ATTACHMENT 7

Separately Written Commission Member Dissents to the Commission's Overall Recommendations

FROM: JoElla L. Julien, Commission Member

DATE: July 6, 2010

RE: **SEPARATE STATEMENT BY COMMISSION'S PUBLIC MEMBER**

As the lone public member of the Commission for the Revision of the Rules of Professional Responsibility ("the Commission") I feel that I have a duty to speak out about the rules we have just promulgated.

These Rules have been written to govern the behavior of lawyers who practice law in the State of California. They were written to "protect the public" and "to promote the integrity of the profession". (See Chapter 1, Rule 1-100 of the current rules.) These rules will be presented to the State Bar of California Board of Governors, the ruling body of the State Bar, and then will be presented to the California Supreme Court for their endorsement as their rules.

I have just spent nine years on this Commission having served previously on the 1989 "Commission", again, as the lone public member.* I took my position seriously as I felt it both an honor and privilege to represent all of the citizens of California. I found that my fellow Commission members were painstakingly to a fault honest, sincere, and diligent. However, I am not sure that our product is one that will serve the purpose for which it was intended.

We were ask to do what we could to harmonize these rules with the ABA Model rules, and I believe, that is what got us in trouble. The California rules were not seriously flawed and, needed perhaps some updating , i.e., cases highlighting technology advancements, but I believe, as do some of my colleagues, that we have created many unworkable rules. To be workable, they should be clear and, by and large, most of the rules are clear. Part of the rule's

composition/format was to provide commentary for each rule to assist the attorney in applying the rules. In the past this section has been called “Discussion” where brief explanations of the rules appeared. The proposed rules now call this section ”Comments”. The comments are typical of the verbosity most of us non-lawyers would expect from lawyers--not only too long and legal but often obscure the meaning of the rule. We spent many hours and, yes, sometimes days on ideas, words, and their placement within a sentence. Many “Comments” read like treatises on a particular subject. Their length, in my opinion, assures me that most lawyers will not read the rules and the comments. The “Rules” should be short and to the point so that practitioners can do the right thing as they interact with their clients. Frequently, I complained in meetings to the Commission that we were getting too verbose and that my expectation was that since lawyers were trained in the art of research, some points of discussion would be best left to that lawyer spending time to do the extra research if, indeed, that was what was needed.

I observed Commission members giving their best to come up with <u>every</u> permutation possible on a rule. This is not possible. Many of the issues will out themselves as we travel along the road less travelled and some issues may never be resolved, but I do give my colleagues the award for best efforts.

This document which is 30 pages is proposed to be purportedly 99 pages! I do believe that the law. while admittedly evolving, has not been so revolutionized that the Rules have to be that long. In fact, I do not remember in our work promulgating that many brand new rules to increase the volume so exponentially. Those changes which have happened seem to me to have moved at glacial -like speed. Perhaps the forward thinking lawyers are right--legal practice is becoming so global that we must make it easier for other lawyers to come and

practice in California and by being closer to the Model Rules, their ability to conform will be greatly enhanced.

While I could go on and on about what I think is wrong with the proposed rules and our process, I do not want to do what I have accused the Commission of doing--being too verbose, so I will end my treatise here and simply make a brief recommendation.

I suggest to both the Board of Governors and to the Supreme Court not to throw all of the work out...but to carve out that which will continue to protect the client while aiding in the trust and confidence the public has come to know.

Respectfully submitted,

JoElla L. Julien
Commission Member
Commission for the Rules of Professional Responsibility (2010)

* That Commission revised these same basic rules in 18 months.

FROM: Kurt W. Melchior and Jerome Sapiro, Jr.

DATE: July 6, 2010

RE: **WHY THE PROPOSED NEW RULES OF PROFESSIONAL CONDUCT SHOULD BE REJECTED**

The Commission for the Revision of the Rules of Professional Conduct was appointed by the Board of Governors of the State Bar in 2001 and has labored for 9 years. It is about to bring forward its final work product. We have been members of this Commission since its inception, as we were of its predecessor Commission which wrote the current Rules of Professional Conduct that have served us well since 1989. The majority of the Commission's members also served on that prior incarnation. Our colleagues and we have spent an unbelievable number of hours over the last 9 years, going word by word through the American Bar Association's Model Rules, which were last revised in 2002, under a directive that the Commission should see what it could do to conform California's Rules to the ABA Model Rules, which have been adopted in all other United States jurisdictions, albeit with extensive and various modifications from state to state.

