DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-500 [5.6]

Lead Drafter: **Tuft**
Co-Drafters: **Bleich, Ham, Harris**
Meeting Date: **October 23, 2015**

I. CURRENT CALIFORNIA RULE 1-500

Rule 1-500 Agreements Restricting a Member's practice

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

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

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

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

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

Discussion:

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.

I.A. CURRENT ABA MODEL RULE

Rule 5.6 Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

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

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule 1-500 [5.6] as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 5.6 (CLEAN)

Rule 5.6 Restrictions On A Lawyer's Right To Practice

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or

(2) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

[(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.]

(c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

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Comment

[1] Concerning the application of paragraph (a)(1)(ii), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.]

IV. PROPOSED RULE 5.6 (REDLINE TO CURRENT CALIFORNIA RULE 1-500)

~~Rule 1-500~~ Rule 5.6 ~~Agreements Restricting a Member's practice~~ Restrictions On A Lawyer's Right To Practice

~~(A)~~ (a) ~~A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:~~ A lawyer shall not participate in offering or making:

(1) ~~Is~~ a ~~part of an employment~~ partnership, shareholders~~', or partnership agreement among members provided the restrictive agreement does not survive the~~ , operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the ~~employment, shareholder, or partnership relationship~~relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or

(2) ~~Requires payments to a member upon the member's retirement from the practice of law; or~~ an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

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

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

(c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

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

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

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.~~
[1] Concerning the application of paragraph (a)(1)(ii), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.]

IV.A. PROPOSED RULE 5.6 (REDLINE TO CURRENT ABA MODEL RULE 5.6)

Rule 5.6 Restrictions On A Lawyer's Right To Practice

(a) A lawyer shall not participate in offering or making:

(~~a~~1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement ~~concerning~~that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or

(~~b~~2) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

[(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.]

(c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

Comment

[1] ~~An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.~~ Concerning the application of paragraph (a)(1)(ii),

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see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (~~b~~a)(2) prohibits a lawyer from offering or agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[[3] This Rule does not ~~apply to~~ prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.]

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 09/29/15:**

  1. *Howard v. Babcock* (1993) 6 Cal.4th 409 permits an agreement among law partners imposing a reasonable cost for a limited period of time upon departing partners who compete with the law firm in a limited geographic area. Stating this concept in the rule would provide a greater degree of notice and clarity to the membership.

  2. The exceptions currently set forth in the rule, along with language addressing the concept noted above, would provide meaningful guidance to the membership. Additional examples of agreements that restrict a member's practice without violating the rule are not necessary.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

  1. OCTC supports this rule, but believes Comment 1 more appropriately belongs in a treatise, law review article, or ethics opinion.[1]

- **State Bar Court:** No comments received from State Bar Court.

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[1] Comment [1] to RRC1's proposed Rule 5.6 provided:

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See Howard v. Babcock (1993) 6 Cal.4th 409, 425.

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VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 5.6: Restrictions on Right to Practice," revised April 21, 2015, is available at::

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_6.authcheckdam.pdf

- Twenty-seven jurisdictions have adopted Model Rule 5.6 verbatim.[2] Twenty-three jurisdictions have adopted a rule that is substantially similar to Model Rule 5.6.[3] California has adopted a rule substantially different in format and structure from Model Rule 5.6. However, the substance of rule 1-500 is substantially similar to the Model Rule.

- Eight jurisdictions have adopted a rule that provides for an exception for practice restrictions in connection with a sale of a law firm.[4]

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend that the structure of current rule 1-500 be replaced with the rule structure used in jurisdictions that have adopted the Model Rule structure, i.e., state only the general prohibitory language in the introductory clause ("shall not participate in offering or making") of paragraph (a), then state the two specific prohibited agreements: (1) partnership/shareholders/operating/employment agreements ("partnership agreements") that restrict right to practice; and (2) agreements to restrict practice made as part of a settlement.[5]

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[2] The 27 jurisdictions are: Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

[3] The 23 jurisdictions are: Alabama, Alaska, Arizona, Arkansas, District of Columbia, Georgia, Hawaii, Idaho, Kentucky, Massachusetts, Michigan, Mississippi, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, and West Virginia.

[4] The eight jurisdictions are: Alaska, Arkansas, Hawaii, Idaho, Michigan, Mississippi, New York, and Pennsylvania.

