THE STATE BAR OF CALIFORNIA

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2167

STATE BAR Commission for the Revision of the Rules of Professional Conduct - RULES AND CONCEPTS THAT WERE CONSIDERED, BUT ARE NOT RECOMMENDED FOR ADOPTION

(Updated to reflect the Board of Governor's action at its July 22 - 24, 2010 meeting.)

Overview of the Commission's Study:

The State Bar's Special Commission for the Revision of the Rules of Professional Conduct conducted a thorough study of the California Rules of Professional Conduct. The Commission considered each of the current California rules in rule number order. In considering each rule, any relevant ABA Model Rule or ALI Restatement section was compared and contrasted as to policy, scope, and drafting details.

The Commission also considered state variations in the Model Rules as some jurisdictions have declined to adopt certain aspects of the ABA Model Rules, or have adopted them with material revisions. Further, the Commission considered law review articles, ethics opinions issued by jurisdictions outside California that were based either on that jurisdiction's version of the Model Rules or on the earlier ABA Model Code, and national studies and other major developments, trends, and initiatives, such as multijurisdictional practice ("MJP") and multidisciplinary practice ("MDP"). The ABA Model Code, the American Trial Lawyers Association American Lawyer's Code of Conduct, and other authorities were also reviewed in connection with certain topics. Of particular interest to the Commission were the developments in California case law and advisory ethics opinions published by COPRAC and bar association ethics committees in California.

In carrying out its study, the Commission considered rules and concepts that it concluded should not be included in the Commission's final report and recommendation for revised California Rules of Professional Conduct. The following discussion summarizes these rules and concepts.

ABA Model Rules Not Recommended for Adoption:

List of Model Rules Considered but not Recommended for Adoption

Model Rule	**Title**
1.3	Diligence
1.8(d)	(re Literary or Media Rights)
1.8(i)	(re Proprietary Interest in the Subject Matter of Representation)
1.10(a)(2)	Imputation of Conflicts of Interests: General Rule (re use of an ethical wall or screen to rebut imputation)
1.18(d)(2)	Duties to Prospective Clients (re use of an ethical wall or screen to rebut imputation)
2.3	Evaluation for Use by Third Parties
3.2	Expediting Litigation
4.1	Truthfulness in Statements to Others
4.4	Respect for Rights of Third Persons
5.7	Responsibilities Regarding Law Related Services
7.6	Political Contributions to Obtain Government Legal Engagements or Appointments by Judges
8.3	Reporting Professional Misconduct

1. Model Rule 1.3 Diligence

Model Rule 1.3 provides:

> A lawyer shall act with reasonable diligence and promptness in representing a client.
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> Comment
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> [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.
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> [2] A lawyer's work load must be controlled so that each matter can be handled competently.
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> [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.
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> [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends

> on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.
>
> [5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

The Commission is not recommending adoption of Model Rule 1.3 because it determined that diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence. Both current California Rule 3-110 and the Commission's proposed Rule 1.1 define competence as inclusive of diligence as a key factor in assessing a lawyer's performance of legal services. The Commission's proposed Rule 1.1, in part, provides:

> (b) For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

In addition, Comment [2] of proposed Rule 1.1 is derived from Comment [1] to Model Rule 1.3 and clarifies the obligation of diligence in a manner that is comparable with the Model Rule's description of diligence. The Commission's Comment [2] provides:

> Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rules 1.2 and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Based on the foregoing, the Commission's decision not to recommend adoption of Model Rule 1.3 is not a rejection of diligence as an important standard of professional conduct. Instead, the Commission's decision seeks to perpetuate California's current approach to regulating lawyer competence which includes diligence as a key factor.

Minority. A minority of the Commission favors adoption of Model Rule 1.3. The minority opposes continuing the California approach of treating diligence as a component of competence under proposed rule 1.1 rather than as a separate rule. Although competence and diligence are often viewed together, they are distinct concepts of professional

responsibility. The Model Rules and the Restatement of the Law Governing Lawyers provide that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. For example, competence requires that a lawyer have sufficient learning and skill to ascertain the applicable statute of limitations; diligence requires that being aware of the period of limitations, the lawyer not allow it to expire due to the lawyer's neglect and inattention. Most every state but California underscores the importance of requiring competent lawyers to act with sufficient commitment and dedication in pursuing a client's matter through to conclusion by adopting Model Rule 1.3 rather than simply treating diligence as an element of competence. Comment [3] to Model Rule 1.3 states that "perhaps no professional shortcoming is more widely resented than procrastination." Even when the lawyer is competent, neglect and unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer and the legal profession. California case law is consistent with the requirements of Model Rule 1.3. See Vapnek, et al., California Practice Guide: Professional Responsibility (The Rutter Group 2009) ¶ 6:92 ff. Yet, by recommending against adoption of Model Rule 1.3, the majority sends the wrong message that diligence is not a distinct obligation in California. Even if that is not the message, conflating competence with diligence in proposed rule 1.1 will serve only to confuse lawyers about these separate obligations and will result in less public protection.

At its June 25 – 26, 2010 meeting, the Commission considered a public comment letter that urged adoption of Model Rule 1.3. That letter was submitted by a group thirty ethics law professors including the following drafters of the letter: Geoffrey Hazard; Deborah Rhode; and Richard Zitrin. The group disagreed with the Commission's view that diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence. The group stated: "We strongly agree with the Commission's minority report with respect to this Rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: paying adequate attention. MR 1.3 and its comments need to be approved by the Board."

