THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING, AND DEVELOPMENT

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DATE: August 13, 2009

TO: Members of the Commission for the Revision of the Rules of Professional Conduct

FROM: Randall Difuntorum, Commission Staff Counsel

SUBJECT: 10-day Ballot Circulation of Proposed Rule 5.6 [1-500]

Proposed Rule 5.6 [1-500] is being distributed for your consideration. The revisions adopted at the Commission's July 24 & 25, 2009 meeting have been implemented and approval of the revised rule is being sought through a 10-day ballot procedure.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be adopted subject to further public comment when the Commission's entire rules are distributed.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart that compares the Commission's proposed rule and comment to the counterpart ABA Model Rule. The chart includes a general introduction and provides specific explanations for any departures from the ABA Model Rule. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 5.6, Draft 5 (8/7/09), is provided as Enclosure 2.

Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Monday, August 24, 2009, proposed Rule 5.6 [1-500] will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

Thank you.

Encs.

Enclosure 1

Proposed Rule 5.6 [1-500]
(Comparison Chart Showing Changes to Model Rule 5.6)

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.6* Restrictions on a Lawyer's Right To Practice

August 2009
(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 5.6 adopts verbatim the language of ABA Model Rule 5.6, as amended in February 2003.

In addition, Comments [1]-[3] to Proposed Rule 5.6 are identical to the comments to ABA Model Rule 5.6 with one addition: the Commission voted to add to Comment [1] a reference to an exception to paragraph (a) articulated by the California Supreme Court in *Howard v. Babcock* (1993) 6 Cal. 4th 409, 425, in which the Court upheld an agreement requiring a departing partner to pay former partners or forego certain benefits otherwise due if the departing partner competes is specified geographical regions following withdrawal, is permissible and is not inconsistent with Rule 1-500 of the California Rules of Professional Conduct. The Commission considered the policy decision made by the Supreme Court in *Howard* and determined that this policy continues to be the appropriate policy for California and, as such, it should be explicit in the rule comments. As the Supreme Court reasoned, permitting such an exception "strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment."

* Proposed Rule 5.6, Draft 5 (8/7/09).

ABA Model Rule **Rule 5.6 Restrictions On Right To Practice**	**Commission's Proposed Rule*** **Rule 5.6 Restrictions on a Lawyer's Right to Practice**	**Explanation of Changes to the ABA Model Rule**
A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or	A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or	The introductory language and paragraph (a) are identical to the Model Rule.
(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy	(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy	Paragraph (b) is identical to the Model Rule.

* Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 5.6 Restrictions On Right To Practice** **Comment**	**Commission's Proposed Rule** **Rule 5.6 Restrictions on a Lawyer's Right to Practice** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.	[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for ~~restrictions incident to provisions concerning retirement benefits for service with the firm~~ an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425.	Comment [1] is based on Model Rule 5.6, cmt. [1], except that the second sentence has been revised to include language and a citation to the California Supreme Court decision in *Howard v. Babcock*. The stated rationale for permitting such an exception, that it "strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment," is language taken directly from the decision. See Introduction.
[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.	[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.	Comment [2] is identical to the Model Rule.
[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.	[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.	Comment [3] is identical to the Model Rule.

Enclosure 2

Proposed Rule 5.6 [1-500]
Clean Version of Draft 5 (8/7/09)

Rule 5.6 Restrictions on a Lawyer's Right to Practice

A lawyer shall not participate in offering or making:

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

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

Comment

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

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

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

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August 13, 2009 Difuntorum 10-Day Ballot Memo to RRC:

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10-DAY BALLOT E-MAILS:

August 23, 2009 Sapiro E-mail to RRC List:

I agree with the substance of the proposed rule. However, I recommend a change in its wording.

In Comment [3], the Model Rule has the phrase, "This Rule does not apply to prohibit restrictions . . . ." I think it would be an improvement if we delete the phrase "apply to." Then, the sentence would begin, "This Rule does not prohibit restrictions . . . ."

I request that this rewording be considered at our next meeting.