[5] Current rule 1-500 instead states in the introductory clause the two specific prohibitions on (i) a restriction on practice made as part of a settlement or (ii) any other restriction on practice, then states three exceptions to the prohibition.

- Pros: The Model Rule structure more accurately distinguishes the two kinds of prohibited agreement, recognizing that the former kind (partnership, etc.) is subject to exceptions, while the latter kind (agreement as part of settlement) is not. Current rule 1-500 is confusing because none of the three exceptions in paragraph (A) would apply to an agreement made as part of a settlement that restricts a lawyer's practice. In addition, all other 50 jurisdictions have adopted the Model Rule structure. Adopting the Model Rule structure should facilitate compliance with the Rule's limitations on partnership agreements by multijurisdictional law firms.
- Cons: There is no evidence that the structure of current rule 1-500 has been confusing or misleading.

2. Recommend adding an exception to paragraph (a)(1) that would permit a practice restriction in partnership agreements that "is authorized by law."
   - Pros: The exception would codify the general holding in *Howard v. Babcock* (1993) 6 Cal.4th 409 [25 Cal.Rptr.2d 80] that a partnership can impose reasonable costs on a departing lawyer in compliance with Bus. & Prof. Code § 16602. The drafting team has recommended a general "authorized by law" exception because of the wide range of restrictive arrangements that law firms might employ under § 16606 and that any attempt to describe more specifically the holding in *Howard v. Babcock* would be inaccurate.[6]

[6] In addition to general exception recommended, the drafting team also considered the following variations for paragraph (a)(1):

(1) [**ALT1**] a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) ~~concerning~~ concerns benefits upon retirement, or (ii) imposes reasonable costs on a departing partner or shareholder who competes with the law firm, provided that such costs are imposed for only a limited time in a limited geographical area;

(1) [**ALT2**] a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) ~~concerning~~ concerns benefits upon retirement, or (ii) imposes reasonable costs as authorized by Business and Professions Code § 16602 on a departing partner or shareholder who competes with the law firm;

(1) [**ALT3**] a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) ~~concerning~~ concerns benefits upon retirement, or (ii) is authorized by Business and Professions Code § 16602;

The drafting team also considered not including a new exception for the Howard v. Babcock situation but instead address it in a comment as had RRC1. (See IX, Open Issues, below.)

- Cons: It is not certain that *Howard v. Babcock* created an exception to rule 1-500; rather, it is arguable that court viewed the law firm's agreement in compliance with Bus. & Prof. Code § 16602 as not having violated rule 1-500. (See IX., Open Issues, below.)

3. Recommend adoption of Model Rule 5.6(b) as proposed rule 5.6(a)(2).
   - Pros: Proposed paragraph (a)(2) adheres to the recommended structure of Model Rule 5.6. (See paragraph 1.) This would not be a substantive change from current rule 1-500, which includes the same prohibition in the introductory clause to paragraph (A).
   - Cons: None identified so long as the Model Rule structure is approved.

4. Recommend retaining current rule 1-500(B) (prohibiting agreements not to report violations of the Rules), but bracket the paragraph as a placeholder to indicate that its inclusion in proposed Rule 5.6 is without prejudice to the Rule 1-120/8.4 drafting team's including the provision in a proposed Rule 8.3 [Reporting Misconduct].
   - Pros: The provision is an important public protection and should be retained in the Rules. Although this prohibition on agreements *not to report rule violations* arguably does not fit in a rule that is intended to prohibit restrictions on practice, by retaining the provision in this Rule pending its consideration by the 1-120/8.4 team will ensure that it will not be dropped from the Rules.[7]
   - Cons: None identified.

5. Recommend retention of current rule 1-500(A)(3), which provides an exception for agreements that impose restrictions on practice as part of disciplinary proceedings pursuant to Bus. & Prof. Code §§ 6092.5(i) and 6093.
   - Pros: There is no evidence that there is a problem with this provision. Removing it could lead to unnecessary litigation as to whether the Bus. & Prof. Code sections trumped Rule 5.6's prohibitions on agreements restricting practice. Placing the provision in a separate paragraph is not intended as a substantive change but is recommended to conform to the recommended Model Rule structure. (See paragraph 1, above.)
   - Cons: None identified.