The Commission was not persuaded and did not change its view that the concept of diligence in California should continue to be included within the duty of competence. The Commission noted that the excerpted language above from Comment [2] of the proposed competence rule was added to clarify the relationship of diligence and competence. The Commission also recognized that there is no evidence that the State Bar has been unable to discipline lawyers for neglect of client matters without a separate rule on diligence.

2. Model Rule 1.8(d) re Literary or Media Rights

Model Rule 1.8(d) provides:

> [Rule 1.8 Conflict of Interest: Current Clients: Specific Rules]
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> (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Comment

Literary Rights

> [9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Model Rule 1.8(d) is one of several unrelated provisions concerning conflicts of interest and potential conflicts that the ABA has collected in a single rule. The Commission is recommending that most of those provisions be adopted as separately-numbered and separately-titled rules, with numbers corresponding to the letters in the Model Rule (e.g., proposed Rule 1.8.1 is the counterpart of Model Rule 1.8(a)). The Commission has determined that taking this approach will facilitate indexing of the Rules and the ability of lawyers to find the relevant provisions.

Although the Commission is recommending the adoption of most of the provisions in Model Rule 1.8, it is recommending that Model Rule 1.8(d) not be adopted. The Model Rule carries forward concepts expressed in the Model Code. DR 5-103(A) stated in relevant part: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client..." EC 5-4 stated: "If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended."

California has not adopted a similar prohibition. Instead, literary rights arrangements between lawyers and clients have been considered under the Rule 3-300 rubric. (See *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 616, n. 6.) The California Supreme Court addressed the conflict issues associated with literary rights agreements in *Maxwell* and rejected the conflict of interest considerations that have been used to justify the Model Rule. *Maxwell* involved an agreement by which a criminal defendant charged with a capital offense entered into an agreement to confer the ownership of his life story to his defense counsel. The agreement had extensive disclosures. It advised the client to seek the advice of independent counsel. The defendant was examined and was determined to have knowingly consented to the arrangement. Nevertheless, the trial court recused the defendant's lawyers on the grounds that the agreement created a conflict of interest.

The Supreme Court disagreed. It stated,

> "A life-story agreement creates no such inherent or inevitable conflict. The contract here discloses that the value of petitioner's story might benefit from a long, sensational trial leading to conviction and death. It seems not unlikely, though, that counsel's self-interests might best be served by a careful, diligent defense that avoids conviction or minimizes the penalty. A quiet strategy that succeeds may well make a better story than a flamboyant failure. Counsel's reputation, a precious professional and commercial asset, is enhanced; and the risks of professional discipline and demeaning criticism are reduced. Also, it may be commercially prudent to keep lurid facts confidential until the legal battle has ended.
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> Justice Files' dissenting remarks in the Court of Appeal are particularly apt: 'Although the literary rights contract is not a common experience for attorneys, the kind of 'conflict' discussed here is not at all unusual. . . . [A]lmost any fee arrangement between attorney and client may give rise to a 'conflict.' An attorney who received a flat fee in advance would have a 'conflicting interest' to dispose of the case as quickly as possible, to the client's disadvantage; and an attorney employed at a daily or hourly rate would have a 'conflicting interest' to drag the case on beyond the point of maximum benefit to the client.
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> The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest.'" (*Maxwell*, *supra*, 30 Cal.3d at 619, n. 8.)

The Court concluded that a client could give an informed consent to the conflicts of interest that could arise from a literary rights agreement.

The Court's concluding comment in *Maxwell* states,

> "We stress that our opinion connotes no moral or ethical approval of life-story fee contracts. We have addressed only this narrow question: May a criminal defendant (here charged with capital crimes) be denied his right to representation by retained counsel simply because of potential conflicts or ethical concerns even when he has asserted, after extensive disclosure of the risks, that he wishes to proceed with his chosen lawyers and no others? Our answer is No." (*Maxwell*, *supra*, 30 Cal.3d at 622.)

In a concluding footnote, the Court stated,

> "As Justice Files observed below: 'I do not disagree with EC 5-4 of the American Bar Association's Code of Professional Responsibility, which declares that the kind of contract which is here involved 'should be scrupulously avoided.' But we are here dealing with a fact and not a theory. The defendant and his attorneys have made the contract. The question now is whether this defendant, charged with four capital offenses, shall be deprived of his chosen attorneys and forced to accept the trial court's choice who, in the words of the *Faretta* court: '"represents" the

> defendant only through a tenuous and unacceptable legal fiction.'" (*Maxwell*, *supra*, 30 Cal.3d at 622, n. 13.)

Model Rule 1.8(d) imposes an unconsentable prohibition on literary right agreements based on principles that the Supreme Court did not accept in *Maxwell*. *Maxwell* demonstrates that such agreements do not always involve a conflict of interest and that a client can consent to a literary rights agreement in the face of potential conflicts. The Commission is not aware of any particular development that would suggest that the Court would be prepared to abandon *Maxwell.* Indeed, in 2008, the Court cited *Maxwell* in its concluding footnote in *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706 without questioning its holding.

