

AGENDA ITEM

JANUARY 121

DATE: December 13, 2010

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Governors

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Rules of Professional Conduct Proposed New and Amended,
Reconsideration of Proposed Rule 7.5(c) re Restriction on the
Name of a Public Officer in a Law Firm Name

EXECUTIVE SUMMARY

This item recommends reconsideration of a proposed Rule of Professional Conduct adopted by the Board of Governors ("Board") as a part of the State Bar's Rules Revision Commission project. Following the Board's action to adopt comprehensive rule revisions, staff received further comment from Legislative staff which has prompted a staff recommendation that the Board reconsider the adoption of proposed Rule 7.5(c) [re: restriction on the name of a public officer appearing in a law firm name]. The staff recommendation is to reconsider the rule and upon reconsideration, that the Board: (1) not adopt proposed Rule 7.5(c); and (2) direct staff to delete the rule from the set of rules that are being submitted to the Supreme Court for approval. Both Board Committee and full Board action are required to effectuate this action.

BACKGROUND

The Board 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 Upon the recommendation of

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 Board Committee on Regulations and Admissions, proposed Rule 7.5(c) was adopted by the Board on July 24, 2010 as part of the State Bar's project to revise the entire California Rules of Professional Conduct. As with the other rules adopted by the Board, Rule 7.5(c) was developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct ("Commission") following study and multiple public comment opportunities. As drafted by the Commission and adopted by the Board, the language of proposed Rule 7.5(c) is identical to the language of ABA Model Rule 7.5(c). This is consistent with the charge that was given to the Commission. In part, that charge directed the Commission to study the ABA Model Rules and stated that the Commission's proposed revisions should seek to "eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues."

After the Board's action to adopt the rules, comment was received from Legislative staff expressing concerns about the adoption of Rule 7.5(c) [re: restriction on the name of a public officer appearing in a law firm name]. Staff reviewed the concerns and conducted research on the rule's interpretation in jurisdictions that have adopted ABA Model Rule 7.5(c). Following the analysis of the comment by Legislative staff, staff determined to recommend that the Board reconsider its adoption of the rule with the objective of rejecting the rule and deleting it from the set of proposed rules that have been adopted by the Board for submission to the Supreme Court.

ISSUE

Whether to reconsider the Board's prior adoption of proposed Rule 7.5(c) and upon reconsideration, whether to: (1) reverse the Board's prior adoption of the proposed rule revision; and (2) direct staff to delete the proposed rule revision from the set of rules that are being submitted to the Supreme Court for approval.

CONCLUSION

In recognition of a potential chilling effect that proposed Rule 7.5(c) might have on constitutionally protected lawyer speech which, in turn, would be detrimental to the public's interest in the free flow of truthful and not misleading information concerning the availability of legal services, Rule 7.5(c) should not be adopted by the Board and should not be submitted to the Supreme Court for approval as a new California rule. (The full text of Rule 7.5 as recommended for further revision is provided in Attachment 1.)

DISCUSSION

As developed by the Commission and adopted by the Board at its meeting on July 24, 2010, proposed Rule 7.5(c) provides:

"(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."

This language is identical to the language of ABA Model Rule 7.5(c) and, by its terms, establishes a test for determining the permissibility of a law firm name to include the name of a lawyer holding a public office. If a lawyer is actively and regularly practicing with a law firm while, at the same time, holding a public office, then the law firm name may include that lawyer's name. If a lawyer holding public office is not actively and regularly practicing with the firm, then the rule prohibits the inclusion of that lawyer's name in the law firm name.

After the Board's adoption of Rule 7.5(c), Legislative staff provided comment on the policy that would result from the proposed rule's implementation in California. Specifically, Legislative staff inquired as to whether the Model Rule has been applied in Model Rule jurisdictions as a complete ban and prior restraint on lawyer speech, as opposed to a standard that sets a substantive test for determining the propriety of speech. It was observed that if the rule is susceptible to being applied as a ban, then that policy would be contrary to existing California law set by current rule 1-400. Current rule 1-400 prohibits a law firm name that includes the name of a lawyer holding public office only if that law firm name is a false, deceptive, misleading or confusing message concerning the availability of legal services.