6. Recommend adoption of proposed Comment [1], which includes citations to Bus. & Prof. Code § 16602 and *Howard v. Babcock*.
   - Pros: Provides importance guidance on how the "authorized by law" exception in paragraph (a)(1)(ii) might be applied. The drafting team believes that rather than attempting to accurately characterize the holding in *Howard v. Babcock*, it is

[7] The provision, which was moved to RRC1 proposed Rule 8.3, was inadvertently dropped from RRC1's proposed Rules when the Board rejected proposed Rule 8.3. The drafting team wants to ensure that a similar inadvertent deletion does not occur.

more helpful to provide citations to § 16602 and the case for the requisite interpretive guidance.[8]
- Cons: None identified.

7. Recommend adoption of proposed Comment [2], which is based on Model Rule 5.6, cmt. [2], and explains how paragraph (a)(2) is applied.
   - Pros: The comment does not merely restate the black letter, which expressly prohibits an agreement that restricts a lawyer's right to practice, which by its terms could include an agreement to cease all practice of law. The comment clarifies that this prohibition is intended to apply to the specific situation where a lawyer agrees not to represent particular persons, e.g., plaintiffs who might bring a similar claim.
   - Cons: The comment merely restates the substance of paragraph (a)(2).

8. Recommend adoption of proposed comment [3], which excepts from the application of the Rule agreements for the sale of a law practice.
   - Pros: An agreement to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold. This rule should not frustrate the policy underlying current rule 2-300 [1.17] to permit a solo practitioner to receive compensation for the good will developed. Finally, this comment has been adopted by nearly every jurisdiction, although eight jurisdictions include the exception in the black letter of their rule.[9]
   - Cons: The provision should not be included unless the Commission recommends adopting Model Rule 1.17, which permits the sale of an area (field) of practice and not just the entire practice. The policy underlying current rule 2-300 [1.17], which requires sale of the *entire* practice, is to permit a solo practitioner to receive compensation for the good will developed upon the selling lawyer's retirement from practice. Where the seller retires, there should be no need for a practice restriction clause in the sale agreement.

B. Concepts Rejected (Pros and Cons):

1. Retain current rule 1-500, Discussion ¶.1, which concerns agreements restricting a

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[8] The drafting team also considered adapting the second sentence of RRC1's comment concerning *Howard v. Babcock* as follows:

> Paragraph (a)(1) prohibits an agreement restricting the right of a lawyer to practice after leaving a firm except for an agreement among partners imposing a reasonable cost on the departing partner or shareholder who competes with the law firm in a limited geographical area, as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of the law firm in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[9] See note 4, above.

lawyer's right to practice made as part of a settlement.
- Pros: There is no evidence that Discussion ¶. 1 has caused problems. It is an articulate statement of the practice that proposed paragraph (a)(2) is intended to prohibit.
- Cons: Proposed Comment [2], which is derived from Model Rule 5.6, cmt. [2], is a more succinct statement of the same subject matter.

2. Retain current rule 1-500, Discussion ¶. 2, which concerns practice restrictions in partnership agreements.
   - Pros: The Discussion paragraph elaborates on the prohibition against restrictions on practice in partnership agreements.
   - Cons: The Discussion paragraph merely restates the rule provision it is intended to explain. Moreover, it is an incomplete statement of the current law in light of *Howard v. Babcock*.

3. Recommend adoption of a provision that would prohibit confidential settlement agreements. (See article by Richard Zitrin, attached.)
   - Pros: Confidential settlements undermine public safety to the extent evidence of dangerous products is concealed by preventing disclosure of the evidence in a case. Confidential settlements also potentially frustrate the objective of Rule 5.6 to prevent restrictions on practice as part of a settlement; with a confidential settlement, there is no evidence whether rule 5.6 was violated.
   - Cons: If confidential settlements are to be prohibited, it should be accomplished by statute or rule of procedure, not a rule of professional conduct. There are many policy decisions that implementing such a rule would require that are beyond the scope of the Commission's Charter.

