse, except where the client is~~a person related to the ~~member.~~lawyer, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,

unless the lawyer or other recipient of the gift is related to the client.

(b) For purposes of this Rule, related persons include a spouse, registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

~~Discussion:~~**Comment**

[1] ~~A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where~~ Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce or attempt to induce a substantial gift from a client except where the lawyer is related to the client as set forth in paragraph (a). (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence ~~occurred~~occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.

[3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

COMPARISON TO ABA MODEL RULE

(This version shows changes to the relevant parts of ABA Model Rule1.8.)

~~Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules~~**Rule 1.8.3 [4-400] Gifts From Client**

* * *

(~~c~~)(a) A lawyer shall not~~ solicit any~~ :

(1) induce or attempt to induce a client to make a substantial gift~~ from a client~~, including a testamentary gift, to the lawyer or a person related to the lawyer, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift~~.~~,

unless the lawyer or other recipient of the gift is related to the client.

(b) For purposes of this ~~paragraph~~Rule, related persons include a spouse, ~~child, grandchild, parent, grandparent~~registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

* * *

Comment

* * *

~~Gifts to~~ Lawyers

~~[6]~~[1] ~~A lawyer~~ Lawyers may accept ~~a gift from a client, if the transaction meets general standards~~ modest holiday, birthday, and other gifts of ~~fairness. For example, a simple gift such as a present given at a holiday~~celebration or ~~as a token of~~ appreciation ~~is~~from their clients. Lawyers also may take steps that might result in their clients making permitted~~. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although~~ gifts, such ~~a gift may be voidable~~ as by ~~the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.~~sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not ~~suggest that a substantial gift be made to the lawyer~~induce or ~~for the lawyer's benefit,~~attempt to induce a substantial gift from a client except where the lawyer is related to the client as set forth in paragraph (~~c).~~
a). (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[~~7~~2] If ~~effectuation of~~effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client ~~should~~must have ~~the detached~~ independent advice ~~that~~

from another lawyer~~ can provide.~~. (Cal. Probate Code, sections 21350 et seq.) The sole exception ~~to this Rule~~ is where the client is a relative of the donee.

[~~8~~3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest ~~provision in Rule 1.7 when there is a significant risk that the lawyer's interest~~provisions in ~~obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary.~~Rule 1.7(d) [3-310(B)]. In ~~obtaining the client's informed consent to~~disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client

(a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except a lawyer may:

(1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;

(2) lend money to the client after the lawyer is retained by the client, based on the client's promise, in writing, to repay the loan, provided the lawyer complies with Rule 1.8.1 [3-300] before making the loan or agreeing to do so;

(3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and

(4) pay court costs and reasonable expenses of litigation on behalf of an indigent client in a matter in which the lawyer represents the client.

(b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that the gift was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

Comment

[1] This Rule is intended to balance two competing concerns. One is the concern that, if lawyers subsidize their clients' legal proceedings, they might encourage clients to pursue matters that might not otherwise be brought and might give lawyers a financial stake in the proceedings that might injuriously affect the performance of their duties to their clients, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that the prohibition on lawyers providing financial assistance to their clients might adversely affect clients' access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect lawyers against client demands for loans or gifts.

[2] The lawyer must comply with Rule 1.8.1 [3-300] before entering into any proposed agreement with a client that is described in paragraph (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) [3-310(B)(4)] concerning the effect the proposed agreement might have on the lawyer's representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12 [4- 300].

[3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable rule of court or statute.

PROPOSED RULE (CLEAN VERSION)

[4] See Rule 7.1 concerning the potential consequence of a representation by a lawyer, directly or indirectly, that the lawyer will provide any financial benefit that is not permitted by this Rule.