In deciding not to recommend adoption of a California version of Model Rule 1.8(d), the Commission reassessed California's existing law and policy and concluded that the absolute prohibition in Rule 1.8(d) is not warranted. Adequate client protection is afforded if literary rights agreements are permitted with appropriate disclosures and consents in compliance with the Commission's proposed Rule 1.8.1.

Although the Commission is not recommending adoption of Model Rule 1.8(d), the Commission is recommending adoption of the following provisions in the Rule: 1.8(a) (see proposed Rule 1.8.1); 1.8(b) (see proposed Rule 1.8.2); 1.8(c) (see proposed Rule 1.8.3); 1.8(e) (see proposed Rule 1.8.5); 1.8(f) (see proposed Rule 1.8.6); 1.8(g) (see proposed Rule 1.8.7); 1.8(h) (see Proposed Rule 1.8.8); 1.8(j) (see proposed Rule 1.8.10); and 1.8(k) (proposed Rule 1.8.11). Refer to the materials for each proposed rule for a full explanation of the differences, if any, with the Model Rule counterpart.

The Commission members unanimously approved the foregoing recommendation.

3. Model Rule 1.8(i) re Proprietary Interest in the Subject Matter of Representation

Model Rule 1.8(i) provides:

> [Rule 1.8 Conflict of Interest: Current Clients: Specific Rules]
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> (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
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> (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
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> (2) contract with a client for a reasonable contingent fee in a civil case.
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> Comment
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> *Acquiring Proprietary Interest in Litigation*
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> [16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e),

> the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Model Rule 1.8(i) is another of several unrelated provisions concerning conflicts of interest and potential conflicts that the ABA has collected in a single rule but which the Commission is recommending be adopted as separately-numbered and separately-titled stand-alone rules. See discussion concerning rejection of Model Rule 1.8(d), above. Similar to Model Rule 1.8(d), the Commission is recommending that Model Rule 1.8(i) and the related Comment [16] not be adopted. As explained in the Model Rule comments, Model Rule 1.8(j) is based on (i) common law prohibitions on champerty and maintenance and (ii) the potential difficulty in discharging counsel. California has never included the concept of maintenance and champerty in a rule of professional conduct. The Commission believes that an acquisition of an ownership interest should be governed by proposed Rule 1.8.1, the general rule governing a business transaction with a client and a lawyer's acquisitions of an adverse interest. The comments to Model Rule 1.8(i) suggest that the ABA had a specific transaction in mind when it adopted the Model Rule, but neither the Model Rule nor the Comment provides any specific information on this point. The result is a Model Rule that is overbroad (in that it would apply to acquisitions that may be fair and reasonable and could pass muster under Rule 1.8.1) and that covers a subject that is already addressed in Rule 1.8.1. Rule 1.8.1 does a much better job of distinguishing between those acquisitions that should be prohibited and those that should not.

Although the Commission is not recommending adoption of Model Rule 1.8(d), the Commission is recommending adoption of the following provisions in the Rule: 1.8(a) (see proposed Rule 1.8.1); 1.8(b) (see proposed Rule 1.8.2); 1.8(c) (see proposed Rule 1.8.3); 1.8(e) (see proposed Rule 1.8.5); 1.8(f) (see proposed Rule 1.8.6); 1.8(g) (see proposed Rule 1.8.7); 1.8(h) (see Proposed Rule 1.8.8); 1.8(j) (see proposed Rule 1.8.10); and 1.8(k) (proposed Rule 1.8.11). Refer to the materials for each proposed rule for a full explanation of the differences, if any, with the Model Rule counterpart.

The Commission members unanimously approved the foregoing recommendation.

4. Model Rule 1.10(a)(2) Imputation of Conflicts of Interests: General Rule (re use of an ethical wall or screen to rebut imputation)

Model Rule 1.10 provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
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> > (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
> >
> > (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
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> > > (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
> > >
> > > (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
> > >
> > > (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
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> (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
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> > (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
> >
> > (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
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> (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.
Definition of “Firm”

Comment

[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether to or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10.

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of

a client represented by a lawyer for formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having

> served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.
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> [12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Model Rule 1.10 addresses two concepts: (i) the imputation of a lawyer's conflict to other members in the lawyer's firm on the ground that lawyers in a firm regularly share confidential information of their clients; and (ii) the availability of an "ethical screen" (also referred to as an "ethical wall") to rebut that presumption of shared confidences. In the public comment draft, the Commission recommended adoption of a rule that closely tracked the Model Rule, but without an ethical screen provision. After initial public comment distribution, the Commission recommended adoption of a modified version of Model Rule 1.10 that would have permitted, in limited circumstances, the screening of a lawyer who moves from one private firm to another.[1/] However, a minority of the Commission took the position that no rule which provides that an ethical screen could effectively rebut the presumption of shared confidences in the context of a lawyer moving from one private firm to another should be adopted. The Board of Governors Committee on Regulation and Admissions considered the Commission's recommendation (including the view of the Commission minority) at its March 5, 2010 meeting and the Board Committee determined not to recommend that the Board adopt any part of the proposed Rule, including that part of the Rule which addressed the concept of imputation of one lawyer's prohibition to other members in the firm. As to the screening provision, the Board Committee observed that the concept of ethical screens, in the context of lateral attorney movement from one private law firm to another, was an unsettled issue in California. As to the provisions concerning imputation, the Board concluded that the concept of imputation is well-settled in California case law and that a Rule of Professional Conduct was not necessary. In accordance with the Board Committee's action, a California version of Model Rule 1.10 was not recommended for adoption by the Board at that time.

