

McCurdy, Lauren

From: Difuntorum, Randall
Sent: Monday, October 26, 2009 9:57 AM
To: 'Robert L. Kehr'
Cc: Harry Sondheim; McCurdy, Lauren; Kevin Mohr; Kevin Mohr G
Subject: RRC Nov. Agenda Item III.M Law Firm Discipline
Attachments: COPRAC Memo re Publicizing Disciplined Lawyers Affiliation(2-20-96).pdf; COPRAC Comment re Publicizing Disciplined Lawyers Affiliation(12-13-96).pdf

See attached COPRAC comment letter and memorandum. –Randy D.

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From: Robert L. Kehr [mailto:rlkehr@kscllp.com]
Sent: Saturday, October 24, 2009 8:15 AM
To: Difuntorum, Randall
Cc: Harry Sondheim; McCurdy, Lauren; Kevin Mohr; Kevin Mohr G
Subject: RRC

Randy: I just saw that the November agenda includes consideration of law firm discipline. I remember that COPRAC considered this in about 1996-97, and I wonder if its report is available.

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THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

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December 13, 1996

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Re: Comment on Publicizing Disciplined Lawyer's Affiliation

Dear Ms. Yen:

The Standing Committee on Professional Responsibility and Conduct ("COPRAC") provides the following comments on the proposals to adopt a policy to either (1) publish the name of the law firm or office (collectively referred to herein as "law firm") where a disciplined attorney was affiliated at the time of the discipline violation, or (2) publish the size and type of the law firm or office where a disciplined attorney affiliated at the time of the discipline violation.

I. Background and Summary

Earlier this year, COPRAC considered the first of the two proposals, regarding publication of the name of the law firm where a disciplined attorney was affiliated at the time of the discipline violation. This consideration resulted in a report by COPRAC dated February 20, 1996 which noted that a narrow majority favored the proposal. At its November and December, 1996 meetings, COPRAC reconsidered this proposal. After considerable discussion and careful consideration, at the November meeting a substantial majority of COPRAC members voted to recommend that the State Bar not adopt the proposal. At the December meeting, however, after more considerable discussion and careful consideration, a narrow majority once again favored the proposal.

Since, as reflected by the background set forth above, COPRAC was unable to reach a consensus on the first proposal, the Committee decided that both points of view would be reported in this comment.

COPRAC, however, did reach a consensus on the second of the two proposals, regarding publication of the size and type of the law firm or entity with which a disciplined attorney was affiliated at the time of the disciplined violation. This proposal was not

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considered by COPRAC prior to the recent request for public comment. At both its November and December, 1996 meetings a majority of COPRAC members voted to recommend that this proposal not be adopted because it would serve no useful purpose and the goal that it seeks to achieve can be attained by other means which are already available.

II. Comment on the First Proposal Regarding Publication of Law Firm Name

A. Comments in Opposition to the Proposal

The reasons for opposing the proposal regarding identification of the firm name include the following which were set forth in detail in COPRAC's February 20, 1996 report:

1. Publishing the firm name is a form of law firm discipline for which there are no standards or due process.

Publishing the law firm name is a form of law firm discipline. Associating the firm name with a disciplined lawyer exposes the firm to ridicule and stigma associated with the disciplined lawyer's conduct, even if the firm had no involvement in that conduct. Indeed, the firm name would be published even if the disciplined lawyer violated firm rules, even if the law firm is the victim of the lawyer's wrongdoing, and even if the disciplined lawyer acts outside the law firm context or the practice of law.

Many of the arguments in favor of the proposal reflect an intent to use the publication of the law firm name as a form of discipline. These arguments assume that law firms condone or participate in the violations of their disciplined lawyers. If law firms engage in such conduct, it should be proven in the disciplinary process, not presumed based on perceptions of law firms which may not be accurate.

Presently, neither the legislature nor the Supreme Court has given the State Bar authority to discipline a law firm. A system of law firm discipline requires a set of standards to which law firms will be held and procedures which comply with due process to determine whether the law firm has wilfully violated those standards. No such standards or procedures presently exist.

As a result, publishing the law firm name will unfairly result in guilt by association, and a denial of due process. The firm would be disciplined without notice, without an opportunity to be heard, and without any determination regarding its culpability.

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If a law firm's actions warrant punishment, that punishment should be imposed through a proper system of discipline, rather than indirectly through guilt by association. Before embarking on such a course, however, it would be prudent to consider the experience in other jurisdictions first. Since COPRAC's last report on this issue, the Appellate Divisions of the Supreme Court of New York (which are the trial level courts) have adopted rules which directly require law firms to comply with New York disciplinary rules and impose on law firms and their senior management lawyers the duty to adequately supervise or make reasonable efforts to ensure lawyers in the firm conform to the disciplinary rules. It would be preferable to await the implementation of those rules in New York before determining whether such a system is feasible or desirable in California.

2. Publishing the law firm will tend to mislead the public.

The rationale for the proposal indicates that the State Bar expects some members of the public will use the publication of a law firm's name in making decisions about employing that firm. In the absence of any determination about the firm's culpability, this information is likely to confuse and mislead the public.

Publishing the law firm name creates an aura of suspicion and mistrust about the law firm which may not be accurate and which the law firm cannot effectively rebut. Publishing the firm name may cause some members of the public to infer that the firm has engaged in improper conduct, despite the fact that no such determination has been made. Even if the publication is accompanied by a disclaimer to the effect that the firm's culpability has not been determined, the fact that the State Bar has seen fit to publish the firm name may still cause some to suspect the firm's integrity, when such suspicions are not warranted. Most law firms are not public figures with access to and influence in the media through which they can correct the misimpressions that may result from publication of their names.

As a result, publishing the firm name may cause the public to draw inferences which are not appropriate. The State Bar and the legislature have repeatedly recognized in the regulation of lawyer conduct that communications are misleading when they contain information from which the public may draw inferences about the lawyer or law firm which may not be true, even when other more correct inferences may be drawn as well. Under rule 1-400 of the Rules of Professional Conduct, a communication regarding the availability for employment (which includes any use of a law firm name) cannot be deceptive or tend to confuse deceive, or mislead the public. (See Rule 1-400(A)(1) & (D)(2).) A communication which contains testimonials or endorsements of past performance is presumed to violate the rule because of its tendency to cause prospective clients to assume information about the lawyer's level of performance which may not be warranted. (See Rule 1-400, Standard 2.)

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For the same reasons, under the State Bar Act, an electronic media advertisement is presumed to be deceptive if it refers to the result of a specific case without providing adequate information about the circumstances and when such an advertisement refers to the amount recovered in a case. (Bus. & Prof. Code §§6158.1(a)&(c).)

These presumptions exist because the State Bar and the legislature have recognized that the references to past conduct without sufficient information are misleading and confusing. Publishing a law firm name has the tendency to mislead or confuse the public in the same way.

The State Bar should be consistent in its policy in this regard. For the same reasons that the public should not receive information which may unfairly present a lawyer or a law firm in a favorable light, the public should not receive information which may unfairly present the lawyer or law firm in an unfavorable light. Indeed, for the State Bar to act otherwise would send an inappropriate message to the membership that the State Bar is not subject to the same high standards to which it holds its members.

Publishing the law firm name without providing those firms with due process is likely to expose the State Bar to embarrassment and risk. It would create the appearance that the State Bar does not respect one of the fundamental elements of the American legal system and would subject the State Bar to the risk of litigation with innocent law firms unfairly punished by the publication.

3. Publication may be a disservice to the disciplined lawyer and the public.

Disciplinary actions which are short of disbarment recognize the need to rehabilitate the disciplined lawyer so that future violations do not occur. In the case of lawyers who practice in law firms, the firm, through its supervision, is a place where rehabilitation can occur. When this occurs, both the public and the State Bar can benefit. The public gets a rehabilitated lawyer which is accomplished with less active supervision by the State Bar than might otherwise be necessary.

Publicizing the law firm name may create an incentive for the law firm to discharge the disciplined lawyer in order to disassociate itself from the stigma resulting from the publication. Once discharged, the disciplined attorney may have to sink or swim on his or her own, since other firms may be reluctant to hire that lawyer. As a result there is a loss of the supervision and rehabilitative role that a law firm can provide.

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4. The proposal does not achieve its stated objectives.

To the extent publishing the law firm name is intended to identify where the disciplined lawyer is practicing, the proposal does not achieve that objective because it would not reveal current information about the disciplined lawyer's employment. If the disciplined lawyer has changed law firms between the time of the offense and the discipline, the proposal would not provide the public with that information. Instead, publishing the disciplined lawyer's affiliation at the time of the offense could create the misimpression that the lawyer is still affiliated with that firm.

If the proposal were changed to require the publication of a disciplined lawyer's current law firm affiliation, it would unfairly stigmatize a law firm that had no connection with the disciplinary offense. In addition, it would further encourage law firms to disassociate themselves from a disciplined lawyer, and, in turn, further retard the goal of rehabilitation.

To the extent that publishing the law firm name is intended to address the perception that lawyers in larger firms are not being disciplined, there are more effective ways of achieving this goal which do not require publication of the firm name. A detailed discussion of these alternatives is set forth in section III of this letter.

B. Comments in Favor of the Proposal

The reasons for supporting the proposal regarding identification of the firm name include the following which were set forth in detail in COPRAC's February 20, 1996 report:

1. Publicizing the law firm name increases the public's and legal community's access to information about the lawyers who have fallen below the ethical standard of conduct. A member of the public who is in the process of selecting an attorney has a right to know as much as possible about an attorney who that person is considering hiring. The public also has a right to know if a law firm's lawyers are continually being disciplined for unethical conduct. Other than promotional brochures, a client receives no printed material about a firm and thus has no real way to discover the ethical culture of a law firm, information which may be helpful in selecting a firm. For example, if a firm's lawyer is disciplined for overbilling or for maintaining a conflict of interest among clients, the client may have a legitimate concern about whether the firm's practices, and not just the individual attorney's practices, led to the ethical violation.

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Other state licensed occupations require that companies be held accountable to the public for mistakes made by people employed by that company, even if they are no longer employed by the company. The same should be true for law firms, where a client's confidences, and sometimes life savings, are repositied.

2. California is one of the few states where lawyers are not required to report on each other. Thus, ethical sores can fester in law firms. Publicizing the law firm name would have the collateral effect of encouraging law firms to police their lawyers and force the establishment of law firm ethics committees. Self scrutiny by firms can only improve the ethical culture of entities which traditionally appear to have silently encouraged overbilling (by realistically unobtainable billing quotas) and the overlooking of conflicts in order to obtain the maximum number of clients.

The argument that naming the firm denies it due process is, upon scrutiny, weak. The firm itself suffers no sanction, penalty, or direct disapprobation. Moreover, law firms are more than willing to print their names next to the lawyer who brings in a new client or wins a big case. In fact, they make it a point to print their names with individual lawyers' qualifications in publications available to the public such as Martindale-Hubbell. They should therefore be willing to print their name next to lawyers within their firms who have fallen below the standard of care. Any besmirching of the firm's name is balanced by the easy access of firms to the media in the promotion of their practices.