COMPARISON TO CURRENT CA RULE

Rule ~~4-210.~~1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client

(A~~)~~(a) A ~~member~~ lawyer shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the ~~member~~lawyer or ~~member's~~lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except ~~that this rule shall not prohibit a member~~a lawyer may:

(1) ~~With the consent of the client, from paying~~pay or agree~~ing~~ to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation~~; or~~, with the consent of the client;

(2) ~~After employment, from lending~~lend money to the client ~~upon~~after the lawyer is retained by the client, based on the client's promise, in writing, to repay ~~such~~ the loan~~;~~, provided the lawyer complies with Rule 1.8.1 [3-300] before making the loan or agreeing to do so;

(3) ~~From advancing~~advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. ~~Such costs~~ "Costs" within the meaning of this ~~subparagraph (3) shall be~~ paragraph (a)(3) are limited to all reasonable expenses of litigation ~~or~~ , including court costs, and reasonable expenses in ~~preparation~~preparing for litigation or in providing ~~any~~ other legal services to the client~~.~~; and

(4) pay court costs and reasonable expenses of litigation on behalf of an indigent client in a matter in which the lawyer represents the client.

~~(B)~~(b) ~~Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300. (Amended by order of Supreme Court, operative September 14, 1992.)~~A lawyer does not violate this rule by offering or giving a gift to a current client, provided that the gift was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

Comment

[1] This Rule is intended to balance two competing concerns. One is the concern that, if lawyers subsidize their clients' legal proceedings, they might encourage clients to pursue matters that might not otherwise be brought and might give lawyers a financial stake in the proceedings that might injuriously affect the performance of their duties to their clients, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that the prohibition on lawyers providing financial assistance to their clients might adversely affect clients' access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect lawyers against client demands for loans or gifts.

[2] The lawyer must comply with Rule 1.8.1 [3-300] before entering into any proposed agreement with a client that is described in paragraph (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) [3-310(B)(4)] concerning the effect the proposed

agreement might have on the lawyer's representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12 [4- 300].

[3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable rule of court or statute.

[4] See Rule 7.1 concerning the potential consequence of a representation by a lawyer, directly or indirectly, that the lawyer will provide any financial benefit that is not permitted by this Rule.

COMPARISON TO ABA MODEL RULE

(This version shows changes to the relevant parts of ABA Model Rule1.8.)

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client

~~(e)~~(a) A lawyer shall not directly or indirectly ~~provide financial assistance to a client in connection with pending or contemplated litigation~~pay or agree to pay, guarantee, represent, or sanction a representation that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except thata lawyer may:

(1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;

(2) lend money to the client after the lawyer is retained by the client, based on the client's promise, in writing, to repay the loan, provided the lawyer complies with Rule 1.8.1 [3-300] before making the loan or agreeing to do so;

~~(1)~~(3) ~~a lawyer may~~ advance ~~court~~ the costs ~~and expenses of litigation~~ of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and

~~(2)~~(4) ~~a lawyer representing an indigent client may~~ pay court costs and reasonable expenses of litigation on behalf of an indigent client in a matter in which the lawyer represents the client.

(b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that the gift was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

Comment

~~*Financial Assistance*~~

~~[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.~~

[1] This Rule is intended to balance two competing concerns. One is the concern that, if lawyers subsidize their clients' legal proceedings, they might encourage clients to pursue

matters that might not otherwise be brought and might give lawyers a financial stake in the proceedings that might injuriously affect the performance of their duties to their clients, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that the prohibition on lawyers providing financial assistance to their clients might adversely affect clients' access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect lawyers against client demands for loans or gifts.

[2] The lawyer must comply with Rule 1.8.1 [3-300] before entering into any proposed agreement with a client that is described in paragraph (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) [3-310(B)(4)] concerning the effect the proposed agreement might have on the lawyer's representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12 [4- 300].

[3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable rule of court or statute.

[4] See Rule 7.1 concerning the potential consequence of a representation by a lawyer, directly or indirectly, that the lawyer will provide any financial benefit that is not permitted by this Rule.

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.11 [3-320] Relationship With Other Party's Lawyer

A lawyer shall not represent a client in a matter if the lawyer knows that the lawyer representing another person involved in the matter is the lawyer's spouse, parent, child, or sibling, lives with the lawyer, is a client of the lawyer, or has an intimate personal relationship with the lawyer, unless the lawyer informs the client in writing of the relationship.

Comment

[1] Rule 1.8.11 [3-320] is not limited to litigation matters.