The Commission has painstakingly examined the work product of the ABA word by word, and over these 9 years has parsed that material as well as the myriad variations that members of the Commission proposed when we were unhappy with the ABA language. In various places we have departed from the ABA formulation. The two of us are convinced that, despite the intelligence, knowledge, and diligence of our colleagues, the new Rules will blur the reasonably clear lines that now exist, that lead to discipline for improper conduct. The new Rules will create numerous unnecessary obstacles to a reasonable, careful, and client-oriented practice of law. The Board of Governors should reject the Rules; and if it does not, the Supreme Court should reject them.

The two authors do not agree on all of the criticisms contained in this paper. Jerry does not share the objections to the sale of geographic or subject matter practices; and Kurt does not share the objections to accepting the Legislature's solution to buying in at a client's probate or similar sale. But we are in such broad overall agreement that we have decided to go forward with our common protest.

As a first matter, let's be clear on what is involved. Common parlance refers to these Rules as the "ethical rules" governing lawyers. Not true: they are promulgated by the Supreme Court and have the force of law in governing the professional conduct of all California lawyers. Ethics are everyone's private business. Non-compliance with the Rules of Professional Conduct can subject a lawyer to discipline, including suspension or loss of license; and their violation may indicate a violation of a professional standard of care, creating civil liability. (*Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41.)

The current Rules of Professional Conduct and the official comments to those Rules take up 29 double column pages in the State Bar's Publication 250, "California Rules of Professional Conduct and the State Bar Act." An incomplete late draft of the new version takes up 99 pages of the same format. The actual "final, final" work product will be still longer. Is there so much new and regulatory development in the law of lawyers that the details of lawyers' regulation have become more than three times more complicated in just over 20 years? The answer is No.

To be sure, the proposed new Rules include many new and sometimes painful regulations; but the main part of the expansion lies in hopelessly wordy, academic and obscure musings called Comments. For instance, proposed Rule 1.7, entitled "Conflict of Interest: Clients," has 38 comments, but even so it is not the only rule dealing with conflicts of interest. Depending on how you count them, there are at least 8 more conflict of interest rules. By

contrast, the ***only*** current rule concerning conflicts of interest – Rule 3-310 – has just 12 paragraphs of "Discussion," many of which are just 2 to 3 lines long, while Comment 22 to proposed Rule 1.7 is 42 lines long all by itself! And that is just one of 38 Comments to that one proposed Rule. We will discuss the substantive content of the Rules and Comments later.

The present Professional Rules of Conduct are reasonably clear. They have served us well for more than 20 years, and there has been no general complaint that they are inadequate. Amendments have been few. Some of the new proposed Rules are often rigid where the present rule allows flexibility, as we will explain. At other times, the converse is true: the new proposed Rules are at times more unnecessarily yielding, and some are exceedingly vague. But before we turn to our main theme, we would like to report on last weekend's meeting of the Commission. This was the Commission's "final, final" meeting except for whatever may be returned to us by the Board of Governors or the Supreme Court, and its activities at that well seasoned event are indicative of the various ills which the new Rules, if adopted, will bring on all members of the State Bar,

Because our rules are disciplinary rules, the violation of which is cause for discipline, they should state principles about which there is broad consensus. However, the proposed new rules do not do that. To start with a highly controversial rule which is also discussed below, the Commission voted 6:6 on a motion to adopt proposed Rule 1.8.10 about "sexual relations with client," meaning that the Rule would not be recommended for adoption. After further discussion, one member changed her vote to an abstention, and the Rule was passed out by the overwhelming vote of 6:5:1, marking the Commission's fourth about-face on whether this rule should or should not go forward. For further detail about the issues involved on this vote, read on below.

Regarding proposed Rule 1.17, which would for the first time allow a lawyer or law firm to sell a geographic or subject matter part of the law practice, a motion to delete the permission to sell a geographic part of the practice failed by a 4:4 vote with 2 abstentions. The Rule then passed out of the Commission by an overwhelming 5:4 vote with one abstention.