At its May 14, 2010 meeting, the Board Committee revisited its decision not to adopt any counterpart to Model Rule 1.10 and decided to adopt a version of Model Rule 1.10 without that Rule's screening provision. As it had at its earlier March 2010 meeting, the Board Committee determined that the concept of ethical screens, in the context of lateral attorney movement from one private law firm to another, was an unsettled issue in California, and was better left to resolution by case law. It recognized, however, the importance of having an imputation rule, and voted to adopt a version of Model Rule 1.10 without a provision for screening based on a recommendation of the Commission. In addition, a Comment to the Rule was included to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because the Rule does not expressly provide for screening. See Comment [10] to proposed Rule 1.10.

At its June 25 – 26, 2010 meeting, the Commission considered public comments both for and against inclusion of a screening provision in proposed Rule 1.10. The Commission also considered the California Supreme Court's action on a petition for review of the Court of

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[1/] Only lawyers who had not "substantially participated" in the prior representation would be eligible for screening under the modified rule the Commission proposed.

Appeals decision in *Kirk v. First American Title Ins. Co*. (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620]. On June 23, 2010, the Supreme Court denied review and also denied all requests that the Court of Appeal decision be depublished. After further discussion, the Commission voted to request that the Board of Governors reconsider the issue of including a screening provision in proposed Rule 1.10.

At its meeting on July 22 – 24, 2010, the Board considered the Commission's request to reconsider the inclusion of a limited screening provision and the Board again determined that screening was unsettled and better left to further development in the case law. In part, this approach to the issue of screening offers the advantage of case-by-case refinement of screening principles in the appellate courts and in the Supreme Court and such developments could be monitored and inform any potential future State Bar consideration of screening standards in the rules.

5. Model Rule 1.18(d)(2): Duties to Prospective Client (re use of an ethical wall or screen to rebut imputation).

Model Rule 1.18(d) provides:

> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (ii) written notice is promptly given to the prospective client.

The corresponding comments to Model Rule 1.18(d) provide:

> [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

> [8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

During the initial public comment distribution, the Commission recommended adoption of a version of Model Rule 1.18 that would have tracked Model Rule 1.18(d)(2) and its related comments and permitted, in the limited circumstances contemplated under the Rule, the screening of a lawyer who had received confidential information of a prospective client so long as the lawyer took reasonable measures to avoid exposure to more confidential information than was reasonably necessary to determine whether the lawyer would, or even could, represent the prospective client. Following public comment, the Commission decided not to recommend the adoption of any rule counterpart to Model Rule 1.18. Two separate groups of Commission members dissented from that position. One group favored adoption of a version of the Rule that substantially tracked the public comment draft, i.e., provided for screening as in Model Rule 1.18(d)(2). A second group of dissenters favored adoption of a version of the Rule without paragraph (d)(2). The Board of Governors Committee on Regulation and Admissions considered the Commission's recommendation (including the views of the two groups of dissenters) at its May 14, 2010 meeting and the Board Committee, agreeing with the second group of dissenters, voted to recommend adoption of a version of Rule 1.18 without paragraph (d)(2) and its screening provision. As with Rule 1.10, the Board Committee determined that whether the timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter best left to be determined by the case law. Further, as it did with Rule 1.10, the Board Committee recommended adding a Comment to the Rule to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because the Rule does not expressly provide for screening. See Comment [8] to proposed Rule 1.18.

At its June 25 – 26, 2010 meeting, the Commission considered public comments both for and against inclusion of a screening provision in proposed Rule 1.18. The Commission also considered the California Supreme Court's action on a petition for review of the Court of Appeals decision in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620]. On June 23, 2010, the Supreme Court denied review and also denied all requests that the Court of Appeal decision be depublished. After further discussion, the Commission voted to request that the Board of Governors reconsider the issue of including a screening provision in proposed Rule 1.18.

At its meeting on July 22 – 24, 2010, the Board considered the Commission's request to reconsider the inclusion of a limited screening provision and the Board again determined that screening was unsettled and better left to further development in the case law. In part, this approach to the issue of screening offers the advantage of case-by-case refinement of screening principles in the appellate courts and in the Supreme Court and such developments could be monitored and inform any potential future State Bar consideration of screening standards in the rules.

6. Model Rule 2.3 Evaluation for Use by Third Parties

Model Rule 2.3 provides:

> (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that

making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as

advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

The Commission is not recommending adoption of Model Rule 2.3 because it believes that the Rule's standards are not sufficiently clear for purposes of lawyer discipline. While the Rule might offer helpful guidance, it would be problematic as a disciplinary standard. For example, the Commission regarded the following key phrases in paragraph (a) as unclear for disciplinary purposes: "evaluation of a matter affecting a client;" and "compatible with other aspects of the lawyer's relationship with the client."