4. Recommend adoption of a provision that would prohibit institutional clients from requiring that a lawyer, as part of a retention agreement, not represent certain persons, e.g., a competitor of the client.[10] (See 6/29/2015 Letter to Chair & Commission from Anthony Davis, on behalf of Law Firm General Counsel.)
   - Pros: According to the author, the provision would avoid frustrating a subsequent client from retaining counsel of choice because of the agreement. Provision would presumably apply to sophisticated clients who tend to seek such agreements.
   - Cons: As with a provision prohibiting confidential settlements, this provision

[10] The proposed provision would provide:

(c) A member shall not be a party to or participate in offering or making an agreement with a client containing a categorical restriction against: (i) the representation of parties that are mere competitors of the client not adverse to the client in a matter or (ii) the representation of parties in matters adverse to legal entities that lack a unity of interest with that client."

would require policy decisions for implementation that are beyond the scope of the Commission's Charter.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. See section VIII.A.1, above, re the adoption of Model Rule 5.6 structure and rejection of the current California structure. However, although the rule's appearance will be different, the substantive duties will largely remain the same. (See paragraph 2, below.)
2. The addition of the "authorized by other law" exception is a substantive change to current Rule 1-500, but should not result in a change of duties as lawyers and firms are already subject to the holding in *Howard v. Babcock*. (See section VIII.A.2, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

1. The only alternative considered was to retain the structure of current rule 1-500. (See Section VIII.A.1, above.)

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IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Whether a rule similar to current rule 1-500 is still required to protect the public's interest.

2. Whether a provision should be added to the proposed rule that would except from the rule agreements between government employees and the government under which the employee agrees not to engage in the practice of law against the government or lobby the government for a period that exceeds an applicable statute.[11]

3. Whether the black letter of the rule should include an express "authorized by law" exception, which is intended to capture the general holding in Howard v. Babcock, to the prohibition on practice restrictions in partner/shareholder agreements. (See discussion and alternatives at section VIII.A.2 and note 6, above.) If the black letter provision were not included, the recommendation would be to include a comment that adapts the second sentence of the first Commission's Comment [1]. (See note 8, above.)

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Tuft
- [Date]: Email Comment

Bleich
- [Date]: Email Comment

Ham
- [Date]: Email Comment

Harris
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-500 [5.6] in the form attached to this report and recommendation.

[11] It has been the Obama Administration's practice to have government appointees sign an agreement under which they promise not to lobby the government for a period of two years after leaving government. The applicable statute prohibits lobbying for a period of one year.

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Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1-500 [5.6] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

THE STATE BAR
OF CALIFORNIA

Date: September 29, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for October 2015 meeting

CONTENTS

I.

OPENING COMMENT

The following comments address the rules to be considered at the Commission's October 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.

POINTS FOR CONSIDERATION

[TEXT OMITTED]

B. Rule 1-500: Agreements Restricting a Member's Practice

1. *Howard v. Babcock* (1993) 6 Cal.4th 409 permits an agreement among law partners imposing a reasonable cost for a limited period of time upon departing partners who compete with the law firm in a limited geographic area. Stating this concept in the rule would provide a greater degree of notice and clarity to the membership.

2. The exceptions currently set forth in the rule, along with language addressing the concept noted above, would provide meaningful guidance to the membership. Additional examples of agreements that restrict a member's practice without violating the rule are not necessary.

[TEXT OMITTED]

III.

CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

Initial Public Comments
[Rule 1-500 – Agreements Restricting a Member's Practice]

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-049b	Law Firm General Counsel Roundtable	Yes	1-500	Suggest amending the rule clarify that the rule is intended to apply to prevent attorneys from entering agreements that would bar attorney from representing client's competitor and prevent clients from asserting conflicts based on their attenuated relationships to affiliates. Propose the following amendment to 1-500: "(C) A member shall not be a party to or participate in offering or making an agreement with a client containing a categorical restriction against: (i) the representation of parties that are mere competitors of the client not adverse to the client in a matter or (ii) the representation of parties in matters adverse to legal entities that lack a unity of interest with that client."	

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June 29, 2015

Justice Lee Emond, Chair
and
Members of the Rules Revision Commission
c/o Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposal of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients

Dear Justice Edmon, Chair, and Members of the Second Rules Revision Commission:

I am writing to you on behalf of the Law Firm General Counsel Roundtable, a group of in-firm general counsel of large firms doing business in California. The group has been meeting regularly several times each year for over 12 years, moderated by James Jones, who is currently a Senior Fellow at Georgetown University Law Center.