The ABA Model Rules include a "snitch" rule: a mandatory requirement that an attorney report to the State Bar "when the attorney knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." Note that no conviction is necessary to trigger this reporting provision. Most informed lawyers agree that mandatory reporting has its problems, as exemplified by Illinois' Himmel case in which a lawyer was found to have violated that state's snitch rule when his client directed the lawyer not to report but instead to work out the problem with the miscreant lawyer by obtaining restitution for the client. The lawyer who accomplished the client's wishes was then found to have thereby violated the snitch rule. Still, the Commission is recommending adoption of a somewhat modified snitch rule – making mandatory informants out of all of us – by the overwhelming vote of 6:5:1.

Rule 1.5, concerning the important subject of Fees for Legal Services, failed of adoption on the first vote, 6:6. (I won't detail the issues which may have influenced various of the voters.) One member then changed her vote, and the rule is now recommended for adoption by a 7:5 margin.

Because they are disciplinary rules, our current rules establish bright line tests for permissible or impermissible behavior. The new rules often do not. Instead, they are often written in the voice of the Restatement, and lengthy comments have been added to try to explain them.

As an example of a change which will make the Rules more opaque, we will discuss one of the most important Rules: that which prohibits conflicts of interest. Present Rule 3-310(C) is brief and straightforward:

Any member shall not, without the informed written consent of each client:

(1) "Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict [etc.]."

No one has thought it necessary to define "conflict:" Everyone seems to understand what the term means, although the courts have had to resolve uncertain situations as they always do.

The new proposed Rule 1.7 prohibits representation in conflict situations where, either, "the representation of one client will be directly adverse to another client," which is clear and fine; or more obscurely, where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest by the lawyer." One of us has researched this matter: he found 26 cases nationwide in which the phrases "significant risk" and "materially limited" were in close proximity. All involved claims of disqualification of counsel. All either found there was such a significant risk or that there was not, and accordingly disqualified the lawyer or not. But the research found <u>not one case</u> in which the court did anything other than to repeat the phrase and then reach its decision. No court, to our knowledge, has explained what this

language means or what it prohibits; yet, California proposes to adopt it so as to be in conformity with the rules in other states.

Interestingly, one trial court decision stated that this language gave the attorney ***discretion*** whether she could adequately represent the client in a potential conflict situation! *In re Estate of Reeves-Timothy*, 2006 Pa. Dist. and Country LEXIS 213. The only other case found in which there was an analysis (of sorts) of the phrase "significant risk" was where a criminal defense attorney was disqualified because he was himself currently being prosecuted by the same prosecuting officer. *State v. Cottle* (2008) 194 N.J. 449. Why are we going to expose the complex field of conflicts of interest to these uncertainties, when there has been nothing wrong with our terse and clear formulation? And what do the 38 Comments contribute to our understanding? We will quote one of the briefer ones, Comment 3:

> [3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed written consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by failure to institute such procedures will not excuse a lawyer's violation of this Rule. Whether a lawyer-client relationship exists or, having once been established, is continuing, is beyond the scope of these Rules.

What does this tell you, beyond the language of the Rule itself? Nothing!

The example of a mushy Comment which we have just quoted is one of a countless number. We will give a couple of other examples. These have been selected at random and can easily be expanded to pamphlet size.

Here's a Comment which muses for more than a dozen lines about what types of things might be reported to a client:

> Proposed Rule 1.4 [Communication], Comment 1:
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> 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 a criminal 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 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, and the advantages and disadvantages of, 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.

And here are Comments 2 through 5 to proposed Rule 1.6, which is entitled "Confidentiality of Information." The reader will readily see that these are more than 60 lines of "explanation" as to ***why*** client information given to a lawyer is confidential. Philosophical discussions of this nature may be appropriate for an ethics symposium, but they serve no function and have no place in officially promulgated, mandatory rules of law.

> "*Policies Furthered by the Duty of Confidentiality*
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> [2] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance, (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this

information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal information protected by Business and Professions Code section 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Information protected by Business and Professions Code section 6068(e)(1).

[3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)(1)" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has required be kept confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and Professions Code section 6068(e) is broader than lawyer-client privilege. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal.