3. New York, one of the leading states in the ethics area, has already adopted law firm discipline. New York adopted law firm discipline because it believed that it would encourage both law firms and attorneys to act more prudently. Whenever a profession is encouraged to act in a more professional manner, the end result is less harm to the public, less disciplinary matters that must be pursued by the State Bar courts, and less attorneys prosecuted, because of their fear of accountability to their partners. New York has specifically amended DR 1-1-4 and DR 1-5-1-5 to do the following:

- a. A law firm must "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules."
- b. A law firm "shall adequately supervise, as appropriate, the work of partners, associates and nonlawyer who work in the firm." In deciding what is "appropriate", one listed factor is "the likelihood that ethical problems might arise in the course of working on the matter."

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- c. A law firm "shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with [imputed disqualification rules]." Failure to have such a system is a violation of the rules, even if a conflict does not arise.
- d. The new rules also clarify and strengthen the duties of partners and supervisory lawyers to correct the effects of unethical conduct and assure other lawyers' compliance with the ethical rules.

Such discipline is really not new, especially where law firms have already been sanctioned because their lawyers have made racist remarks, have sexually harassed secretaries, or have defrauded government agencies. The truth is, the culture of law firms goes a long way in determining the behavior of the lawyers in those firms.

4. Publicizing the names of the firm would not require a major revamping of the discipline system. In reality, publicizing the name of the firm would only require the State Bar to provide that information to whatever publications it currently provides the name of the disciplined lawyer. It would take some work, but when all the smoke and mirrors are cleared, the truth is that it would take little to provide that information. Fear that complete law firm discipline will not be adopted in California, as it has been in New York, should not stop the State Bar from merely publicizing the name of the firm next to the disciplined lawyer.

5. Publicizing the name of the firm would help alleviate the prevalent myth that sole practitioners are the only lawyers disciplined. This view played a part in the recent move to eliminate the State Bar. Whether false or not, there is a perception, borne out by statistics, that sole practitioners are the primary targets of discipline. See Ted Schneyer, "Professional Discipline for law firms?", Cornell L.Rev. 1 (1992), and Anthony Davis, "Professional Discipline for Law firms — The Emperor Needs New Clothes", American Bar Association Professional Lawyers Quarterly, Volume 6, Issue 1, page 1 (November 1994). Law firms have traditionally hidden behind big teams of lawyers and have never been held accountable by the State Bar for their conduct. This conduct should not be condoned, especially by the State Bar's failure to implement law firm discipline.

6. Many members of the Committee, including some who opposed the proposal to publicize the names of law entities, expressed support for the general notion of law firm

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discipline. Publicizing the name of the firm could be the first step toward bringing ethical accountability to law firm practice.

III. Comment on the Second Proposal Regarding Publication of the Size and Type of the Law Firm.

As noted above, a majority of COPRAC members believe that publishing the size and type of the law firm does not accomplish its stated purpose and that there are better means which should be used to achieve its objective.

The rationale set forth for this proposal is that such publication "may also provide relevant public information without unduly tainting the affiliated entity or office", since the law firm would not be identified by name. Such information may be thought to provide data relating to the perception that sole practitioners are the primary targets of discipline, almost to the exclusion of lawyers associated with legal entities. (See Report of the Discipline Evaluation Committee to the Board of Governors (hereinafter "DEC"), p. 39, regarding this perception.) Yet publishing the size and the type of law firm in individual disciplinary actions would merely indicate that in a particular instance, a particular lawyer was affiliated with a particular size of law firm and a particular type of practice. Such information, by itself, has no significance and could be misleading.

The real issue is not whether there are any lawyers in law firms who are being disciplined, but rather whether lawyers in such entities are being disciplined in proportion to the harm they cause. Individualized publication of the type and size of the law firm does not inform the public of about the proportionality of that discipline and could be perceived as demonstrating that lawyers in legal entities are being adequately disciplined even though that might not be true. In addition, individualized publication of the law firm type and size is an isolated statistic which becomes meaningful only when it is disseminated in the aggregate over a period of years. It is the aggregate figures that are relevant to the DEC conclusion that the perception about discipline of lawyers in law firms was a "misapprehension". (DEC, p. 39.)

Aggregate statistics already exist and should be made available to the public using existing information without the need to make reference to the size and type of law entity with which a disciplined attorney is affiliated. Thus, there is no need to publish that affiliation. For example, a study done by the Office of the Chief Trial Counsel for DEC dated July 1, 1994 concluded that, based upon data underlying the study, "all complaints are processed without regard to the size of an attorneys [sic] firm". (Office of the Chief Trial Counsel study at p. 6.) This study noted that the majority of active members in private

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practice in California are in solo practice or in small firms and that only 8% of the complaints received on the State Bar's toll free line over a period of five months involved members who practiced in firms of six or more lawyers. However, the study noted that 16% of the actions taken by the State Bar were against members in firms of six or more lawyers, although complaints related to such members amounted to only 8% of the total volume.

There is thus no need for publication of any additional statistical data in connection with the publication of discipline against a specifically named lawyer. A better solution for dispelling the misapprehension that lawyers in large firms are not the subject of discipline would be to publicize existing information rather than creating and publicizing additional data which is of questionable value.

Very truly yours,



Stanley W. Langford
Chair

SWL/kds

304490

cc: Professor Robert M. Barrett (vice chair)
Randall Difuntorum, Esq. (staff counsel)



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A & C OPEN AGENDA
ITEM II.J. MARCH 1996
COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

DATE: February 20, 1996
TO: Members of the Board Committee on Admissions and Competence
FROM: Committee on Professional Responsibility and Conduct
SUBJECT: Publicizing A Disciplined Attorney's Affiliation

EXECUTIVE SUMMARY

At its August 25, 1995 meeting, the Board Committee referred the Discipline Evaluation Committee's recommendation concerning the publication of law firm names to COPRAC and requested that COPRAC conduct a study and provide a report back to the Board Committee with a recommendation as to whether or not the name of the law firm or office with which the attorney was associated at the time of the disciplinary offense should also be listed when the name of the individual attorney is publicized.

Following its study, the members of COPRAC have been unable to reach a strong consensus. Two votes were taken to establish consensus. Only a small majority of COPRAC members favor a recommendation that the Board Committee support the proposal. Similarly, a narrow majority voted in favor of deferring any action on the proposal until there is resolution of the related issue of whether to adopt statutes, rules and procedures for the discipline of law firms. The original Board Committee referral to COPRAC includes a request that COPRAC conduct a study on the issue of discipline of law firms and provide a report back to the Board Committee towards the end of this Board Committee year. A COPRAC representative will attend the Board Committee's March 1, 1996 meeting to present this item and respond to questions. Board Committee members with preliminary questions regarding this matter may contact Randall Difuntorum, staff attorney to COPRAC, at (415) 241-2161.

**REPORT AND RECOMMENDATION OF THE COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT ON THE PUBLICIZING OF A
DISCIPLINED ATTORNEY'S AFFILIATION**

I. ISSUE

Currently when the fact that an attorney has been disciplined is publicized, the announcement which is published contains the name of the attorney, the city in which the attorney practices and a brief description of the basis for the discipline. It has been proposed that whenever an attorney's name is publicized, the name of any law firm or other organization with which the attorney was affiliated at the time of the violation for which the attorney has been disciplined also be publicized. Should this proposal be adopted?

II. RECOMMENDATION

Following extensive discussion, the members of COPRAC could not achieve a strong consensus position for purposes of making a recommendation. Consequently, COPRAC determined that the recommendation portion of this report provide the Board Committee with the actual votes taken on the recommendations considered. COPRAC voted as follows regarding the following recommendations:

That the Board Committee on Admissions and Competence recommend to the Board of Governors that, pursuant to Business and Professions Code sections 6076, 6077 and 6092.5 subsections (b) (2) and (h), the Board tentatively adopt, subject to public comment, a policy that whenever the name of an attorney who has been disciplined is publicized, the name of any law firm or other organization with which the attorney was affiliated at the time of the violation for which discipline was imposed also be publicized.

6 in favor; 3 opposed; 2 abstentions

That the Board Committee on Admissions and Competence defer acting on this proposal until such time as it has resolved the related issue of whether to consider the adoption of statutes, rules and procedures for the discipline of law firms and other law entities in addition to, or in lieu of, the discipline of individual members.

6 in favor; 5 opposed

III. DISCUSSION

A. Background

Recommendation #7 of the Discipline Evaluation Committee Subcommittee on Prosecutions stated at page 37 of the Committee's Report:

When the names of disciplined attorneys are published, the law firms or offices where they were affiliated at the time of the discipline violation should also be listed, along with whether they have ended that affiliation. (e.g., John Doe of A, B, and C, or John Doe, formerly of A, B, and C.)

In its Discussion, the Committee stated:

While the State Bar does not license or discipline law firms or offices, it would not be unfair to identify the organization with which the disciplined attorney was affiliated at the time of the violation. Additionally, such identification might end the misapprehension that only solo practitioners are disciplined.

This recommendation, together with a recommendation suggested by the Office of Chief Trial Counsel—that the State Bar should consider, after appropriate review, the adoption of appropriate statutes, rules and procedures to impose discipline on a law firm or other law entity¹ which, as collective institution, commits a disciplinary violation—were referred to the Board Committee on Admissions and Competence ("Board Committee") by the Board Committee on Discipline. The Committee on Discipline suggested that the Board Committee refer these recommendations to Committee on Professional Responsibility and Conduct ("COPRAC") with a request that COPRAC make its recommendations on these matters by May 1996.

The Board Committee, however, split the two recommendations and resolved that COPRAC should make its recommendation on the issue of publication of law firm names by February 1996 and make its recommendation on the other issue by August 1996.

COPRAC has been unable to find precedent for such publication in any other jurisdiction and therefore believes that, if adopted, California would become the first state to adopt this procedure.

¹The phrase "law entity" or "law entities" is used in this report to encompass law firms, law partnerships, law corporations, public law agencies, and any other type of association of lawyers, including tradenames which are used by one or more attorneys.

B. Reasons for publicizing the names of law entities

- 1. Publicizing would assist the public in identifying attorneys who have been disciplined, thereby providing information which some members of the public may consider meaningful in their employment of counsel.**

A member of the public who is in the process of selecting an attorney may be interested in knowing as much as possible about the attorney who is under consideration, including her or his status with the disciplinary arm of the State Bar. If an attorney who is part of a law entity has been disciplined, the member of the public may decide to reject that attorney. The fact that this attorney was associated with a particular entity at the time that the ethical breach occurred may then become significant.

Absent publication, this member of the public may unknowingly hire another attorney associated with the same law entity with which the disciplined attorney is associated. The failure to recognize that both attorneys are part of the same entity may be due to any of a number of possible circumstances. For example, the attorney may be "of counsel" to the law entity and have offices at a location separate from the entity, or the entity may be practicing law under a number of different names or may have offices in various locations which the member of the public does not associate with one another even if the same name appears somewhere on the door. Because of the division of labor in many entities, the attorney who was rejected may end up doing some work on the case.