Mr. Jones is presently out of the country and has asked me to write to you to deliver the attached Proposal of Law Firm General Counsel for Future Regulation of Relationships between Law Firms and Sophisticated Clients for submission to the Second Rules Revision Commission, which I assisted in preparing. We are aware that we missed the June 16 date set for such submissions, and we apologize for our lateness on behalf of the Roundtable and those firms' general counsel who have signed the Proposal. Because the Roundtable members are dispersed it took us longer than anticipated to complete the text of the Proposal and to gather signatures from those general counsel who wished to sign it. On their behalf, I respectfully request that the Commission accept and give consideration to our Proposal despite its lateness.

Thank you for considering this request and, hopefully, the Proposal itself.

Respectfully, on behalf of Members of Law Firm General Counsel Roundtable,

Sincerely yours,

HINSHAW & CULBERTSON LLP

Anthony E. Davis

AED/jls
Enclosures

cc: James W. Jones

STATE BAR OF CALIFORNIA
SECOND COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

PROPOSAL OF LAW FIRM GENERAL COUNSEL FOR FUTURE REGULATION OF RELATIONSHIPS BETWEEN LAW FIRMS AND SOPHISTICATED CLIENTS

The undersigned are partners and senior lawyers in large law firms operating in California, as well as multiple jurisdictions within and outside the United States. Some of us serve as general or associate general counsel of our firms, while others serve in ethics and risk management roles. Most of us spend parts of each and every business day addressing conflicts and potential conflicts of interest and wrestling with client imposed restrictions on our firms' abilities to offer our services broadly across the market. We are all very familiar with the California Rules of Professional Conduct, and we are hopeful that the Second Commission will be open to considering important changes in the Rules to make them more responsive to the needs of practicing lawyers in the Twenty-First Century.

Introduction

As explained below, our thesis is "one size does not fit all" when it comes to regulating conflicts of interest. Rules properly designed to protect unsophisticated consumers from possible overreaching are unnecessary and indeed undesirable when the client is a sophisticated business enterprise. The typical client for a large law firm today is a large corporation with an in-house legal staff (sometimes with scores or even hundreds of lawyers). Many such clients promulgate outside counsel guidelines specifying in great detail the terms and conditions of representation to be followed by their law firms. With respect to conflict waivers, such clients often have lawyers or even committees tasked to address waiver requests. The fear that a California lawyer or law firm will take advantage of such a client entirely ignores the realities of these relationships.

California is well-known for its myriad, state-of-the-art consumer protections statutes. Those statutes almost always distinguish between "consumer" and "business or commercial" transactions. That distinction is also recognized in the State Bar Act that excludes corporate clients from the requirement that most engagements must be the subject of a written fee agreement. Business & Professions Code section 6148(d)(4). As the Commission begins its important work, we urge it to recognize that the world of big business and big law is different, and that California can be a national leader in promulgating workable rules to address the unique aspects of these important relationships while still preserving protections for clients who need them.

In their article *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, Professors Janine Griffiths-Baker and Nancy J. Moore note that the general proscription against conflicts of interest has become increasingly problematic because of four influential factors: (1) an increasing demand for specialized legal services, (2) the globalization of commerce,

(3) growth in the size of law firms, and (4) increased mobility within the profession.[1] The demand for specialization within the profession, coupled with the representation of global corporate clients by equally global law firms has given rise to more frequent potential conflicts of interest. Ironically, this has occurred at the same time that corporate clients have become ever more sophisticated consumers of legal services, with their own in-house law departments more than capable of waiving conflicts while still protecting their interests. Rules which, entirely contrary to reality, presume that such consumers need to be protected from overreaching by outside counsel drive up the cost of legal services for everyone. The current conflicts rules in California invite large corporations to allege conflicts and even disavow conflict waivers for tactical reasons. This restricts clients, small and large, from having the counsel of their choice and leads to unnecessary and inappropriate use of substantial judicial resources, serious expense, and delays.

Sophisticated clients are well able to understand – and if they choose, waive – conflicts of interest involving their outside counsel. An individual client, on the other hand, may be less able to understand the nature of potential conflicts and the implications of waiving them. California has a well-established policy of protecting consumer interests; yet California courts have also recognized that not all consumers are similarly situated and hence not all require the same laws and standards for their protection.[2] This is as true in the context of legal representations as in the context of consumer goods or services. Accordingly, we propose an amendment to the current conflict of interest rules that allows for different presumptions to apply to the enforceability of conflicts waivers, depending on whether or not the client is a sophisticated client. If adopted, this amendment would continue to protect individual consumers of legal services from being subjected to agreements contrary to their interests when made without true consent while, at the same time, facilitating sophisticated clients in pursuing agreements that would provide them with improved access to the legal service provider of their choice.