State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].)

Scope of the Lawyer-Client Privilege

[4] The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.

Scope of the Duty of Confidentiality

[5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e)(1) is not concerned only with information that lawyer might learn after a lawyer-client

> relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e)(1) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

One justification for this enormous rewriting effort is that by adopting ***a version*** of the ABA Model Rules, extensively modified in its fine points through 9 years of hairsplitting deliberation by ethics experts, California will supposedly get in step with the rest of the country, making it easier for out of state lawyers to conform their conduct to California standards while practicing here. While we agree that the interstate practice of law keeps growing, we doubt very much that the number of lawyers from other states who will practice in California in any given year will be even close to 1-10th of the 227,000 lawyers who are licensed to be in active practice in California today. Nor do the Rules of the 49 other states accept the ABA Model Rules in lockstep: the variations are infinite. Aren't we throwing out a known, well working model to perhaps accommodate a few people, while requiring hundreds of thousands of California lawyers to discard what works well for them and relearn the rules that govern their professional lives, just to start over again?

We have been consulted on professional conduct matters on countless occasions and one of us has testified as an expert on lawyers' conduct dozens of times. In our experience, California lawyers are by and large sincere and well intentioned, and mean to comply with the Rules which govern their professional lives. But their actual knowledge of those rules is uncertain, which is why they contact us or others with knowledge of the field. These new Rules, which have been debated for years by the experts who make up the Commission's membership - with one phrase often debated for hours and many matters being adopted by a single vote margin, or defeated when a motion fails by a tie vote - are fodder for experts like our Commission colleagues and ourselves. We are deeply convinced that all of that nuanced detail will not be helpful to the profession and will only lead lawyers into traps.

Specific problems abound. We have mentioned problems with respect to the conflict of interest rules. Here are some others.

The ABA Model Rules have collected a potpourri of concerns in a single rule, Rule 1.8, entitled "Conflict of Interest: Clients: Specific Rules." The Commission found this assemblage so confusing and illogical that, unlike any other jurisdiction, it divided Rule 1.8 into 11 sub-rules, which it has denominated as Rules 1.8.1 – 1.8.11. Many of these "sub" rules are extremely complex, and some are not workable. For instance, Rule 1.8.7 deals with "Aggregate Settlements" and would require the "informed written consent of each client" before a lawyer can make or accept a settlement offer on behalf of several clients. Since settlements are often made in mediation or in a last minute hallway discussion at the courthouse, there will then be no way in which the lawyer "can first obtain the informed written consent of each client . . . before accepting an opposing party's aggregate settlement offer," as the new Rule will require.

The Commission debated this subject at length and was well aware of the problem it is creating. One of us remembers a case in which he represented more than a dozen members of

a voting trust, who had given appropriate written conflict waivers at the outset and had appointed certain members of the trust to act for them where their individual consent was not immediately attainable. It was the only way to run that litigation. We settled that case in mediation. It was a successful settlement; but we could not have done so under this proposed rule.

And what is "informed" written consent? "Informed consent" is defined in proposed Rule 1.0.1(e) as "a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the foreseeable material risks and reasonably available alternatives, to the proposed course of conduct."[1] A careful lawyer would have to write an essay about the terms of the new settlement each time that the give and take of negotiations changes the landscape – at least if it changes the situation "materially." We will be making settlement negotiations much too complex. Lawyers have explained the moving landscape of settlement possibilities to their clients orally, and clients have consented orally, all the time. All that is likely to disappear under this new and unnecessarily rigid rule.

Talking about rigid rules, one rule which has caused many problems is current Rule 2-200, which requires the client's written consent to a division of fees between lawyers who are not partners or associates, but does not state ***when*** that consent must be given. *Mink v. Maccabee* (2007) 121 Cal.App.4th 835, holds that such consent is valid whenever given; but the

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[1] This is a slightly more complex and burdensome requirement than that which now applies (only) to written conflicts waivers [Rules 3-110(A)(1) and (2)], which reads: "(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure . . ."

new Rule [1.5.1] prohibits any such fee provision unless it is made at the outset of the joint representation. While it may be hard for the referring lawyer to get a written fee agreement from the client if that wasn't done before the client and the second lawyer established a firm and close relationship, why should we close the door on that option? And won't the client's consent be more informed if it is given at the time the fee is divided? At that time, both the lawyers and the client will know about the amount of the fee to be divided and the work that has been done, but clients who have to consent at the inception of the relationship cannot know whether the sharing arrangement will turn out to be reasonable or not.