Disclosure of the affiliation of an attorney will assist members of the public in making a knowledgeable selection of counsel by affording a more precise designation of those attorneys who have been disciplined.

Furthermore, even if the disciplined attorney were not to work on a matter for which the client has rejected that attorney, a member of the public may be concerned about the law entity with which that attorney is affiliated. For example, if it is learned that an attorney who belongs to the law entity was disciplined for a conflict of interest among clients, there may be concern about the entity's ability to properly conduct a check for client conflicts of interest. Also, a client may be concerned if two or more members of the same law entity have been the subject of discipline.

The examples noted above are illustrative of why the public can benefit from knowing the law entity with which disciplined attorneys are associated. Providing the name of the law entity is simply an additional piece of truthful information which helps identify the errant attorney to the public.

Indeed, companies that are licensed and employ trades persons are held accountable by the public for mistakes by persons who do work under the companies' licenses. For example, if a plumbing contractor provides shoddy work and a complaint is registered with the state licensing board, the public will be told of the complaint even though the

plumber who worked on the shoddy job was fired. While many attorneys may still think of themselves as members of a profession, we are often treated no different than members of a trade.

2. Publicizing would encourage law entities to self-police and, where necessary, to improve the ethical culture of some entities.

If an attorney in a law entity is disciplined, the entity may be able to distance itself from the act which led to the discipline by the very fact that it is not identified with the discipline. Not so if the law entity itself is publicized at the same time the attorney's name is given to the public or a member of the public.

A law entity may be concerned about the stigma that may result from the publicizing of its name in connection with discipline. It may therefore be motivated to take corrective measures to assure that there is no repetition of that breach by that attorney or other attorneys associated with the entity. Furthermore, if it appears necessary, it may take preventive measures to help assure general compliance with all ethical standards, thereby improving the ethical culture of entities which may appear to tolerate such things as overbilling and overlooking of conflicts in order to obtain clients.

3. Publicizing would encourage attorneys to act more prudently.

Attorneys associated with law entities may be motivated to be more cautious when they straddle the lines beyond which their conduct becomes unethical since if they cross over into forbidden territory it may have an impact upon their relationship to, and retention by, the law entities with which they are associated. As is true of reason 2, *supra*, this may result in less harm to the public, less disciplinary matters to be investigated and prosecuted and less strain on the judicial system associated with discipline.

4. Publicizing is comparable to ramifications already imposed by society upon law entities employing errant attorneys.

An ethical violation by an attorney may lead to consequences unrelated to discipline for the entity with which the attorney is associated. For example, the entity may be disqualified from representing a client or may be sued by the client for malpractice.

Furthermore, sometimes sanctions other than those related to discipline may be publicized when imposed upon law firms for the errant conduct of their lawyers, irrespective of the culpability of the firm. Thus the firm's name will be associated with the attorney's conduct. For example, when a partner at a large law firm made improper racist and sexist remarks while conducting an interview of a University of Chicago Law School student who was seeking employment, the incident was extensively reported in the media and the law school, before it would allow any further interviewing by the firm, required the firm to submit a written description of measures it had taken to prevent any repetition of

this incident. The media has also reported upon the activities of public agencies such as the SEC and Office of Thrift Supervision which imposed sanctions upon firms (Kaye, Scholer and Keating, Muething & Klekamp, respectively) for conduct of individual lawyers.

Thus linkage of attorneys with the law entities with which they are associated is already information which is made available to the public and similar information should be made available in the case of discipline.

5. Publicizing would give further recognition to the linkage which already exists in portions of the disciplinary system without requiring a major revamping of that system.

A number of statutes and rules of professional conduct already recognize that law entities are linked to attorneys subject to discipline. (See, for examples, Business and Professions Code sections 6068 subsection (o)(8), 6132, 6133 and 6168; Rules of Professional Conduct 1-100(B)(1), 1-400, 1-320 and 4-100. As explained in reason 2, supra, law entities, if their names are publicized, may self-police the members of the entity and thus one of the major benefits of imposing direct discipline on law entities can be achieved by indirect means without having to enact new statutes and rules directly encompassing law entity discipline.

6. Publicizing would help alleviate the perception that sole practitioners are primarily the targets of discipline.

There is a perception that sole practitioners are the primary targets of discipline, almost to the exclusion of attorneys associated with legal entities. See, for example, Ted Schneyer, Professional Discipline for Law Firms? (1991) 77 Cornell L.Rev. 1, 6-11, relying in part upon statistics from California in 1981-82. (Id at p. 6.) A number of reasons have been suggested for this paucity of disciplinary proceedings against attorneys associated with entities, especially large entities. For example, unlike the clients of sole practitioners or small entities, the clients of large entities are generally businesses whose grievances are deemed best resolved by changing entities rather than reporting complaints to the disciplinary authorities. Additionally, tasks in large entities are often performed by teams of attorneys, which makes it difficult for disciplinary authorities to determine which attorney or attorneys committed the wrongful act. Another reason might be that the infrastructures of large entities may often be the sources for the ethical practices of the firm and responsibility for inadequate infrastructures is often hard to identify or attribute to a particular individual. (See generally, Schneyer, ibid.) Although there are other reasons which have been suggested, they all lead to the same conclusion that attorneys in large entities are not as likely to be held accountable in the disciplinary process as sole practitioners or those practicing in small entities.

A study done by the Office of the Chief Trial Counsel for the Discipline Evaluation Committee dated July 1, 1994 concludes that, based upon data underlying the study, "all

complaints are processed without regard to the size of an attorneys [sic] firm." (Office of the Chief Trial Counsel study at p. 6.) This study noted that the majority of active attorneys in private practice in California practice alone or practice in small firms and that only 8% of the complaints received on the State Bar's toll free line over a period of five months involved attorneys who practiced in firms of six or more attorneys. However, the study also noted that although complaints only related to 8%, 16% of the actions taken by the Bar were against persons in firms of six or more attorneys.

It is unclear precisely what conclusion can be drawn from this study. One interpretation of the data is that the kinds of complaints received against firms with six or more attorneys during the stated time period were more prosecutable than the kinds of complaints received against attorneys in the smaller law practices.

The Discipline Evaluation Committee noted that the perception that the Bar only disciplined solo practitioners was a "misapprehension", and that publication of law entity names "might end" this misapprehension.

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1. Should the name of a law entity be publicized only in the event an attorney associated with the entity is disciplined for conduct occurring at the time the attorney was associated with that entity?

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Consequently, many of the same reasons for publicizing the name of the legal entity with which an attorney was associated at the time of the act for which discipline is being imposed may be equally applicable even prior to the time discipline is imposed. Consideration should therefore be given to publicizing the name of the law entity at any stage of the proceedings when the name of an attorney becomes a matter of public record.

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Simply to say that John Doe of A, B and C was disciplined for conduct while associated with A, B and C and that John Doe was also disciplined for conduct which occurred while

formerly associated with X, Y and Z would not appear to be adequate, especially if this statement is followed merely by a description of the events leading up to the discipline. The public might infer that after the conduct which occurred while associated with X, Y and Z, John Doe became associated with A, B and C who agreed to this association with knowledge of what happened at X, Y and Z when in fact A, B and C did not become aware of this conduct until long after it associated John Doe. Thus merely publicizing names of law entities may not be adequate without a detailed explanation of when the relevant events occurred and became matters of public record in relation to the periods of time during which the errant attorney was or is associated with an entity. Indeed, using the term "formerly" may imply to the public that an association was terminated upon the entity learning of the conduct, when in fact this may not be true. Thus there should be additional study of the format which will be used to publicize the law entity.

3. Before implementing a system which would publicize the names of law entities, consideration should be given to obtaining input from members of the Bar, as well as the general public.

Publicizing names in the manner proposed would be a major change from the current system which does not attribute the misdeeds of members to those with whom the member is associated. Before such a change occurs, the public, including those who would be directly affected—law entities, should be given an opportunity to comment on this proposal. This is the methodology utilized for all other rules of professional conduct affecting the imposition of discipline.

4. Before implementing this system, consideration must be given to whether it would need approval from the Supreme Court.

Currently all rules of professional conduct which impact the imposition of discipline require the approval of the Supreme Court. (Business and Professions Code section 6076) Although publicizing names does not directly impact the imposition of discipline, it arguably indirectly imposes a form of discipline upon law entities by associating the entity with the person disciplined, i.e. guilt by association. There would appear to be no law, regulation or rule requiring approval by the Supreme Court, but it may be deemed prudent to seek some form of approval from the Court.

D. Reasons for not publicizing the names of law entities

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Whenever a law entity's name is publicized with the name of someone who has been disciplined, the name of the entity may be tarnished because of the perception which may thereby be created for the general public. Members of the public may infer that the entity condoned the conduct which led to the discipline. At a minimum, **some type of disclaimer should be used** so that this perception is precluded. More fundamentally however, the entity may have no control whatsoever over the conduct which led to the discipline. Thus the discipline may be imposed for conduct not usually associated with the practice of law—for example driving under the influence of narcotics or filing a false tax return. Why should a law entity be held accountable for such conduct without having an opportunity to demonstrate that it was not responsible for the conduct and did not condone it?

Even though both federal and California law appear to indicate that it would not be unconstitutional to publicize a law entity's name in conjunction with the publication of the name of someone who has been disciplined,² the damage to the entity's reputation may very well have serious economic impact. Although it is problematic whether a law entity could demonstrate that its earnings were impaired merely by the publication of its name in connection with the imposition of discipline, it is not right for an entity to be subject to such a risk without having the opportunity to demonstrate that its name should not be linked to the disciplined attorney.

²The United States Supreme Court has stated: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau (1971) 400 U.S. 433, 437, 27 L. Ed. 515, 519, 91 S.Ct. 507. Although the Court later "re-rationaliz[ed]...earlier cases" (Monaghan, Of "Liberty" and "Property", 62 Cornell L.Rev. 405, 424), including the Constantineau case in Paul v. Davis (1976), 424 U.S. 693, 47 L. Ed. 405, 96 S.Ct. 1155, its recasting of the underpinnings of Constantineau in Paul has been the subject of substantial criticism. (See Mosrie v. Barry (1983) 718 F.2d 1151 [concurring opinion of Judge Ginsburg].) In spite of such criticism, it appears, however, that in California in order to prevail when one's good name or reputation is besmirched, one must show that the misconduct "caused such a stigma to...[one's] reputation that it impaired...[one's] ability to make a living." (Southern California Rapid Transit District, et al. v. Superior Court (1994) 30 C.A.4th 713, 730, 36 C.R.2d 665, 675, correctly interpreting Paul v. Davis, which had been misconstrued in earlier cases as holding that the misconduct must either "cause a stigma to one's reputation or which impairs one's ability to earn a living." Gray v. Gustine (1990) 224 CA3d 621, 629, 273 C.R. 730, 734 (emphasis added); see also Gamel v. Bunzel (1977) 68 C.A.3d 999, 137 C.R. 627) As noted in the text, it is doubtful whether a law entity could sustain the burden imposed in Southern California Rapid Transit District, et al. v. Superior Court, *supra*.

