Rule 1.8.2 Use of Current Client's Information
(Commission's Proposed New Rule Adopted on August 14, 2015 – Clean Version)

A lawyer shall not use a client's information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted by these Rules or the State Bar Act.

Comment

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of a current client.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.2
(No Current Rule)
Use of Current Client's Information

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-100 (prohibition on disclosure of confidential information) and Business and Professions Code § 6068(e) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterparts, a series of rules that address confidentiality issues as they might arise in a different contexts: Model Rules 1.6 (prohibition on *disclosure* of a *current* client's confidential information), 1.8(b) (prohibition against *use* of confidential information to a current client's disadvantage), and 1.9(c)(1) and (2) (prohibition against *use* of confidentiality to a *former* client's disadvantage and prohibition on *disclosure* of a *former* client's confidential information). The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having separate rules that regulate different aspects of protecting the confidential information of a lawyer's clients: proposed rule 1.6 (prohibiting disclosure of a current client's confidential information); 1.8.2 (prohibiting use of a current client's confidential information to the client's disadvantage); and 1.9(c) (prohibiting use or disclosure of a former client's confidential information); and

(2) proposed Rule 1.8.2 (Use of Current Client's Information), which regulates the use of a current client's confidential information. Proposed Rule 1.8.2 is derived from Model Rule 1.8(b) but incorporates language that more accurately reflects the source of confidentiality duties in California.

Proposed rule 1.8.2 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. ***Recommendation of the ABA Model Rule Confidentiality Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of lawyers' confidentiality duties. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific confidentiality duties. This is of particular concern in California, which traditionally has the strictest duty of confidentiality in the country. At the same time, this approach will promote a national standard for how the confidentiality duty in different contexts is organized within the Rules.[1]

[1] Every other jurisdiction in the country has adopted the ABA confidentiality rules framework that regulates the duty through three provisions: Model Rules 1.6, 1.8(b) and 1.9(b).

2. ***Recommendation to expressly address the duty owed to current clients not to use their confidential information to the client's disadvantage***. As noted, the proposed rule regulates a lawyer's *use* of a client's confidential information. The existing duties of confidentiality and loyalty in the Rules (rules 3-100 and 3-310(E)) and State Bar Act (Business and Professions Code § 6068(e)) do not expressly address the type of client protection advanced by proposed rule 1.8.2. These current provisions are lacking to the extent that they could be narrowly construed to prohibit improper *disclosure* of client information (confidentiality) or the actual representation of an adverse interest (conflicts of interest). Such an interpretation could impair disciplinary actions that would otherwise address the type of misconduct – use of confidential information – that is targeted by this proposed rule.

The Commission did consider that a new rule might be unnecessary because § 6068(e)(1) is not limited to protection of client information. Section 6068(e) is arguably broad enough to encompass the trust and confidence that a client reposes in an attorney, the policy that underlies the rule. Compare the discussion of existing law duties owed to a former client in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] to the proposed Rule. On balance, however, the Commission determined that a rule which expressly prohibits the use of a client's confidential information to the client's disadvantage is preferable to relying on implied duties parsed from the Nineteenth Century language of section 6068(e)(1). As such, the proposed rule's express prohibition will better promote compliance and facilitate enforcement.

Text of Rule 1.8.2. Proposed rule 1.8.2 is a single paragraph rule that largely tracks Model Rule 1.8(b). It substitutes the term "information protected by Business and Professions Code § 6068(e)(1)" for the Model Rules' term "information relating to the representation of a client" because § 6068(e)(1) is the source of the confidentiality duty in California. It also adds "or the State Bar Act" to the exception clause because lawyers in California are uniquely regulated by the State Bar Act. The Model Rule's phrase "or required" has been deleted because there is no provision in either the Rules or the State Bar Act that requires a lawyer to compromise the duty of confidentiality owed a client.

There is a single comment to proposed Rule 1.8.2 that clarifies that a lawyer also violates the lawyer's duty of loyalty to the client when the lawyer uses the client's information to the client's disadvantage.

National Background – Adoption of Model Rule 1.8.2

Every jurisdiction except California has adopted some version of Model Rule 1.8(b). Thirty-five jurisdictions have adopted Model Rule 1.8, paragraph (b) verbatim;[2] 12 jurisdictions have adopted a rule provision substantially similar to 1.8(b)[3]; three jurisdictions have adopted a rule substantially different from Model Rule 1.8(b).[4]

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[2] The 35 jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia.

[3] The twelve jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Massachusetts, Michigan, New Jersey, Ohio, Texas [the corresponding rule is Texas Rule 1.05(b)], Virginia and Wyoming.

[4] The three jurisdictions are: Georgia, Mississippi and North Dakota.

Rule 1.8.2 ~~Conflict Of Interest:~~Use of Current ~~Clients: Specific Rules~~Client's Information
(Redline Comparison of the Proposed Rule to ABA Model Rule)

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~~(b)~~ A lawyer shall not use a client's information ~~relating to representation of a client~~protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted ~~or required~~ by these Rules or the State Bar Act.

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COMMENT

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of a current client.

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~~Use of Information Related to Representation~~

~~[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.~~

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