In studying the language, the Commission compared the Model Rule to the counterpart provision in the Restatement and state variations of the Model Rule and found that these provisions often added rule language or comments in an apparent effort to articulate a more precise duty. This led to consideration of the option of drafting a California state variation that would depart significantly from the Model Rule. However, this approach was viewed as undesirable, in part, because certain policy concerns would remain regardless of the rule language, such as the application of the Rule as a default civil standard in assessing a lawyer's preparation of a third party opinion letter.

7. Model Rule 3.2 Expediting Litigation

Model Rule 3.2 provides:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
>
> Comment
>
> [1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

The Commission is not recommending adoption of Model Rule 3.2 for several reasons. First, the Rule is not intended to protect the client (who is protected by the lawyer's duty of competence, Rule 1.1), but rather to protect the interests of the justice system and of adverse parties. This means that any complaint under the Rule would be made by someone other than the client, and the lawyer's defense likely would require the lawyer to disclose confidential client information. Second, the Rule lacks the specificity necessary for a rule that may result in a lawyer being disciplined. In effect, the Rule's "reasonable efforts" standard is a negligence standard that would require the State Bar Court to determine retroactively how a case might have been better handled. Lastly, Model Rule 3.2's concept is, in part, adequately covered by proposed Rule 3.1 (meritorious claims) which includes a statement that lawyers have "a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure" (see Rule 3.1 Comment [1]).

Minority. A minority of the Commission favors enactment of the Rule. The minority explains that the principal reason for having the Rule is that lawyers' dilatory tactics impede the administration of justice and are a burden upon opposing parties and a waste of public resources. Engaging in tactics that have no purpose other than delay leads to frustration with the courts and eventually disrespect for the law.

8. Model Rule 4.1 Truthfulness In Statements To Others

Model Rule 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
>
> Comment
>
> Misrepresentation
>
> [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.
>
> Statements of Fact
>
> [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.
>
> Crime or Fraud by Client
>
> [3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

The Commission is not recommending the adoption of a counterpart to Model Rule 4.1, which addresses a lawyer's duty of honesty owed to third persons in the course of representing a client. The Commission considered such issues as what knowledge is required to establish a lawyer's "knowledge" of a statement's untruth or what constitutes "incorporation" by a lawyer of a client's untrue statement, and concluded that the subtleties of language in the Model Rule do not lend themselves to a disciplinary rule. Moreover, gross misconduct in respect of the subject of the Model Rule is already subject to discipline under Business and Professions Code sections 6068(d) and 6106. The Commission concluded there is no need for a counterpart to Model Rule 4.1 because the concept of a lawyer's duty not to adopt or vouch for a client's or witness's falsehood is as old as the legal profession itself, and has been established for all this time without the need for a disciplinary rule in an area where the boundaries between permissible and impermissible conduct are often especially difficult to determine. To the extent Model Rule 4.1 is intended to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for silence while a client makes untrue statements, is well established. See: *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208; and *Pumphrey v. K.W.Thompson Tool Co.* (9 Cir 1995) 62 F.3d 1128.

Minority. There are two separate minority positions concerning the Commission's decision not to recommend adoption of a counterpart to Model Rule 4.1:

1. A minority of the Commission strongly disagrees with the Commission's decision because: (i) a rule counterpart to Model Rule 4.1 is an integral part of the Rules as a whole by working in tandem with other rules such as Rules 3.3 and 1.2(d) to proscribe dishonest conduct; (ii) the Business and Professions Code sections cited by the Commission in support of the rejection are inadequate because they either require acts amounting to criminal conduct, section 6128, or contain the amorphous concept of "moral turpitude;" (iii) Model Rule 4.1 has been in existence for over 25 years and has been shown not to chill legitimate advocacy. (See full Dissent A provided in Appendix B.)

2. A second minority is concerned that the Commission's decision not to adopt Rule 4.1, together with the Commission's concomitant decision to limit the scope of a lawyer's duties under Rule 3.9, which governs a lawyer's conduct when appearing in nonadjudicative proceedings such as legislative hearings, will confuse lawyers about their duty of honesty in such circumstances. (See full Dissent B provided in Appendix B.)

9. Model Rule 4.4 re Respect for Rights of Third Persons

Model Rule 4.4 provides:

> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
>
> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

The Commission is recommending that Model Rule 4.4 and the related rule comments not be adopted.

Model Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third person. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person. The Commission has two primary concerns with the entire paragraph (a) of this rule. First, the Commission is concerned about the vagueness and overbreadth of the terms “embarrass, delay, or burden a third party.” The lack of clarity has the potential of leading to inconsistent enforcement of the Rule. Second, the Commission is concerned that the Rule will have a chilling effect on legitimate advocacy, in part because many proper litigation tactics may result in embarrassing an opposing party or delaying litigation. The Commission notes that under existing California statutory law, a lawyer who engages in extreme delay of a client’s case for personal gain may be subject to a misdemeanour charge under Business and Professions Code section 6128(b).

Model Rule 4.4(b) provides that a lawyer who receives a document relating to the lawyer’s representation of a client and “knows or reasonably should know” that the document was inadvertently sent shall promptly notify the sender. The Commission also recommends against adoption of paragraph (b) of Model Rule 4.4 and the related comments, in part, because a lawyer’s duties concerning inadvertently transmitted writings often are fact-bound inquiries and therefore are difficult to specify in a rule that will have disciplinary consequences. In addition,

case law may continue to evolve in this area of lawyer conduct in response to variations in factual situations.