3. Publicizing the names of law entities will cause them to disassociate themselves from disciplined attorneys.

If the publication of the law entity's name is in the format suggested by the Discipline Evaluation Committee (John Doe of A, B and C or formerly of A, B and C), an entity will obviously prefer the latter designation since it tells the public that the entity no longer is associated with the disciplined attorney and therefore did not condone the conduct. It thus may be in the best interests of the entity to disassociate itself if its name is to be publicized, whereas had there been no publicizing, it might have retained the association and attempted to "straighten out" the disciplined attorney. Thus publicizing may result in a disservice to both the attorney and the Bar. By retaining an attorney it may be more likely that internal measures can be taken to assist the attorney rather than throwing the attorney overboard to swim on his or her own since other entities may view the attorney as a piranha (or perhaps a pariah).

E. Other considerations related to not publicizing the names of law entities.

1. Relationship to disciplining law entities.

Since consideration will still be given to the issue of whether law entities should be subject to discipline, it may be prudent to await the resolution of that issue before deciding whether to publicize the names of law entities. If, for example, it is decided to discipline entities, it may seem totally unfair to link an entity's name to a disciplined attorney when the entity itself is absolved of any discipline. It may only make sense to consider publicizing entity names if discipline of entities is rejected. The Bar will look foolish if it first establishes a system for publicizing law entities and then withdraws that system when it establishes a system for disciplining law entities. Furthermore, in the event it is decided not to discipline law entities, the reasons for that rejection may be relevant to the publicizing issue. For example, if publicizing is now adopted, some may conclude that this is adequate and alleviates the need for disciplining entities. Either way it is prudent to consider the matters as one package, rather than separate parcels.



THE STATE BAR OF CALIFORNIA

A & C OPEN AGENDA
ITEM II.J. MARCH 1996

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

100 VAN NESS AVENUE, 28th FLOOR, SAN FRANCISCO, CALIFORNIA 94102-5238

TELEPHONE: (415) 241-2157

DATE: February 20, 1995
TO: Members of the Board Committee on Admissions and Competence
FROM: Committee on Professional Responsibility and Conduct
SUBJECT: Publicizing A Disciplined Attorney's Affiliation

EXECUTIVE SUMMARY

At its August 25, 1995 meeting, the Board Committee referred the Discipline Evaluation Committee's recommendation concerning the publication of law firm names to COPRAC and requested that COPRAC conduct a study and provide a report back to the Board Committee with a recommendation as to whether or not the name of the law firm or office with which the attorney was associated at the time of the disciplinary offense should also be listed when the name of the individual attorney is publicized.

Following its study, the members of COPRAC have been unable to reach a strong consensus. Two votes were taken to establish consensus. Only a small majority of COPRAC members favor a recommendation that the Board Committee support the proposal. Similarly, a narrow majority voted in favor of deferring any action on the proposal until there is resolution of the related issue of whether to adopt statutes, rules and procedures for the discipline of law firms. The original Board Committee referral to COPRAC includes a request that COPRAC conduct a study on the issue of discipline of law firms and provide a report back to the Board Committee towards the end of this Board Committee year. A COPRAC representative will attend the Board Committee's March 1, 1996 meeting to present this item and respond to questions. Board Committee members with preliminary questions regarding this matter may contact Randall Difuntorum, staff attorney to COPRAC, at (415) 241-2161.

**REPORT AND RECOMMENDATION OF THE COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT ON THE PUBLICIZING OF A
DISCIPLINED ATTORNEY'S AFFILIATION**

I. ISSUE

Currently when the fact that an attorney has been disciplined is publicized, the announcement which is published contains the name of the attorney, the city in which the attorney practices and a brief description of the basis for the discipline. It has been proposed that whenever an attorney's name is publicized, the name of any law firm or other organization with which the attorney was affiliated at the time of the violation for which the attorney has been disciplined also be publicized. Should this proposal be adopted?

II. RECOMMENDATION

Following extensive discussion, the members of COPRAC could not achieve a strong consensus position for purposes of making a recommendation. Consequently, COPRAC determined that the recommendation portion of this report provide the Board Committee with the actual votes taken on the recommendations considered. COPRAC voted as follows regarding the following recommendations:

That the Board Committee on Admissions and Competence recommend to the Board of Governors that, pursuant to Business and Professions Code sections 6076, 6077 and 6092.5 subsections (b) (2) and (h), the Board tentatively adopt, subject to public comment, a policy that whenever the name of an attorney who has been disciplined is publicized, the name of any law firm or other organization with which the attorney was affiliated at the time of the violation for which discipline was imposed also be publicized.

6 in favor; 3 opposed; 2 abstentions

That the Board Committee on Admissions and Competence defer acting on this proposal until such time as it has resolved the related issue of whether to consider the adoption of statutes, rules and procedures for the discipline of law firms and other law entities in addition to, or in lieu of, the discipline of individual members.

6 in favor; 5 opposed

III. DISCUSSION

A. Background

Recommendation #7 of the Discipline Evaluation Committee Subcommittee on Prosecutions stated at page 37 of the Committee's Report:

When the names of disciplined attorneys are published, the law firms or offices where they were affiliated at the time of the discipline violation should also be listed, along with whether they have ended that affiliation. (e.g., John Doe of A, B, and C, or John Doe, formerly of A, B, and C.)

In its Discussion, the Committee stated:

While the State Bar does not license or discipline law firms or offices, it would not be unfair to identify the organization with which the disciplined attorney was affiliated at the time of the violation. Additionally, such identification might end the misapprehension that only solo practitioners are disciplined.

This recommendation, together with a recommendation suggested by the Office of Chief Trial Counsel--that the State Bar should consider, after appropriate review, the adoption of appropriate statutes, rules and procedures to impose discipline on a law firm or other law entity¹ which, as collective institution, commits a disciplinary violation--were referred to the Board Committee on Admissions and Competence ("Board Committee") by the Board Committee on Discipline. The Committee on Discipline suggested that the Board Committee refer these recommendations to Committee on Professional Responsibility and Conduct ("COPRAC") with a request that COPRAC make its recommendations on these matters by May 1996.

The Board Committee, however, split the two recommendations and resolved that COPRAC should make its recommendation on the issue of publication of law firm names by February 1996 and make its recommendation on the other issue by August 1996.

COPRAC has been unable to find precedent for such publication in any other jurisdiction and therefore believes that, if adopted, California would become the first state to adopt this procedure.

¹The phrase "law entity" or "law entities" is used in this report to encompass law firms, law partnerships, law corporations, public law agencies, and any other type of association of lawyers, including tradenames which are used by one or more attorneys.

B. Reasons for publicizing the names of law entities

1. Publicizing would assist the public in identifying attorneys who have been disciplined, thereby providing information which some members of the public may consider meaningful in their employment of counsel.

A member of the public who is in the process of selecting an attorney may be interested in knowing as much as possible about the attorney who is under consideration, including her or his status with the disciplinary arm of the State Bar. If an attorney who is part of a law entity has been disciplined, the member of the public may decide to reject that attorney. The fact that this attorney was associated with a particular entity at the time that the ethical breach occurred may then become significant.

Absent publication, this member of the public may unknowingly hire another attorney associated with the same law entity with which the disciplined attorney is associated. The failure to recognize that both attorneys are part of the same entity may be due to any of a number of possible circumstances. For example, the attorney may be "of counsel" to the law entity and have offices at a location separate from the entity, or the entity may be practicing law under a number of different names or may have offices in various locations which the member of the public does not associate with one another even if the same name appears somewhere on the door. Because of the division of labor in many entities, the attorney who was rejected may end up doing some work on the case.

Disclosure of the affiliation of an attorney will assist members of the public in making a knowledgeable selection of counsel by affording a more precise designation of those attorneys who have been disciplined.

Furthermore, even if the disciplined attorney were not to work on a matter for which the client has rejected that attorney, a member of the public may be concerned about the law entity with which that attorney is affiliated. For example, if it is learned that an attorney who belongs to the law entity was disciplined for a conflict of interest among clients, there may be concern about the entity's ability to properly conduct a check for client conflicts of interest. Also, a client may be concerned if two or more members of the same law entity have been the subject of discipline.

The examples noted above are illustrative of why the public can benefit from knowing the law entity with which disciplined attorneys are associated. Providing the name of the law entity is simply an additional piece of truthful information which helps identify the errant attorney to the public.

Indeed, companies that are licensed and employ trades persons are held accountable by the public for mistakes by persons who do work under the companies' licenses. For example, if a plumbing contractor provides shoddy work and a complaint is registered with the state licensing board, the public will be told of the complaint even though the

plumber who worked on the shoddy job was fired. While many attorneys may still think of themselves as members of a profession, we are often treated no different than members of a trade.

2. Publicizing would encourage law entities to self-police and, where necessary, to improve the ethical culture of some entities.

If an attorney in a law entity is disciplined, the entity may be able to distance itself from the act which led to the discipline by the very fact that it is not identified with the discipline. Not so if the law entity itself is publicized at the same time the attorney's name is given to the public or a member of the public.

A law entity may be concerned about the stigma that may result from the publicizing of its name in connection with discipline. It may therefore be motivated to take corrective measures to assure that there is no repetition of that breach by that attorney or other attorneys associated with the entity. Furthermore, if it appears necessary, it may take preventive measures to help assure general compliance with all ethical standards, thereby improving the ethical culture of entities which may appear to tolerate such things as overbilling and overlooking of conflicts in order to obtain clients.

3. Publicizing would encourage attorneys to act more prudently.

Attorneys associated with law entities may be motivated to be more cautious when they straddle the lines beyond which their conduct becomes unethical since if they cross over into forbidden territory it may have an impact upon their relationship to, and retention by, the law entities with which they are associated. As is true of reason 2, supra, this may result in less harm to the public, less disciplinary matters to be investigated and prosecuted and less strain on the judicial system associated with discipline.

4. Publicizing is comparable to ramifications already imposed by society upon law entities employing errant attorneys.

An ethical violation by an attorney may lead to consequences unrelated to discipline for the entity with which the attorney is associated. For example, the entity may be disqualified from representing a client or may be sued by the client for malpractice.

Furthermore, sometimes sanctions other than those related to discipline may be publicized when imposed upon law firms for the errant conduct of their lawyers, irrespective of the culpability of the firm. Thus the firm's name will be associated with the attorney's conduct. For example, when a partner at a large law firm made improper racist and sexist remarks while conducting an interview of a University of Chicago Law School student who was seeking employment, the incident was extensively reported in the media and the law school, before it would allow any further interviewing by the firm, required the firm to submit a written description of measures it had taken to prevent any repetition of

this incident. The media has also reported upon the activities of public agencies such as the SEC and Office of Thrift Supervision which imposed sanctions upon firms (Kaye, Scholer and Keating, Muething & Klekamp, respectively) for conduct of individual lawyers.