Among the more dangerous new Rules is 1.17, which will allow what one of us sees as potentially unrestrained trafficking in clients and cases. Our current Rule 2-300 was carefully written to allow solo lawyers who retire, take the bench or pass away to realize some value from the law practices they built up over a lifetime, by selling all or substantially all of their practice in one single transaction under a strict regulatory regime. For reasons that have never been explained to the objector's satisfaction, a majority of the Commission is expanding this rule so that now lawyers and law firms will be able to sell any geographic or substantive area of their practice. Thus, if a San Francisco law firm were to open a San Diego office and find it was not profitable, it could sell that practice, which you cannot do now. Or if a lawyer finds a multimillion dollar case in a field where she does not practice and that she does not know, she can sell that "area of practice" which may consist of that one single case.

The Commission has spent a long and enormous effort to protect clients and the professionalism of the practice of law. Indeed many of the new rules, such as the requirement of informed written consent to settlements which we discussed earlier, are written so strictly in the interests of a perceived necessity of client protection that they will actually hinder the honest and effective practice of law. It makes no sense to us that while, for instance, we go to extreme

lengths to preserve and expand rigidity in hereafter requiring "informed written consent" to settlements for more than one client, at the same time we will further commercialize the practice of law beyond what is already happening (a different subject which one of us may write at an early opportunity), by allowing open commerce in branch offices and in areas of practice. The intentions behind this Rule were good, but the rule is destructive.

Rule 1.18 deals with communications with parties who do not become clients. That area of the law has not been a problem. Indeed, it may often be difficult and subtle to draw a line that avoids receiving confidential information from a potential client before an attorney-client relationship is established, so as to preserve the lawyer's freedom of action if the engagement is not taken. The case law has dealt adequately with this subject (*see Flatt v. Superior Court* (1994) 9 Cal.4th 275; *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556). There is no need for a rule of professional conduct in this area, and the ABA rule which the Commission proposes will create nuances and lines of distinction which are unrealistic in the context of non-client contacts.

Very problematical is Rule 1.8.10, which moves from the current California version of prohibiting sexual relations with clients (Rule 3-120) to the ABA version. California's rule prohibits sexual relations with clients where the relationship is based on the abuse of power, intimidation and the like in the relationship, or where the "sexual relations cause the member to perform legal services incompetently." The ABA has an out-and-out prohibition against <u>any</u> sexual relation with a client who had not been the lawyer's intimate before the professional relation began.

The Commission originally voted to adhere to the California version, which fully satisfies any concerns about any abuse of the power relationship between attorney and client where such a power relationship exists. Representing clients in criminal matters or in marital

dissolutions are some obvious examples of such relations; but if, for example, lawyer and client work together in the employee benefits division of an organization they are effectively equals and there is no need for official review of their personal relations. The current formulation does not allow the State Bar to function as the bedroom police in situations where attorney and client are in fact equals. There is no warrant for such intrusions. Inexplicably, the Commission later voted 7:6 to reverse itself and, after two more reversals in its voting as explained earlier, now proposes to ban <u>any</u> sexual relation with a client where the personal relation did not predate the attorney-client relationship. That makes the Bar into a bedroom police, and its existing common practice of disciplinary actions for non-practice related conduct does not bode well for the future of such a rule.