Minority. A minority of the Commission agrees with the State Bar Office of the Chief Trial Counsel, and with a group of thirty ethics law professors and other commenters, who submitted letters in support of the adoption of Model Rule 4.4. The commenters observed that Rule 4.4(a) provides important protection regarding the rights of third persons and should be adopted. Paragraph (a) has been the rule in most states for more than a quarter century without a showing that the Rule has been misapplied or that it improperly chills legitimate advocacy. The stated rationale for not adopting the Rule not only lacks empirical evidence but speaks only to the first part of paragraph (a). The Commission does not address the second provision that prohibits the use of methods of obtaining evidence that violate the legal rights of third persons. Both paragraph (a) and (b) are consistent with existing California law. Many rules entail "fact bound inquiries" and paragraph (b) provides a clear and consistent standard of what is expected of lawyers in the case of an inadvertently transmitted document. The recommendation not to adopt this rule will signal to lawyers and the public that the legal rights of third persons are not entitled to the same protection in California as they are in other jurisdictions.

10. Model Rule 5.7 Responsibilities Regarding Law Related Services

Model Rule 5.7 provides:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
>
> > (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
> >
> > (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
>
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.
>
> Comment
>
> [1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection

of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, the conduct of nonlawyer employees in the distinct entity that the lawyer controls, complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Model Rule 5.7 defines “law related services” as services that might be performed by a lawyer in conjunction with legal services, but would not constitute the unauthorized practice of law if performed by a nonlawyer. The Rule provides that a lawyer generally must comply with the

Rules of Professional Conduct when providing law related services. The Commission is not recommending adoption of Model Rule 5.7 because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection. Generally, the Commission agrees with the concept of Model Rule 5.7 but has determined that there are certain specific terms and standards provided for in the Rule that are materially inconsistent with existing California authorities. The Commission reviewed the existing California authorities and concluded that adoption of any California counterpart to Model Rule 5.7 might undermine existing law and guidance.

Minority. A minority of the Commission disagrees with the decision not to adopt a California version of Model Rule 5.7. The minority notes that many law firms, both inside and outside of California today own, operate or are otherwise affiliated with ancillary businesses, including: lobbying; financial counseling and planning; client asset management through registered investment companies; human resources and benefits; consulting and training; international trade; education; environmental and health care consulting; ADR; and litigation support services. In addition, law firms are restructuring due to the impact of technology and globalization and this will cause inevitable confusion among lawyers and the public about how the rules apply to law related services, particularly where the services are offered by a "law firm." The minority contends that, if the proposed new California rules are to remain viable for the foreseeable future, a version of Model Rule 5.7 is critical.

At its June 25 – 26, 2010 meeting, the Commission considered a public comment letter that supported adoption of Model Rule 5.7. That letter was submitted by a group thirty ethics law professors including the following drafters of the letter: Geoffrey Hazard; Deborah Rhode; and Richard Zitrin. The group asserted that Model Rule 5.7 simply makes it clear that when lawyers engage in multi-disciplinary work and are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct. The group disagreed with the Commission's view that California case law provides "broader and more nuanced guidance," such as to make the Rule unnecessary. The group stated that adopting Model Rule 5.7 would in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance and that nuanced court adjudication might not be needed if the Rule were adopted in California.

The Commission was not persuaded and did not change its position on Model Rule 5.7. The Commission noted its extensive effort to capture, in rule format, the principles embodied in the many reported California appellate decisions. It made this effort, not because doing so is needed for discipline as lawyers have been disciplined many times without the existence of a rule comparable to Model Rule 5.7, but in order to help guide lawyers. The Commission finally concluded that this effort was not successful, that any iteration of the Rule likely would be inaccurate and misleading, and that it would be better for lawyers to refer to case law in this area. Like a number of other states, the Commission decided not to recommend adoption of the Rule.

11. Model Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

Model Rule 7.6 provides:

> A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution

or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Comment

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the

contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

The Commission is recommending that Model Rule 7.6 not be adopted because its substance is addressed adequately by Business and Professions Code section 6106, a State Bar Act statute serving as a disciplinary standard that encompass various forms of egregious misconduct, including acts of dishonesty and corruption, and criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. In addition, a lawyer who engages in such misconduct would be in violation of other rules the Commission has proposed, such as Rules 3.5 (impartiality of a tribunal) and 8.4 (misconduct). Further, the Commission is concerned about potential uneven application of Rule 7.6 and questions whether the Rule would be effective. The Commission does not interpret Model Rule 7.6 as reaching the improper conduct itself. The Rule does not prohibit a lawyer from contributing money to a political campaign to obtain an appointment or engagement, but rather prohibits the lawyer from *accepting* the appointment or engagement. Moreover, in studying this Rule, the Commission determined that Model Rule 7.6 is the least adopted of the ABA Model Rules. As of May 1, 2009, only seven jurisdictions had adopted the Rule (Colorado, Delaware, Idaho, Iowa, Maine, Missouri, and Washington). Consistent with the foregoing, the Commission believes that the misconduct that might be covered by Model Rule 7.6 is better regulated in California by Business and Professions Code section 6106 and by the provisions of the other proposed rules that are recommended by the Commission.