Thus linkage of attorneys with the law entities with which they are associated is already information which is made available to the public and similar information should be made available in the case of discipline.

5. Publicizing would give further recognition to the linkage which already exists in portions of the disciplinary system without requiring a major revamping of that system.

A number of statutes and rules of professional conduct already recognize that law entities are linked to attorneys subject to discipline. (See, for examples, Business and Professions Code sections 6068 subsection (o)(8), 6132, 6133 and 6168; Rules of Professional Conduct 1-100(B)(1), 1-400, 1-320 and 4-100. As explained in reason 2, supra, law entities, if their names are publicized, may self-police the members of the entity and thus one of the major benefits of imposing direct discipline on law entities can be achieved by indirect means without having to enact new statutes and rules directly encompassing law entity discipline.

6. Publicizing would help alleviate the perception that sole practitioners are primarily the targets of discipline.

There is a perception that sole practitioners are the primary targets of discipline, almost to the exclusion of attorneys associated with legal entities. See, for example, Ted Schneyer, Professional Discipline for Law Firms? (1991) 77 Cornell L.Rev. 1, 6-11, relying in part upon statistics from California in 1981-82. (Id at p. 6.) A number of reasons have been suggested for this paucity of disciplinary proceedings against attorneys associated with entities, especially large entities. For example, unlike the clients of sole practitioners or small entities, the clients of large entities are generally businesses whose grievances are deemed best resolved by changing entities rather than reporting complaints to the disciplinary authorities. Additionally, tasks in large entities are often performed by teams of attorneys, which makes it difficult for disciplinary authorities to determine which attorney or attorneys committed the wrongful act. Another reason might be that the infrastructures of large entities may often be the sources for the ethical practices of the firm and responsibility for inadequate infrastructures is often hard to identify or attribute to a particular individual. (See generally, Schneyer, Ibid.) Although there are other reasons which have been suggested, they all lead to the same conclusion that attorneys in large entities are not as likely to be held accountable in the disciplinary process as sole practitioners or those practicing in small entities.

A study done by the Office of the Chief Trial Counsel for the Discipline Evaluation Committee dated July 1, 1994 concludes that, based upon data underlying the study, "all

complaints are processed without regard to the size of an attorneys [sic] firm." (Office of the Chief Trial Counsel study at p. 6.) This study noted that the majority of active attorneys in private practice in California practice alone or practice in small firms and that only 8% of the complaints received on the State Bar's toll free line over a period of five months involved attorneys who practiced in firms of six or more attorneys. However, the study also noted that although complaints only related to 8%, 16% of the actions taken by the Bar were against persons in firms of six or more attorneys.

It is unclear precisely what conclusion can be drawn from this study. One interpretation of the data is that the kinds of complaints received against firms with six or more attorneys during the stated time period were more prosecutable than the kinds of complaints received against attorneys in the smaller law practices.

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March 17, 2006 Tuft Memo to RRC:

TO: Rules Revision Commission
FROM: Mark L. Tuft
DATE: March 17, 2006
RE: The Concept of Law Firm Discipline

Overview

The controversial topic of law firm discipline involves consideration of three primary issues: what is the standard of discipline that should be imposed against a law firm, what types of violations should result in law firm discipline, and what are the appropriate sanctions that should be imposed. There are also policy considerations whether law firm discipline is effective to deter institutional misconduct, whether the State Bar has sufficient resources to impose discipline against law firms fairly and to monitor compliance and whether jurisdictional and due process issues make enforcement less feasible.

Concepts of Law Firm Discipline

The idea of law firm discipline is to ensure that the environment in which lawyers practice is conducive to proper ethical conduct. The objective is to insure that a culture of ethical behavior is encouraged and practiced by all members of the firm from senior partners to new associates.

A number of different standards of law firm discipline have been proposed over the years. Professor Ted Schneyer proposes, for example, that the tort theory of respondeat superior should be applied to law firms and law firms should be liable for the ethical violations of its lawyers. Schneyer, *Professional Discipline for Law Firms?*, 77 Cornell L.Rev. 1 (1991). Schneyer argues that attorneys who commit ethical violations while working for large firms know that if they are clever, they can bury their misconduct within the firm, making it impossible to pin the violation(s) on any particular individual. Professional discipline of law firms should be viewed in the same manner as corporate criminal liability; that is, ethical problems in law firms can be inherently structural and, thus, similar to corporate malfeasance. The respondeat superior standard has not gain much acceptance.

Another approach is to impose a collective sanction against a responsible group within the firm (e.g., the firm's labor and employment group) instead of the entire firm. This would diminish the feeling of unjust punishment by members of the firm that have no connection with the misconduct and would lead to an increase in group policing at a more focused level. Proponents argue that this approach would better achieve the goal of law firm discipline since lawyers in large firms tend to interact primarily with other attorneys in their practice group. See, *Collective Sanctions and Large Law Firm Discipline*, 111 Harv. L.Rev. 2336 (2005).

Another approach would require all law firms to designate at least one partner as a compliance specialist for the firm. Since law firm culture is viewed as having a significant impact in shaping conduct within the firm, law firm discipline should mirror the way the legal profession regulates itself through the use of a designated compliance officer. Chamliiss & Wilkens, *A New Framework For Law Firm Discipline*, 16 Geo.J.Legal Ethics 335 (2003). However, proponents of this approach are unable to articulate a formal plan, concluding instead that each firm must be able to police itself and determine the best means of enforcement on its own.

A more practical approach from this writer's perspective, and one that was initially proposed by Ethics 2000, is to extend responsibility under Rules 5.1(a) and 5.3(a) to the law firm itself as well as to partners and other lawyers in the firm who possess comparable

managerial authority. Attached as part of these materials are copies of public discussion draft no. 3 of proposed revised rule 5.1 and the discussion draft of rule 5.3, dated September 2, 2000. Ethics 2000 decided not to include law firms in the proposed revisions to these rules primarily as a result of comments received from NOBC and ALAS. Copies of the Reporter's notes on the comments received from NOBC and a statement filed on behalf of ALAS opposing extending these rules to law firms are also attached.

New York and New Jersey

Currently, New York and New Jersey are the only two jurisdictions that have included law firm discipline in their rules. New York has its own rule, DR 1-104, while New Jersey adopted rules 5.1 and 5.3 with the addition of "law firm" as a responsible party. Copies of both rules are included in the materials. New York also has DR 5-105(E), which requires law firms to maintain a conflict checking system.

The New York approach "encourages law firms to put institutional measures in place in order to avoid lapses in ethics or competence." See the attached comments of NYBA, Committee on Ethics 2000. Although New York has so far meted out a few private reprimands to law firms under DR 1-104, the NYBA reports that law firms have put prophylactic measures in place to maintain an ethical environment. *Id.*

There are a few reported cases in New Jersey dealing with law firm discipline:

Matter of Jacoby & Meyers, 147 N.J., 374 (1977) – law firm reprimanded for failure to process matters through a New Jersey Trust Account in one of the approved financial institutions of the New Jersey State Bar. However a fine of \$10,000 was not enforced because of uncertainty regarding the authority of the court to impose such a fine.

Matter of Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 155 N.J. 357, (1998) – law firm reprimanded and ordered to pay cost of proceedings for soliciting clients immediately following a gas leak disaster which led to the destruction of several homes in New Jersey. Attorneys and the firm were disciplined for arriving at a Red Cross shelter and offering legal advice, soliciting clients and placing an RV outside of the Red Cross shelter as a mobile law office. However, the case does not discuss NJRC 5.1 but focuses instead on improper solicitation. Thus, the reasoning behind disciplining the law firm remains unclear.

California

A proposed policy that either the name of the law firm or office where a disciplined attorney was affiliated at the time of the discipline violation be published was circulated for public comment in 1997 but was not adopted by the State Bar Board of Governors. A second proposal that the Bar consider publishing the size and type of the law firm or office where a disciplined attorney was affiliated at the time the disciplinary violation was published was ultimately referred to RAD.

Courts in California have on occasion imposed sanctions on law firms based on a climate of wrongdoing. A good example (thanks to Bob Kehr) is *Moser v. Bret Hart Union High School District*, 366 F. Supp 2d 944 (E.D. 2005). In *Moser*, a District Court in the Eastern District sanctioned a school district, its attorney and the law firm under Rule 11 and other authority based on frivolous objections, mischaracterizations of facts and misstatements of the law. The court relied on Model Rule 3.3, CRPC 5-200 and section 6068(d) in support of the court's authority under its local rules.

Appropriate Sanctions and Consequences

Whether law firm discipline will actually deter institutional misconduct depends in large part on the sanctions that should be administered and the consequences to the firm of

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having discipline imposed. Attached is a report from the ABA Standing Committee on Professional Discipline and Competence recommending amendments to the ABA Model Rules for lawyer disciplinary enforcement to provide for the discipline of law firms with possible sanctions, including reprimand, admonition, disgorgement of fees and fines.

Some proponents believe that the imposition of fines and disgorgement of fees will cause law firms to behave more ethically. Proponents argue that firms do not want to lose profits and fines will hurt the bottom line and will hit partners where it hurts the most. Others believe that a private or public reprimand will get a firm's attention and will encourage compliance as no firm wants a disciplinary record or to have unethical conduct by its lawyers that occurs during the ordinary course of the firm's business made know to the public.

Opponents argue that it will be hard to discipline a law firm in a fashion that will effectively deter ethical misconduct. Imposition of a fine, for example, will either cause the law firm to break up, particularly if the fine is more than the firm can bear, or it will be factored in by large law firms as the cost of doing business. Some believe that a private reprimand will not materially change the behavior of the firm since the reprimand will be unknown to the legal community and the public. At the same time, a public reprimand may go too far in damaging the reputation of innocent attorneys associated with the firm, particularly where the ethical violation is limited to one practice group or to one office in a multi-office law firm. A public reprimand or other sanction could also result in harm to clients of the firm if the firm goes out of business.

Opponents further argue that the current disciplinary system is inadequate to fairly sanction law firm misconduct. If the goal is to ensure that law firms behave ethically, there must be some sort of policing or monitoring system to prevent the law firm from resuming impermissible conduct when the initial scrutiny has ended. The State Bar may not have sufficient resources or personnel to monitor law firm conduct or to discipline large law firms. There are also jurisdictional and due process concerns. For example, should a law firm be disciplined if the attorneys who conducted the unethical behavior have left the firm? See, generally, *How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?* 16 Geo.J.Legal Ethics 203 (2002).