In addition, Legislative staff also observed that the language used in Rule 7.5(c) might be challenged as vague. In particular, there is concern about the undefined, yet critical, phrases "substantial period" and "not actively and regularly practicing."³

Staff researched and analyzed the concerns raised and found that: (1) historically some lawyer-legislators in California have continued to practice law during "off season" times and that some of these lawyer-legislators include their names as part of their law firm name (e.g., former Speaker/Assemblymember Willie Brown); and (2) Model Rule 7.5(c) has been cited in at least one state in a manner which suggests that the rule could be treated as an absolute ban (e.g., in the state of Montana, see Montana Bar Ethics Opinion No. 001029 [although distinguishable on its facts, this opinion articulates an "appearance of impropriety" rationale in support of a strict prohibition⁴]; the full text of

³ In the course of the Commission's study, these concerns were not raised by any of the written comments received or public hearing testimony presented. However, it is worth noting that the record of the Commission's deliberation include an initial motion to *not* recommend Board adoption of Model Rule 7.5(c) but that motion failed on a vote of 5 yes, 6 no, 0 abstentions. The policy rationale of the Commission's one member majority on that vote was that the desirability of national uniformity in the area of lawyer advertising militated in favor of the adoption of Model Rule 7.5(c). Subsequent Commission votes to recommend Board adoption of the entire Rule 7.5 passed with a stronger consensus – 8 yes, 1 no, 0 abstentions, and the proposed rule was presented to the Board as not controversial.

⁴ The reference to an "appearance of impropriety" is found in a concurrence written by one member of the Montana Bar committee. That same committee member emphasizes the following observation: "While the skill, experience, and reputation of attorneys – and especially those who have previously gained experience in public service – is a legitimate basis upon which private clients can select an attorney, the fact an attorney currently holds a high public

this advisory bar committee opinion is available online at the Montana State Bar website at: <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=143>).

Although the comment received from Legislative staff was outside the comment period, staff believes that the concerns expressed warrant Board reconsideration of the adoption of Rule 7.5(c). If this rule were to become California law, then it could give rise to a potential chilling effect on constitutionally protected lawyer speech. The chilling effect arises from both the possible application of the rule as an absolute ban and from the ambiguity in key language (the phrases “substantial period” and “not actively and regularly practicing”). Not only does the chilling effect create a basis for constitutional challenge, it is also detrimental to the public’s interest because it would inhibit the free flow of truthful and not misleading information concerning the availability of legal services.

Would law firm names be unregulated if the Board agrees and reverses the prior decision to adopt Rule 7.5(c)? The answer is no. This is because the more general prohibitions in Rule 7.5(a) and Rule 7.1 afford good public protection. Rule 7.5(a) provides: “A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency. . . and is not otherwise in violation of Rule 7.1.” Rule 7.1 defines a lawyer “communication” as including a law firm name and it prohibits any communication that is false or misleading.⁵ Further, proposed Rule 8.4(e) provides that it is misconduct for a lawyer to: “(e) 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.” This latter provision, together with the aforementioned proposed Rules 7.1 and 7.5(a) should serve to avoid the potential misleading use of a government official’s name in a law firm’s name.

office simply is not an appropriate basis upon which the decision to retain a lawyer should be based.” This reasoning suggests a strict prohibition approach to regulating lawyer communications by a lawyer holding public office, rather than an analysis of whether a particular communication is false, deceptive, or misleading to the public.

⁵ This approach to the regulation of a law firm name is consistent with existing California law. Current Rule 1-400 generally prohibits a firm name that is false, deceptive, misleading or confusing. In addition, advertising standard No. 6, adopted by the Board pursuant to Rule 1-400(E), states that a violation of Rule 1-400 may be presumed in the case of:

“(6) A communication in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.”

See also, State Bar Formal Opinion No. 2004-167 available online at the State Bar website at: <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=1Mgy-MI3mm8%3d&tabid=838>.

Accordingly, the deletion of Rule 7.5(c) from the Board's new advertising rules would not leave law firm names unregulated. It would, however, be a deviation from the ABA Model Rules but staff believes this deviation is justified.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

This agenda item does not request adoption of any rule amendment. Instead, it requests that the Board reconsider and reverse a prior decision to adopt a proposed new Rule of Professional Conduct.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

In accordance with the above discussion, staff recommends that the Board reconsider its adoption of proposed Rule 7.5(c) and that upon reconsideration, that the Board: (1) not adopt proposed Rule 7.5(c); and (2) direct staff to delete the rule from the set rules to be submitted to the Supreme Court (this includes conforming changes).

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends that the Board reconsider its adoption of proposed Rule 7.5(c) and that upon reconsideration, that the Board: (1) not adopt proposed Rule 7.5(c); and (2) direct staff to delete the rule from the set rules to be submitted to the Supreme Court.

PROPOSED BOARD RESOLUTION:

Should the Board concur with the Regulation, Admissions and Discipline Oversight Committee recommendation, the following resolutions would be in order:

RESOLVED, that upon the recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board hereby reconsiders its adoption of proposed Rule 7.5(c) and upon reconsideration, that the Board: (1) does not adopt proposed Rule 7.5(c); and (2) directs staff to delete the rule from the set rules to be submitted to the Supreme Court for approval.