[2] Rule 1.8.11 [3-320] is not intended to apply to circumstances in which a lawyer fails to advise the client of a relationship with another lawyer who is in the same law firm as the lawyer of another person involved in the matter, and who has no direct involvement in the matter.

COMPARISON TO CURRENT CA RULE

Rule 1.8.11 [3-320] Relationship With Other Party's Lawyer

A ~~member~~ lawyer shall not represent a client in a matter ~~in which~~if the lawyer knows that the lawyer representing another ~~party's lawyer~~ person involved in the matter is ~~a~~the lawyer's spouse, parent, child, or sibling ~~of the member~~, lives with the ~~member~~lawyer, is a client of the ~~member~~lawyer, or has an intimate personal relationship with the ~~member~~lawyer, unless the ~~member~~lawyer informs the client in writing of the relationship.

~~Discussion:~~**Comment**

[1] Rule 1.8.11 [3-320] is not limited to litigation matters.

[2] Rule 1.8.11 [3-320] is not intended to apply to circumstances in which a ~~member~~lawyer fails to advise the client of a relationship with another lawyer who is ~~merely a partner or associate~~ in the same law firm as the ~~adverse party's counsel~~lawyer of another person involved in the matter, and who has no direct involvement in the matter.

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.12 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.

(b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.

(c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 – 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

COMPARISON TO CURRENT CA RULE

Rule 1.8.12 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(a) A~~)~~ A ~~member~~ lawyer shall not directly or indirectly purchase property at a ~~probate,~~ foreclosure, ~~receiver's, trustee's~~receiver’s, trustee’s, or judicial sale in an action or proceeding in which such ~~member~~ lawyer or any lawyer affiliated ~~by reason of personal, business, or professional relationship~~ with that ~~member or with that member's~~lawyer’s law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian~~,~~ or conservator.

(~~B~~b) A ~~member~~lawyer shall not represent the seller at a ~~probate,~~ foreclosure, receiver~~, trustee~~’s, trustee’s, or judicial sale in ~~an action or proceeding in~~ which the purchaser is a spouse ~~or~~, relative or other close associate of the ~~member~~lawyer or of another lawyer in the ~~member's~~lawyer’s law firm ~~or is an employee of the member or the member's law firm.~~.

(c) This Rule does not prohibit a lawyer’s participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 – 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

PROPOSED RULE (CLEAN VERSION)

Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation

(a) For purposes of this Rule:

(1) "knowingly permit" means a failure to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and

(2) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, whether or not the lawyer is a partner or shareholder or serves in a management role.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Comment

[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.

[2] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (But see Rule 8.4(d).) "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Bus. & Prof. Code §6068, subd. (a).)

[3] In order for discriminatory conduct to be actionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.

[4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.

[5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(d).

COMPARISON TO CURRENT CA RULE

Rule ~~2-400~~8.4.1 Prohibited ~~Discriminatory Conduct~~Discrimination in ~~a~~ Law Practice~~.~~ Management and Operation

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

(1)~~ "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~

~~(2) "knowingly~~"knowingly permit~~"~~" means a failure to advocate corrective action where the ~~member~~lawyer knows of a discriminatory policy or practice ~~which~~that results in the unlawful discrimination prohibited in paragraph (~~B~~b); and

(~~3~~2)~~ "unlawfully"~~"unlawfully" and ~~"unlawful"~~"unlawful" shall be determined by reference to applicable state or federal statutes ~~or decisions making unlawful~~prohibiting discrimination ~~in employment and in offering goods and services to the public.(B)~~ on the basis of race, national origin, sex, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice, a ~~member~~lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race~~ ~~, national origin, sex, sexual orientation, religion, age or disability~~ in:~~

~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~

~~(2) accepting or terminating representation of any client.~~

, whether or not the lawyer is a partner or shareholder or serves in a management role.

~~(C)~~(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non~~-~~-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

~~*Discussion:*~~Comment

[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.

[2] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (But see Rule 8.4(d).) "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole

practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Bus. & Prof. Code §6068, subd. (a).)

[3] In order for discriminatory conduct to be actionable under this Rule, it ~~must first~~first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.

[4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding ~~is~~ thereafter is appealed.

[5] ~~A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)~~This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see rule 8.4(d).