March 28, 2006 Voogd Memo to RRC:

TO: Members Of The Commission
FROM: A.M. Voogd
RE: The Concept Of Law Firm Discipline
DATE: 01-14-06

If we were to draft a rule of professional conduct subjecting law firms to discipline and the rule is approved by the Supreme Court in the normal course, the first law firm disciplined by the rule would challenge the State Bar's authority to impose discipline relying on BP §6076. Ultimately, that challenge would have to be resolved by the Supreme Court. The Court could reject the challenge on the basis of its inherent authority over the discipline of attorneys. See Frye v. Tenderlion Housing. On the other hand, it could reject the rule in an effort to avoid conflict with the Legislature. Similar considerations apply with regard to other proposed rules, such as Rule 5.5(b), where we purport to regulate non-members of the State Bar. The proper and efficient administration of justice requires that this problem be resolved in advance.

The problem can be resolved in one of two ways. The first would be to ask the Legislature to amend the State Bar Act. The Supreme Court might prefer that the Board of Governors follow this approach. This could be done concurrently with requesting the Legislature to amend

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§6068(e) as required by proposed Rule 1.14. The other manner of resolution would be to request an order from the Court indicating that it is exercising its inherent authority in adopting rules regulating non-members of the State Bar. It would appear that Frye validates such an approach as well as indicating that the Bar's existing authority extends only to disciplining members.

After reviewing Mark's excellent memo, I have concluded that ethical benefits of disciplining law firms does not warrant the time and effort involved in pursuing either alternative.

March 28, 2006 Sapiro E-mail to RRC:

Dear Friends:

1. To me, the starting question should be whether there is a need for law firm discipline. There have been a number of cases around the United States in which major law firms have successfully been sued or sanctioned by courts. Major law firms have brought the profession into disrepute. However, I do not know whether there is enough of a pattern to justify discipline of the firms, themselves, as opposed to discipline of individual lawyers in the firms.
2. My intuition is that proposed new Rule 5.1 will suffice to move in the right direction. However, the rationales for not disciplining law firms offered by the Attorneys Liability Assurance Society, Inc., and NOBC are not persuasive and ring hollow to me.
3. I would like to know what prompted New York to establish a rule that permits law firm discipline. Does anyone know whether there was a study that preceded its adoption of that rule?

With best regards to all of you,

Jerry

May 4, 2006 Letter from OCTC to Sondheim (transmitted to RRC by Lauren McCurdy):

Harry B. Sondheim, Chair
State Bar of California Commission for
the Revision of the Rules of Professional Conduct c/o Mary Yen, Esq.
Office of the General Counsel
The State Bar of California
180 Howard Street, 8th Floor
San Francisco, California 94105

Re: Office of the Chief Trial Counsel Response to Commission Inquiry Regarding Law Firm Discipline

Dear Mr. Sondheim:

By e-mail dated April 13, 2006, Mary Yen of the Office of General Counsel notified the Office of the Chief Trial Counsel (“OCTC”) that the Commission for the Revision of the Rules of Professional Conduct (“Commission”) was in the process of deciding whether or not to develop a proposed rule regarding law firm discipline. Ms. Yen indicated that the Commission is interested in the views of the Office of the Chief Trial Counsel on the subject. In particular, we understand that the Commission has asked the following questions:

1. Does the Office of the Chief Trial Counsel see a need for the ability to discipline a law firm?
2. Have there been instances where OCTC felt it did not have sufficient authority to investigate or prosecute an alleged violation because it could not find a responsible attorney or where it would have investigated or prosecuted a law firm if it had the authority to do so?

Thank you for soliciting the views of the Office of the Chief Trial Counsel on the subject of law firm discipline. As you undoubtedly know, although the American Bar Association considered the issue of law firm discipline in its Ethics 2000 process, no proposal for the imposition of discipline against a law firm was ultimately included in the Ethics 2000 Commission’s report. Moreover, although the National Organization of Bar Counsel (“NOBC”) did not take a formal vote on the issue of law firm discipline, the NOBC raised various concerns about a proposed rule on the subject.¹ I am happy, upon your request, to share a copy of the NOBC Ethics 2000 Committee’s written position on the issue.

The Office of the Chief Trial Counsel’s responses to the two questions posed by the Commission is as follows:

Inquiry No. 1: Does OCTC See a Need for the Ability to Discipline a Law Firm?

¹ Among other things, the NOBC Ethics 2000 Committee expressed the opinion that the discipline of individual members is more effective than the discipline of an entire firm and that law firm discipline should not take the place of the identification and prosecution of individual members who engage in misconduct. Additionally, the NOBC Committee expressed the concern that, if the primary means of disciplining a law firm is through monetary sanctions, some firms may simply internalize the expense of monetary sanctions as a cost of doing business and might seek to offer firm-paid fines in order to avoid the individual discipline of firm attorneys.

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Yes. The Office of the Chief Trial Counsel believes that, in an appropriate case, the ability to discipline a law firm may be effective in both imposing appropriate responsibility for current acts of misconduct and in deterring future misconduct.

The Office of the Chief Trial Counsel believes there are situations where the imposition of discipline upon an individual member of a firm who committed misconduct may be an insufficient response to the misconduct. There have also been occasions where the Office of the Chief Trial Counsel has been unable to determine the identity of the individual member or members of the firm who should be held culpable or responsible for the misconduct, even though it is clear that misconduct has occurred.

These situations occur when the law firm

- (a) institutionalizes a policy or procedure or allows a “law firm culture” to develop that leads to a violation of the Rules of Professional Conduct;
- (b) approves, encourages or sanctions a course of conduct that is in violation of the Rules of Professional Conduct; or
- (c) condones or turns a “blind eye” to a course of conduct that violates the Rules of Professional Conduct.

These situations may also occur where the law firm fails to formulate and implement proper policies or procedures to prevent violations of the Rules of Professional Conduct, but no individual member(s) of the firm can be clearly identified as responsible for the misconduct. In some cases, members of a law firm questioned about alleged misconduct may identify other member(s) of the firm as the individual(s) most responsible or as the individual(s) in charge of the particular function within the firm, but there is not clear and convincing evidence to hold any particular member of the firm responsible. In such circumstances, it may be impossible to discipline any individual member(s) of the firm and the misconduct may not be addressed. Moreover, the unwillingness of members of the firm to identify the responsible member or to fully cooperate with the State Bar’s investigation may make it difficult, if not impossible, to effectively identify, investigate and prosecute the culpable party.

The Office of the Chief Trial Counsel believes that discipline should only be sought against a law firm in those instances where the discipline of individual member(s) of the firm would clearly be inadequate to address the misconduct that has occurred or where the conduct would otherwise go unaddressed because the culpable member cannot be individually identified.

Additionally, the Office of the Chief Trial Counsel believes that, in the vast majority of cases, law firm discipline should only occur in conjunction with discipline imposed against an individual member or members of the firm, unless no culpable member can be identified. This would avoid the potential criticism that solo or small firm practitioners are subject to discipline as individuals while large firm practitioners escape individual responsibility in lieu of the discipline of the firm itself or that large firms may simply pay a fine so that its individual members can avoid discipline.

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The Office of the Chief Trial Counsel believes that law firm discipline should generally involve no more than a public reproof or other public reprimand and/or a monetary fine² and that, except in the most egregious circumstances, should not involve the suspension of the firm's right to practice law as this would be likely to harm or punish members and non-members of the firm (as well as clients) who are not personally responsible for the misconduct. Moreover, law firm suspension would likely be viewed as unduly harsh in most cases, unless the misconduct is so widespread and pervasive as to infect the entire firm.

In determining whether to propose a Rule of Professional Conduct authorizing the imposition of discipline upon a law firm, the Commission may wish to consider the impact of Business and Professions Code sections 6167 through 6172, which appears to provide a comprehensive statutory scheme for the imposition of discipline against law corporations.

Business and Professions Code section 6167 provides as follows:

“A law corporation shall not do or fail to do any act the doing of which or the failure to do which would constitute a cause for discipline of a member of the State Bar, under any statute, rule or regulation now or hereafter in effect. In the conduct of its business, it shall observe and be bound by such statutes, rules and regulations to the same extent as if specifically designated therein as a member of the State Bar.”

Additionally, Business and Professions Code section 6169, subdivision (c) provides, in pertinent part, that a “hearing committee” appointed by the Board of Governors shall make written findings and “shall either recommend that the proceeding be dismissed or that a cease and desist order be issued or that the certificate of registration of the corporation be suspended or revoked.”

Therefore, one of the crucial issues to be addressed is whether Business and Professions Code sections 6167 through 6172 were intended to constitute the exclusive means for prosecuting and disciplining law corporations that engage in misconduct. If so, any law firm may seek to avoid more onerous types of “law firm discipline” by incorporating and bringing itself within the statutory scheme applicable to law corporations.

Inquiry No. 2: Have There Been Instances Where OCTC Felt It Did Not Have Sufficient Authority to Investigate or Prosecute an Alleged Violation Because It Could Not Find a Responsible Attorney or Where It Would Have Investigated or Prosecuted a Law Firm If It Had the Authority To Do So?

Yes. The following examples are illustrative of situations that have arisen in the past or that may be expected to arise in the future:

- (a) The law firm has (or appears to condone or sanction) a practice of over-billing or churning of fees or has clearly insufficient safeguards to prevent it;

² Although it has never been implemented, Business and Professions Code section 6086.13 currently authorizes the imposition of monetary sanctions of up to \$5,000 for each violation of the State Bar Act or the Rules of Professional Conduct against a member who is suspended or disbarred or who resigns with disciplinary charges pending.

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- (b) The law firm is grossly negligent in the management of its client trust account or has clearly insufficient safeguards to prevent client trust account abuses by members or non-members employed by the firm;
- (c) The law firm has clearly insufficient safeguards or screening methods in place to prevent non-licensed individuals from practicing law at the firm;
- (d) The law firm is named in multiple lawsuits for malpractice, breach of fiduciary duty or other civil wrongs, but individual members are not named;
- (e) Despite actual knowledge or clear warnings, the law firm fails to investigate or take action against the improper conduct of its members or non-members, such as sexual harassment, employment discrimination, the creation of a hostile work environment or other illegal practices.

The Office of the Chief Trial Counsel believes that the ability to discipline the law firm would have aided us on numerous occasions in the past and would likely aid in the investigation and prosecution of these and other potential violations in the future.

The Office of the Chief Trial Counsel believes that a public reproof or other reprimand by the State Bar and/or the California Supreme Court regarding a law firm's misconduct will deter firms from establishing, encouraging, promoting or allowing policies or procedures that result in violations of the Rules of Professional Conduct. In some cases, this may be the only way to effectively deal with certain types of misconduct. The ability to discipline the law firm itself may also help remove some of the incentive to conceal or cover up misconduct by individual members of the firm in the hope that insufficient evidence against any specific member will be found. The Office of the Chief Trial Counsel believes that most law firms will want to avoid the imposition of a public reproof and/or monetary fine. This will cause firms to take appropriate action to correct problems that could lead to discipline and for which currently there is little or no incentive to correct because of the State Bar's difficulty in investigating and prosecuting such matters.

We hope that the foregoing is useful in your consideration of the issue of law firm discipline and in your determination of whether a Rule of Professional Conduct on that subject should be formulated and proposed. We would be pleased to answer any questions that your Commission may have and to provide you with any additional information that you may find helpful.