The Commission members unanimously approved the foregoing recommendation.

12. Model Rule 8.3 Reporting Professional Misconduct

Model Rule 8.3 provides:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the

Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

At its meeting on July 22 – 24, 2010, the Board of Governors decided not to recommend the adoption of a California counterpart to Model Rule 8.3. The proposal considered by the Board was a Commission recommendation for a rule that was partly permissive and partly mandatory. The Commission's proposed rule would have set a standard of permissive reporting for general misconduct that implicates a lawyer's fitness to practice but, in circumstances where a lawyer knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness, the Rule would have imposed a mandatory reporting obligation. The Commission's proposal differed from Model Rule 8.3, which *mandates* reporting of *any* violation of the Rules (not just

felonious conduct) "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

The Board's action appeared to reflect two concerns. First, the Board seemed to be concerned that lawyers might find it difficult to comply with a rule that appears to assume expertise on the issue of whether misconduct would constitute a felony. Second, it appeared that the Board shared some of the concerns expressed by a minority of the Commission that viewed any mandatory reporting rule as the wrong public policy for California. The minority statement observed that mandatory reporting issues often arise in the midst of representing a client and that the experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, an innocent client might suffer. The minority asserted that reporting can lead to disputes among the lawyers representing clients in a matter and that this could cause a change in counsel, imposing delays and costs on innocent clients. In accordance with the Board's determination, a California counterpart to Model Rule 8.3 is not being recommended for adoption.

Other Concepts for Possible Rules or Additions to Rules Not Recommended for Adoption:

List of Concepts for New Rules or Additions to Model Rules Considered but not Recommended for Adoption

1. Hourly/Time Billing Rule
2. Class Action Rule
3. Law Firm Discipline Rule
4. Good Faith Reliance on Advice of Counsel Rule
5. Waiver of Attorney-Client Privilege Rule
6. Use of Private Will Depositories
7. Practice Succession Plan
8. Lawyer Acting As Lobbyist
9. Proposed Rule 1.11(e) Special Conflicts Of Interest For Former And Current Government Officers And Employees (re requiring imputation of conflicts when government lawyer has moved from private practice and use of an ethical wall or screen to rebut imputation)
10. Special Provisions for the Regulation of Nonrefundable Advance Fees Under Proposed Rule 1.5 (Fees For Legal Services)

1. Hourly/Time Billing Rule

A member of the Commission suggested a new rule focusing on abusive billing practices, in particular practices arising from hourly and other time-based fee arrangements. In addition, the Commission received input from a concerned lawyer who asserted that clients in hourly fee arrangements, and the general public's perception of lawyers, suffer due to abusive billing practices. In support of the suggested rule, the Commission was referred to various articles and studies, including an article entitled "Time Bandits" (Los Angeles Lawyer, March 2001, vol. 24 no. 1, by Gerald F. Phillips) in which the author states:

> The fact that lawyers are held in very low esteem is without dispute. While the causes of this poor standing are varied and worth debating, it is clear that overbilling is partly responsible. Time padding and task padding are major

> reasons for the low image of lawyers. These practices improperly escalate the fees billed to client and thus cause great consternation among the public. ("Time Bandits" at p. 24.)

In response to the concerns presented, the following concept of a possible new rule, among other discussion draft versions, was considered by the Commission.

> (A) A member shall not engage in fraudulent, dishonest or deceptive billing practices.
>
> (B) Where the compensation for legal services payable to a member or a member's Law Firm is based upon an hourly rate or increments of time, the member shall maintain a reasonably accurate method of recording such time, and written records thereof, which shall be made available to the client upon reasonable and timely request.
>
> (C) A member shall not charge costs to a client at an amount in excess of actual cost unless the member has the client's informed written consent.

The Commission understands and appreciates the need for client protection from abusive billing practices. However, the Commission does not recommend adoption of a new rule that specifically targets abusive billing practices. The Commission notes that under current California law, fraudulent or dishonest conduct by a lawyer with respect to fees is likely be a cause for disbarment or suspension under Business and Professions Code section 6106. The Commission believes that a new rule is not needed because the prevalent forms of billing abuse can be addressed adequately by enforcement of existing rules which the Commission is recommending be enhanced, in particular proposed rules 1.5 (prohibition against illegal or unconscionable fees, see paragraph (e)) and 1.15 (client trust accounts, see paragraph (d)). The Commission's proposed enhancements to these rules clarify the client protection afforded with regard to accounting for fees and strengthen the duty of a lawyer to assure that clients understand the terms of fee arrangements, such as terms requiring advance payments.

The Commission also notes that the State Bar's program of mandatory fee arbitration pursuant to Business and Professions Code sections 6200 et. seq. offers effective remedies to clients who have fee claims and that a new disciplinary rule would not add any additional remedial benefit to a client. In fact, the Commission is concerned that a new rule might divert certain fee dispute matters away from the effective arbitration system. For all these reasons, the Commission is not recommending a new rule addressing abusive hourly billing practices.

The Commission members unanimously approved the foregoing recommendation.