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Restrictions on a Member's Right to Practice Law

California Rule of Professional Conduct 1-500 addresses agreements that restrict the right of members of the California Bar to practice law. Members are barred from agreeing to such restrictions and barred from asking other members to make such agreements. In recent years, however, more and more large clients have sought to include far flung affiliates within the definition of the "client" for conflict purposes even though the law firms affected by such restrictions perform no services for those affiliates and the client representatives with whom the law firms work have no relationship to those affiliates. In other cases, clients have sought to bar attorneys from representing competitors. Such terms have the effect of restricting a lawyer's right to practice much like the settlement agreement terms that are prohibited by 1-500. Arguably, 1-500 presently bars such overreaching, but greater clarity is certainly desirable. We suggest that an appropriate test for the boundaries of a request to not represent parties that are adverse to a client's affiliates would be where there is a lack of "unity of interest" between the client and such affiliates Thus we would suggest that RPC 1-500 be amended to include the following:

"(C) A member shall not be a party to or participate in offering or making an agreement with a client containing a categorical restriction against: (i) the representation of parties that are mere competitors of the client not adverse to the client in a matter or (ii) the representation of parties in matters adverse to legal entities that lack a unity of interest with that client ."

Conclusion

In the current legal services market in California, sophisticated clients and law firms alike are seeking means by which the delivery of legal services can become more efficient. Under the current California Rules of Professional Conduct, the rules governing conflicts of interest can effectively reduce the freedom of clients to engage lawyers and law firms of their choice, add significant cost to obtaining legal services, and lead to unnecessary delays in legal proceedings. One means of enabling lawyers and their clients to interact in a more efficient manner and to

enhance competition in the legal market overall is to improve and simplify the rules governing the recognition of waivers of present or future conflicts of interest by sophisticated clients. Another is to clarify that efforts by clients to restrict the rights of lawyers to practice should be limited to cases where genuine conflicts of interest can arise. Therefore, we believe that the Commission should consider amending the Rules of Professional Conduct as we propose to reflect sensitivity to the increasingly varied and nuanced relationships between lawyers and their clients.

We appreciate the opportunity the State Bar of California has provided to submit proposals for consideration by the Commission. We hope our proposals will initiate an important discussion about the needs of members and clients in the current market for legal services and the necessity for the rules governing the profession to reflect and accommodate those needs. We look forward to participating in this discussion.

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General Motors and it's (un)ethical lessons for lawyers

Richard Zitrin, The Recorder (June 2014)

The stories about General Motors' failure to reveal information about ignition defects affecting the safety of millions of car owners is not GM's first effort to keep its dirty laundry secret.

Memories are short, even when it comes to outrageous corporate behavior, and even when that behavior relates to hundreds of accidents and deaths and hundreds of millions of dollars paid. So here's a pop quiz: How many people remember the stories in the 1980s and 1990s of GM's side-mounted gas tank fires? Here's a reminder: For years, many GM trucks had side-mounted gas tanks that did not sit within the frame of the vehicle. Eventually consumer groups and news organizations began claiming these gas tanks were defective because of how easily they could catch on fire or explode in side-impact accidents. But GM insistently denied there was a problem. And there was virtually no evidence that crash victims had been suing GM.

Still, the criticism continued. Clarence Ditlow, then and now head of the original Nader Raider organization, the Center for Auto Safety, continued to say the gas tanks were unsafe. And an NBC network news magazine televised a demonstration that showed a GM truck blowing up.

But GM and its lawyers, in their hubris were so confident in their disinformation that they took the aggressive steps of threatening NBC with defamation claims and, in 1993, suing Ditlow, the center, and for good measure its founder, Ralph Nader, for defamation.

NBC quickly backed down and apologized, but not he Center for Auto Safety. Ditlow dug in for a fight, and after three years of discovery ward, finally obtained the names of 245 gas tank defects cases that had been filed starting in 1973 (sic!) and running through 1996, when the list was provided.