Very truly yours,
Scott J. Drexel, Chief Trial Counsel

May 6, 2006 Speaker Notes of Robert Kehr at 10th Annual Ethics Symposium:

The law firm discipline materials begin on p. 102 [of the Symposium course book].

- A. For the most part, our Rules of Professional Conduct, the State Bar Act, and the underlying fiduciary duties speak in terms of individual lawyers.
 - 1. For example, B & P Code §6068 establishes some of the basic lawyer obligations, such as the duty to support the Constitution and laws of the

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U.S. and of California, to maintain the respect due to Courts and Judges, and so on. That section begins: “It is the duty of an attorney to do all of the following:”

2. §6103 then permits professional discipline for any violation by an attorney of any of his or her duties. Neither of these sections addresses law firms of any kind.
- B. The fact that the rules generally provide for the discipline of individual lawyers does not necessarily mean that law firms cannot be disciplined. For example:
1. the law corporation rules contained in Article 10 of the State Bar Act require at §6167 that law corporations conduct themselves in a way that complies with all the statutes, rules, and regulations binding on individual lawyers; and
- C. The idea of disciplining law firms first was raised in a thorough way by Prof. Ted Schneyer in article you can find at 77 Cornell L. Rev.1 (1991). What I propose to do now is to identify some of the reasons that have been given for law firm discipline, and then I would like to ask the other panelists and then the audience what their thoughts are about this possibility. I want the audience to know that the Commission is at a very early stage in considering law firm discipline, so we are particularly interested in hearing your thoughts. Before I list some possible reasons for law firm discipline, I want to ask the audience to assume that California will adopt some form of M.R. 5.1, which is the rule that imposes on law firm partners, managers and supervisory lawyers responsibility for the operation of their law firm and the conduct of subordinate lawyers of which they are aware. Here are some of the reasons that have been given for law firm discipline:
1. Mark Tuft in his memo to the Commission at p. 201 of the program materials mentions the use of law firm discipline to assure that the environment in which lawyers practice is conducive to proper ethical conduct. And this is the reason expressed by the N.Y. bar for its law firm discipline rule, and Ted Schneyer in his Cornell article describes this as the chief reason for firm discipline.
 2. Ted Schneyer adds to this the idea that many, perhaps most, of the tasks performed in large firms are assigned to teams. He says in his Cornell article that teaming not only encourages lawyers to take ethical risks they would not take individually, but also obscures responsibility, which makes it difficult for both complainants and disciplinary authorities to determine which lawyers committed a wrongful act. He gives as an example the fact that, at least in large firms, pleadings and motions are often the joint product of background preparation and drafting by several attorneys. Consequently, it might be possible to assign responsibility to the firm itself.
 3. Some rules are directed to law firm, but there is no current system in place for disciplining law firms. For example:

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- a) Rule 1-320: “Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer except”
 - b) Rule 2-300 governs sales of law practices to law firms as well as to individual lawyers.
4. There are other situations in which law firms have duties. Prof. Schneyer cites the example of the law firm’s obligation to continue representing a client after the departure from the firm of the lawyer previously responsible for that representation, citing ABA Informal Opn. 1428 (1979).
5. Another possibility is in the small firm context where there is no management structure that might identify an individual lawyer who is responsible for a particular act. For example, who should be disciplined in a five partner law firm where the billing or trust account practices are improper. Would and should the disciplinary authorities discipline each partner?
6. Prof. Schneyer argues that if the Bar doesn’t discipline the firms, Federal agencies will have an added incentive to move more extensively into that field, which might not be a good thing for a variety of reasons.
7. Prof. Schneyer also argues that there are some acts that only can be seen as acts of the firm as a whole. He cites the example of a law firm with one client that accounted for as much as eight percent of the firm’s billings. The SEC disbarred the firm briefly from SEC work b/c of the firm’s involvement in the client’s extensive violation of the securities laws. Another example is in *Moser v. Bret Harte Union High School District*, 366 F. Supp.2d 944 (E.D. Cal. 2005). In this lengthy and detailed opinion the District Court described the conduct of a law firm called Lozano, Smith. The Court stated at p. 984-85: “Lozano Smith’s malfeasance was clearly and repeatedly drawn to their attention by Plaintiff. Yet Lozano Smith deliberately ignored the notice it received, assuming the Court would be too busy or too indifferent to take the time necessary to find the truth. Based on the totality of the circumstances, there is no way to interpret Lozano Smith’s submissions of multiple misleading pleadings under the signature of no less than three attorneys as anything other than a bad faith attempt to mislead the Court about the facts and the law to gain the advantage of prevailing without regard to the true facts and accurate statements of the law. Given Lozano Smith’s steadfast refusal to address *any* of Plaintiff’s repeated complaints about its malfeasance (other than to flatly deny it in one Summary Judgment brief, see Doc. 91 at 1), no other conclusion can be drawn but that its actions were in bad faith to harass the Plaintiff and to obstruct the ascertainment of truth in this case. That Lozano Smith is an expert in this area of law only compounds the severity of its violations.” Then, in addition to sanctioning Lozano Smith’s client under Rule 11, the Court entered the following order against the firm and one of its lawyer:

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- a) Ms. Elaine Yama, Lozano Smith and Bret Harte Unified School District, as a party, engaged in bad faith litigation tactics through their systematic and repeated misstatements of the record, frivolous objections to Plaintiff's statement of facts, and repeated mischaracterizations of the law.
- b) Under FRCP Rule 11, 28 U.S.C. § 1927, *and* the Court's inherent powers, Ms. Yama is ordered to personally pay Plaintiff and his counsel \$5,000 for the increased costs and expenses related to causing Plaintiff's need to repeatedly respond to Defendant's blatant misrepresentations, throughout the four year history of this litigation; Ms. Yama is PUBLICALLY REPROVED and ordered to attend 20 hours of CLE ethics training in programs approved by the California State Bar Association by December 31, 2005, and must submit proof of such training to the Court by December 31, 2005; training received by Ms. Yama while this decision was pending will count towards this requirement. Proof of training must be submitted when the training is complete, not piecemeal.
- c) Under Rule 1128 U.S.C. § 1927, *and* its inherent powers, Lozano Smith is ordered to pay Plaintiff and his counsel \$5,000 for the increased costs and expenses related to Plaintiff's need to repeatedly respond to Ms. Yama's misrepresentations, and briefs on which partners of the firm were appearing counsel, throughout the four year history of this litigation. Lozano Smith is PUBLICALLY REPROVED. Lozano Smith is further ordered to provide a minimum of 6 hours of CLE ethics training for all its associates and shareholders, in programs approved by the California State Bar Association, by December 31, 2005, and must submit proof of such training to the Court by January 30, 2006; training received while this opinion was pending will count towards this requirement. Proof of training must be submitted when the training is completed, and not piecemeal.

May 26, 2006 Tuft E-mail to Randy Difuntorum transmitting comments of Ron Minkoff re NY firm discipline law:

From: "Mark Tuft" <MTuft@cwclaw.com>
Date: Fri, 26 May 2006 16:55:10 -0700
To: "Difuntorum, Randall" <Randall.Difuntorum@calbar.ca.gov>

Randy, please include the following email response to my inquiry to Ron Minkoff on how the New York law firm discipline rule is working. Thanks.

Mark: The guy to talk to about this is Hal Lieberman, who wrote the rule and has been involved in most every case (and there aren't many) in which it has been invoked. The one case you can find involves Wilens & Baker, which I think is the only reported decision applying the rule. From what I know, only the First Department has even attempted to implement the rule. The other Appellate Divisions continue to resist it for two reasons: (i) they feel individuals commit misconduct, not firms; and (ii) our sanctions

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system does not involve fines or probationary conditions, has little flexibility and is designed to deal only with individuals (how do you suspend a firm?). All the disciplinary offices are afraid of taking on law firms, particularly large, white-shoe firms. As a result, the Bar has been little affected. Those of us who believe in law firm discipline have been disappointed in all of this. Hope this helps. Ron

May 30, 2006 Melchior E-mail to RRC:

There are things to be said in support of this proposition, and most of them have probably been mentioned by others who have weighed in on this topic. I raise a note of caution.

1. First, the data provided by OCTC show that the very vast preponderance of complaints from the public involve single practitioners and very small (2-5 people) law firms. This is not a surprise to anyone who thinks about the subject; but thus much of the steam behind the idea that law firms are protected by the Bar, or are somehow too big or powerful to be touched, goes out of the issue. Secondly, as the same material also points out, law firms – particularly the larger firms – have both internal controls which should and mostly do nip the more serious problems in the bud, and a sophisticated clientele which can and does effectively solve its own complaints about the integrity and quality of legal services it receives, by changing counsel or suing their lawyers.
2. Still, there is a sentiment that particularly because they are big and powerful, law firms should not be above the law or beyond the enforcement bodies' control. But while one may think of Enron or Arthur Andersen when considering penalties for organizations, the recital of those two names shows that pursuing sanctions against such organizations is less than an unalloyed social boon: one went bankrupt before it became a by-word for bad conduct; and the other was destroyed by the charges against it although at this writing at least, it remains unclear whether the particular charges were well founded. (I have read elsewhere about Arthur Andersen and do not mourn it; but I question whether government should be the source of its destruction.)
3. Leave that aside. Business corporations are impersonal institutions. Whatever we think and see around us, the practice of law has not yet reached that depersonalized level and I for one hope it will not, at least in my lifetime. Even the biggest law firms are still only agglomerations of people who are practicing law. Probably the biggest firm which ever fell due to its own unethical conduct and hubris was the unlamented Finley, Kumble; but even there there were many lawyers who practiced in an ethical and professional manner.
4. We need to ask the question: is it appropriate for the licensing body to have the power to destroy such an institution, however much some of its members, or even its leadership, act beyond integrity or decency?
5. I don't yet know the answer to that question; but I believe that the material we have been given does not address that or any similar question; and I think that we must do so before we go further.

August 27, 2009 McCurdy E-mail to Martinez, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments for this meeting.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

No lead drafter assignments for this meeting.

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **III.QQ. Rule 4.2 Communication with a Represented Person [2-100] (Post Public Comment Draft #17.4 dated 1/5/09) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.2 to MR 4.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
2. **III.RR. Rule 4.3 Dealing with Unrepresented Person [n/a] (Post Public Comment Draft #5.1 dated 10/15/08; awaiting further discussion at the same time as MR 4.4 and the Commission’s proposed Rule 4.2(e)) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.3 to MR 4.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
3. **IV.C. Rule 4.1 Truthfulness in Statements to Others [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.1 to MR 4.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
4. **IV.D. Rule 4.4 Respect for Rights of 3rd Persons [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Tuft (Co-lead), Voogd**
Assignment: (1) a chart comparing proposed Rule 4.4 to MR 4.4; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
5. **IV.M. Possible Rule re: Law Firm Discipline (no counterpart rules) (possible rule last considered at the April 2006 meeting; see also New Jersey and New York rules) Codrafters: Mohr; Peck; Ruvolo; Tuft**
Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

**RRC – 1-310X [Law Firm Discipline]
E-mails, etc. – Revised (11/3/2009)**

October 24, 2009 Kehr E-mail to Difuntorum, cc Chair & Staff:

I just saw that the November agenda includes consideration of law firm discipline. I remember that COPRAC considered this in about 1996-97, and I wonder if its report is available.