Unfortunately, in the opinion of one of us, as explained in the next four paragraphs, a majority of the Commission also succumbed to the temptation to prefer lawyers' financial interests over client protection. Proposed Rule 1.8.9 is in point. In 1990, the then Commission recommended adoption of what is now Rule 4-300. It reflects the rule that for decades, lawyers have been prohibited from directly or indirectly purchasing assets from their clients' probate or similar sales. *Eschwig v. State Bar* (1969) 1 Cal. 3d 8, 15-16. *Marlowe v. State Bar* (1965) 63 Cal. 2d 304. *Sodikoff v. State Bar* (1975) 14 Cal.3d 422. In 1990, the Legislature amended the Probate Code to permit lawyers to buy property in such probate sales under certain restrictions. The then Commission made the right choice: It recommended that the strict prohibition be continued and called to the attention of the Board of Governors and the Supreme Court the conflict between Rule 4-300 and the Probate Code. The Supreme Court adopted Rule 4-300. The Commission also recommended that the Bar contact the California Law Revision Commission to urge the amendment of Probate Code sections 9880 through 9885 to conform with the rule. However, the Probate Code sections have not been corrected.

The Orange County Bar Association recommended that the current Commission either seek amendment of the Probate Code or amend the rule to confirm with the Probate Code; but the majority of the Commission opted to enrich lawyers. They have recommended that new Rule 1.8.9 continue to prohibit lawyers from buying property from foreclosure, receiver's, trustee's, or judicial sales but to permit lawyers to buy property from probate sales.

This is shocking. The owners of property in foreclosure, receiver's, trustee's, or judicial sales are more likely to have the ability to protect themselves from lawyers who overreach, but a widow, widower, orphan, or surviving parent may have no experience in sales, may be in shock such that she cannot objectively analyze whether her lawyer is being fair, and may not even be able to decide for herself whether the property should be sold at all, let alone at what price. They are dependent upon objective advice from their lawyers. Yet the majority of the Commission voted to allow lawyers to overreach and to repeal the prophylactic rule only in probate sales.

The conflict of interest created by permitting lawyers to buy in probate sales will inherently affect the quality of the lawyers' services. If the lawyer is purchasing an asset from a probate estate, how can he or she objectively analyze the appraisal by the probate referee and recommend to the client whether to object to the appraisal or not? If the appraisal is too low, the purchasing lawyer will pay less for the asset. The code section creates inherent conflicts of interest, without any client protections. No requirement of advice of independent counsel; no informed written consent; and no determination of the capability of the affected client to understand what the lawyer is doing. Our Rule should continue to protect the public against those conflicts, but the Commission disagrees.

We return to our joint views: These are but some examples among many where, with the best of intentions, the proposed Rules have gone off the rails. California lawyers will have to

learn these hundred pages of unnecessary rigidities and often mushy concepts, which may be suitable for ethics seminars but will not improve the rules governing our profession or do a better job of stopping abuses against its clients, the courts or the public.

Many of the most regrettable changes the Commission proposes are the result of orders in early 2009, that wherever possible the Commission should follow the ABA's language[2]. Many times since then, the Commission changed its draft rules in order to comply with that directive.

One of us happens to know the ABA and its operations quite well, having been a delegate to it – on behalf of the State Bar! – for 20 years. This is not the place for an extended discussion of ABA procedures; but we feel certain that the ABA House of Delegates, which meets for 2 days twice a year, never scanned these materials as closely as our Commission did. It is thus illogical that we must adopt the ABA Rules verbatim wherever possible, although they are in many places far more philosophical than they should be and though even with that instruction, we are departing from the model rules in countless ways.

Until now, the Commission has not operated in the eye of public attention. It is time that this process be reversed and that the Bar speak up, so that our Board of Governors and the Supreme Court will recognize the perils to the reasonable and thoughtful performance of our professional duties, which are about to be put upon us if the proposed revisions to the Rules of Professional Conduct are adopted. Certainly many of the proposed changes will do little or no harm, and there may be improvements here or there. Nine years' intense work could not be entirely destructive. But, having been loyal and hard working members of the Commission all that time, we must say in all candor that the bad in the new product far outweighs the good; and the changes got worse as we worked our way toward the goal line.

[2] We understand that our prior instructions had been to follow the ABA's positions as closely as that seemed reasonably possible.

A major flaw in the directive to adhere to the Model Rules is lack of perspective about those rules. The Model Rules are the result of political processes in the ABA. Slavishly following them is no more correct than would be slavishly applying a form set of canned bylaws from a textbook to every corporate setting or copying a formbook pleading by note into every complaint, regardless of the facts.

In short, despite the Commission's hard work and sincere intentions, these Rules should be rejected. Our present rules work well, and our courts and the Bar know how to deal with them.