How could this be? GM had forcefully and repeatedly denied that there was a defect. GM's lawyers even sues over the issue. And surely no car company would have hidden from its consumers something as serious as gas tanks that could burst into flames. Besides, if there were all these explosions and fires, how could GM have possible kept them a secret?

The answer is that GM settled its cases secretly, one at a time, in return for a promise from plaintiffs' lawyers that they would reveal none of the information about the defect that they'd gained in discovery.

By the new millennium, well after Ditlow learned of the 245 cases, gas tank fire litigation was still going on, still largely in secret. Finally in 2001, the Los Angeles Times intervened in a Montana lawsuit involving several members of the Boyd family, killed in a gas tank explosion. The Times asked a federal district court to require GM to release information about cases that had been secretly settled over the years. Needless to say, GM, having spent year denying everything, fought tooth and nail.

District Judge Donald Malloy rules that the Times–and the public–had the right to that information, but in late 2001, the Ninth Circuit remanded the case for a good cause hearing. Finally, in May 2003, 30 years after the first case was filed and seven years after the forced disclosure to the Center for Auto Safety, Judge Malloy, finding GM had no good cause for secrecy, ordered the information released: 297 separate cases settled for $495 million.

Somehow, with our short memories, recollections fade. The questions most often asked about gas tank defects seem to be, "Didn't GM sue NBC and make them back down?" or at best, "Wasn't there something or other about GM trucks' gas tanks years ago?" To this day, GM has never admitted that the gas-tank placement was dangerous.

And yet here is GM again. This time, according to widespread reports, GM denied for years that its small-car ignition systems were dangerously defective. They stonewalled discovery for those who

sued and required secrecy from those who stayed the course until they got the smoking gun in discovery. And while GM changed the ignition architecture in new cars, it breathed not a word to millions of consumers whose cars had–and still have–the old defect.

What does this have to do with the moral compass of lawyers? Plenty. Last week, GM fired two senior lawyers: one in charge of products liability litigation, the other the supposed liaison to GM's engineers on product safety issues. Ditlow told me this week that the "safety" lawyer was deeply involved in the gas-tank cover-ups.

As for outside counsel, defense lawyers too often choose to protect their client's dangerous products instead of the public safety. They stonewall discovery and then offer premiums on settlements conditioned on absolute secrecy. Plaintiffs' lawyers too often look only at their clients'–and, not coincidentally, their own–bottom line. Though they profess to be lawyers for victims, too many turn a blind eye to the real costs of secrecy: the *future* victims, kept in the dark about the truth, who will suffer the same heartaches their clients have already suffered. At the least, these lawyers should be explaining these hidden costs to their clients, many of whom would never accept a settlement if the cost was that their own grief was visited on another family.

In short, no self-respecting lawyer, on either side, should be a party to this kind of collusion.

Fortunately, there are ways to put a stop to this. Perhaps the best are "sunshine in litigation" laws that would forbid agreements or stipulations that keep information from the public. On May, 20, the Sunshine in Litigation Act ("SILA") co-sponsored by Senators Blumenthal (D-CT) and Graham (R-SC), was dropped in the United States Senate. This bill, S.2364, which I was involved in drafting, would do exactly that:

"[A] court shall not enforce any provision of a settlement agreement or [stipulation] among parties that prohibits one or more parties from- (A) disclosing the fact that such settlement was reached or the terms of such settlement, other than the amount of money paid; or (B) discussing a civil action, or evidence produced in the civil action, that involves matters relevant to the protection of public health or safety."

SILA provides appropriate exceptions for individuals' personal identifying information, including health and financial information. The bill also allows protection for trade secrets: *true* trade secrets, not those involving ignitions or exploding gas tanks that don't work right.

Similar legislation passed through the Senate Judiciary Committee in 2011 with bipartisan support. After all, this bill presidents neither a partisan issue nor a political issue, but a *human* issue. There is no legitimate reason to oppose it; the true opposition comes from companies that simply want a blanket license to keep their products' dangers from public view. This time around, perhaps SILA will prevail on both sides of the aisle through both houses of Congress. Then advocates, including me, can move on to similar legislation state by state.

It's an old expression that you can't legislate morality. But sometimes you can legislate lawyers' behavior. Especially when that behavior is used to keep the public in the dark about serious, even deadly, harms.