October 26, 2009 Difuntorum E-mail to Kehr, cc Chair & Staff:

See attached COPRAC comment letter and memorandum:

RRC - 1-310X [Firm Discip] - COPRAC Memo re Disciplined L's (02-20-96).pdf
RRC - 1-310X [Firm Discip] - COPRAC Comment re Disciplined L's (12-13-96).pdf

October 26, 2009 Kehr E-mail to Difuntorum, cc Chair & Staff:

Thank you for getting back to me so quickly on this. It seems that I was wrong in remembering that COPRAC had considered whether law firms should be disciplined.

October 26, 2009 Sondheim E-mail to Kehr, cc Staff:

Note the consideration given to law firm discipline on page 7, item 6.

October 26, 2009 Kehr E-mail to Sondheim, cc Staff:

I caught that, but I had hoped that there would be some meat on the bones. I have some memory that COPRAC had detailed discussions about the pros and cons of law firm discipline. Perhaps I'm confusing the discussion over publicizing the identity of the firm with the separate question of disciplining the firm.

October 30, 2009 McCurdy E-mail to KEM, cc Difuntorum:

Do you have a readily available copy of the New York and New Jersey Law Firm Discipline rules? I intended to include them in the agenda package and inadvertently left them out.

October 30, 2009 KEM E-mail to McCurdy, cc Difuntorum:

I've attached the NY and NJ rules that concern law firm discipline. I had highlighted the NJ provisions but never got around to doing it for the NY rules (I had done it for the NY Code but not for NY's recently-adopted Rules that are based on the MR's).

Please let me know if you have any questions.

October 30, 2009 Difuntorum E-mail to KEM, cc McCurdy:

Thanks for providing the NJ and NY selected rules re law firm discipline.

The NY rules often use the phrase “A lawyer or law firm shall . . . “ (compare the NY advertising rules with the MRs) but I assume that there are key provisions of the New York rules that are regarded as primarily directed at regulating professional conduct that is difficult to attribute to an individual lawyer and is more amenable to a law firm culpability focus. I quickly scanned the 4/1/09 NY rules and came up with the ones listed below. Let me know if you think that these selections are the right excerpts to target when articulating NY’s “law firm discipline” policy as opposed to simply the rules which reference an obligation jointly extended to both a lawyer and that lawyer’ firm.

Excerpts of Rules included: 1.10(e) & (g); 5.1; 5.3(a).

October 30, 2009 Difuntorum E-mail to KEM, cc McCurdy:

I think you also have to include 1.11, 1.12 and 1.18, all of which require that the law firm implement the screen, etc. I also think that you need to include 8.4, especially in light of NY Rule 8.4(g), which proscribes unlawful discrimination in the practice of law. Looks as if NY "copied" Cal. Rule 2-400, no?

As to whether some rules might be primarily directed at law firms because it's difficult to attribute to an individual lawyer, that is probably true. However, I'm not sure I would leave out 4.5 and the advertising rules because of that. Note that the MR's require that a firm ID a lawyer responsible in the ad, etc. If that's not done, then the law firm would be on the hook by the terms of the rule.

I would include all the rules that I sent you, but I would go through and highlight those parts of the rules that you have ID'd below and that I've identified in the first paragraph. As for saving pages, we could probably provide the Commission members w/ just the blackletter. This is more a concept question; what the comments contain would be relevant only if the Commission were to decide to pursue law firm discipline.

October 30, 2009 Difuntorum E-mail to Drafters (Martinez, Peck, Ruvolo, Peck):

Law Firm Discipline Codrafters:

Please see the attachments and message below from Kevin providing the New York and New Jersey law firm discipline rules. Harry has asked staff to use the New York and New Jersey rules as the materials for this item, together with any subsequent codrafter materials.

With regard to the New York rules, you might give special attention to the following: 1.10(e); 1.11, 1.12 and 1.18, 5.1; 5.3; 5.7; 5.8; and 8.4, especially 8.4(g). While there are many New York rules that use the phrase “A lawyer or law firm shall. . . “, the foregoing rules may be of special interest in helping to ascertain potential new standards that would be primarily directed at regulating professional conduct difficult to attribute to an individual lawyer and amenable to a law firm culpability focus.

October 31, 2009 Sondheim E-mail to RRC:

In regard to law firm discipline, please take into account the N.Y. and N.J. rules which are attached hereto.

Attachments:

RRC - 1-310X (5-1, etc) - NJ Rules Firm Discipline2.pdf

RRC - 1-310X [5-1, etc.] - NY Rules Firm Discipline - 1.10, 1.11, 1.12, 1.15, 1.18, 4.5, 5.1, 5.3, 5.4, 5.7, 5.8, 7.1, 7.2, 7.4, 7.5, 8.4 (2009).pdf

October 31, 2009 Julien E-mail to RRC:

I like the New Jersey definition of "law firm" (New Jersey 51a.) The NY document did not come clearly on my computer. I do not know what happened, but maybe it is as tired as I having given over this time to RCC. (smile)

I also agree that a law firm should not be able to do anything that one lawyer in their firm could not do according to the Rules. However, for the life of me, (and I have spent a lot of time thinking about this) I cannot figure out how you would fairly discipline an entire law firm. If there were a way, then I would be in favor of including them in the disciplinary process. I await our (again) further discussion on this because I can be persuaded.

November 1, 2009 Sondheim E-mail to Difuntorum, cc KEM:

If the Commission were to decide to have law firm discipline, could we bring back Rules 5.1, 5.3 and 5.4 which were part of the Batches 1, 2 and 3? I am referring to these rules because of what N.J. has done. It seems to me that adapting the approach of N.Y. would require going back to too many rules.

November 2, 2009 Difuntorum E-mail to Sondheim, cc KEM:

Regarding the topic of "law firm discipline" in general, I believe the Commission's study and record must include some consideration of rule amendments to address this concept because it is a significant development in the legal profession that has arisen both at the national level with ABA E2K and here in California. (It is even an international issue. See attached article concerning developments in NSW.) Like you, I don't think conceptual discussions will advance the ball and such discussions would be too time consuming in any event. Accordingly, I think the Commission's record should show that some rule concept and language was actually considered (and rejected or pursued, whatever the case may be). As New York and New Jersey are the only real paradigms to consider in terms of possible rule language, consideration of those rules is a reasonable approach.

You ask whether the Commission could "bring back" rules in Batches 1, 2, and 3 to facilitate further consideration of law firm discipline rule concepts and language. Here is the proposed Board resolution language from the NOV 132 Board Agenda Item:

"PROPOSED BOARD RESOLUTION

**RRC – 1-310X [Law Firm Discipline]
E-mails, etc. – Revised (11/3/2009)**

Should the Board of Governors concur with the recommendation of the Board Committee on Regulation and Admissions, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of comments received, that the Board of Governors of the State Bar of California hereby adopts the proposed new and amended Rules of Professional Conduct of the State Bar of California, in the form attached to these minutes and made a part hereof, and hereby directs that said rules be transmitted by staff to the Supreme Court with a request that it be approved by the Court; and it is

FURTHER RESOLVED, that the Board's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment distribution of the entire body of proposed rules."

If the Board adopts all of the rules submitted in November, this action would encompass the supervision rules (5.1, 5.3), the advertising rules (7.1.- 7.5), and other rules potentially impacted by consideration of law firm discipline. In view of this, there are at least two options.

OPTION ONE: Assuming the Board adopts all of the rules at the Board's November meeting, it is important to note that the Board's resolution is expressly subject to the proviso that "possible revisions" might be considered after the comprehensive public comment distribution of the entire rules. This means that the Commission could include in Batch 6 a "laundry list" of possible rule amendments intended to implement law firm discipline reforms. Under this approach, the actual language of these rule amendments would be distributed for public comment as part of Batch 6 and the Commission would identify any rules that have previously been "adopted" by the Board but without any law firm discipline component. Like any public comment proposal, the commenters would express their views in support or in opposition to addition of law firm discipline changes. If, for example, law firm discipline changes to Rule 5.1 are rejected and the Commission agrees, the Rule 5.1 as previously adopted by the Board would remain unchanged for the remainder of the process. But, if commenters approve the changes to Rule 5.1 and the Commission agrees, then as part of the Batch 6 submission to the Board for adoption following public comment, the Commission could include a separate additional recommendation that the previously adopted language of Rule 5.1 be substituted with the new language for purposes of the final comprehensive public comment package, so that after the final public comprehensive public comment period is over, the Board could consider adopting the new law firm discipline version of Rule 5.1. By doing so, the law firm discipline changes are processed as a part of the final report and recommendation.

OPTION TWO: A different approach would be to take a pre-emptive strike right now. Let's assume the Commission discussion and votes taken at the November Commission meeting suggest strong support for law firm discipline reforms, the Commission could then decide to request that any affected Batch 1 - 3 rules be withdrawn from consideration by the Board as part of Board Agenda Item NOV 132. Basically, the Commission would orally report to the Board at the Board's November meetings that there have been new developments concerning possible changes to certain rules to facilitate consideration of law firm discipline and that Board adoption of certain rules should be postponed and moved into Batch 6 for processing. (Compare the processing of the definition of "law firm" and Rule 1.2.1, both proposals from Batch 1 that are now on the Batch 6 track.)

**RRC – 1-310X [Law Firm Discipline]
E-mails, etc. – Revised (11/3/2009)**

Neither of the above options gives me great confidence that the Board or the public commenters will understand, from a procedural standpoint, what is going on with a rule that was originally in Batch 1 - 3 but subsequently becomes the focus of law firm discipline initiatives. However, I believe both options are technically available to the Commission.

Let me know what you think and I will continue to explore this by talking with Bob Hawley.

November 2, 2009 Sondheim E-mail to Difuntorum, cc KEM:

Here are my thoughts. Assuming the Commission wants law firm discipline, could we not adopt a rule as part of Batch 6 specifically about law firm discipline which simply states that Rules x, y and z also apply to law firms. Thus we would not need to change any rule we have already adopted. In that regard, if the Commission wants law firm discipline, I would personally prefer that we make it applicable to only the 3 rules adopted by N.J. Since we would be creating something new for California, I think we should go slow to see how it works out, rather than going through all the rules covered by N.Y. Also, if we go the N.Y. route, we will never finish because there are so many rules involved, rather than the 3 in N.J.

This leads me to a further question, how will a law firm be disciplined under the current Bar disciplinary rules? Is there enough flexibility in the current rules to permit, for example, a monetary sanction, since I cannot see the Bar suspending the practice of law for a law firm? What type of discipline is imposed in N.Y. and N.J.?