2. Class Action Rule

A Commission subcommittee was assigned to study: (1) whether, and to what extent if any, the Commission's proposed rules might be improved by including specific references to lawyer conduct arising in the context of class action litigation; and (2) whether the Commission should recommend a standalone rule addressing a lawyer's duties in class action litigation. Regarding the former, the Commission ultimately adopted the following comment to proposed

Rule 1.7 (current client conflicts of interests), which is based on the corresponding comment to Model Rule 1.7:

> [25] This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not typically need to get the consent of an unnamed class member before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

After adoption of this comment, the Commission considered the issue of whether to adopt a standalone rule on class actions. To facilitate discussion of the concept of a possible rule, the Commission considered, among other references, an article by Nancy Moore (the Official Reporter for the ABA Ethics 2000 Commission) entitled "Who Should Regulate Class Action Lawyers?" (203 Illinois Law Review 1477 (2003)), and the American Law Institute's current project on the "Principles of the Law of Aggregate Litigation" (project website link: http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7). To study actual rule text, the Commission considered a proposed rule recommended in an article entitled "Saving the Class Action: Developing and Implementing a Model Rule of Professional Conduct for Class Action Litigation" (Georgetown Journal of Legal Ethics, 16 Georgetown J. of Legal Ethics 353 (2003), by Julie Klusas). The author's recommended rule provides:

> Rule 9.1 Duties in Class Action Litigation
>
> (a) A lawyer's duty to the class-client includes the duty that a lawyer:
>
> (1) Shall abide by a class-client's decision concerning the objectives of the litigation. A lawyer shall also abide by a class-client's decision whether to accept a settlement.
>
> (2) Shall act with commitment to the interests of the class-client and with zeal in advocacy of the class-client's interests.
>
> (3) Shall not represent a class-client and maintain an interest in an individual-client if the representation of the individual-client's interests will be adverse to the class-client's interests. If at any time during the litigation the lawyer becomes aware that the lawyer's previous individual-client or the lawyer's personal interests are adverse to the class-client's interests, the lawyer must immediately withdraw from the conflicted representation to protect the individual-client's or the class-client's interests.
>
> (4) Shall keep a class-client informed of the status of the class action through the class representative, and the lawyer shall keep

attuned to the desires of the class-client as relayed by the class representative.

(b) A lawyer for a party opposing a class action must not speak to a named plaintiff or unnamed class member concerning any matter related to the litigation after the lawsuit has been filed.

(c) In order to represent a class-client's interests in a class action:

(1) A lawyer's fee may be contingent on the outcome of the matter but must be no more than a reasonable percentage of the actual class-client recovery.

(2) A lawyer must' not engage in any form of negotiations with a potential opposing lawyer about a lawsuit that has not yet been filed.

(3) A lawyer shall provide notice of the class action to all class members.

(d) This rule does not apply to class actions involving fee-shifting statutes.

Comment

Duties to Class

[1] Loyalty to the class-client must be preserved above all else. Loyalty includes allowing the class-client to dictate the objectives of the litigation through the class representative. As long as the representative is adequately chosen, as required by FRCP 23(a)(4), and remains in communication with the Class, the loyalty requirement will be satisfied.

[2] When litigation requires sub-classes, there is a presumption that each sub-class will need separate counsel to ensure that its interests will be met. Sub-classes of future plaintiffs should not be permitted except in the context of a FRCP 23(b)(I)(B) class action.

[3] At all times the interests of the class-client must come before the interests of any individual class member, class counsel, or the defendant.

[4] Part of understanding the objectives of the class-client is to have a full understanding of who composes the class. To those ends, class counsel is required to provide the best notice practicable to all potential class members who can be found regardless of the requirements under FRCP 23.

[5] Fees for plaintiff's counsel should be derived solely from the actual gain by the class. For example, if plaintiffs' counsel consents to settlement of a class action by coupons, plaintiffs' counsel is entitled to a percentage of the coupons in coupons or a percentage of the cash value of those coupons utilized by class members.

> [6] No lawyer should attempt to negotiate any kind of agreement for a class action that has not yet been brought in a court. Because there are no court-sanctioned class-clients, any interests expressed for the purpose of litigation can only be self-interests and should be strictly prohibited.

The Commission is not recommending a standalone class action rule for several reasons. First, the Commission believes that there already exists substantial regulation in existing law and through the oversight of judicial officers. Second, the Commission's addition of Comment [25] to proposed Rule 1.7 is responsive to several basic, yet key issues concerning possible conflicting duties that might arise in class action representations. Third, as a matter of national uniformity, the Commission has determined that class action issues are an area where national uniformity is of particular sensitivity and importance. The Commission observes that the ABA has not developed a model for a standalone class action rule, nor has any jurisdiction adopted such a rule. For these reasons, the Commission is not recommending a class action rule.

The Commission members unanimously approved the foregoing recommendation.

3. Law Firm Discipline Rule

A Commission subcommittee was assigned to study whether the Commission should recommend: (1) a concept of law firm discipline as an integral part of its recommendation for new California Rules of Professional Conduct; and/or (2) particular rule amendments to selected rules that would state clearly that a duty to comply is imposed on a law firm in lieu of, or in addition to, duties imposed on individual lawyers. As presented by a subcommittee member, the concept of law firm discipline was described generally as follows.

> 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. (Memorandum to the Commission dated March 17, 2006 from subcommittee member Mark L. Tuft. Refer to the Commission's April 7 & 8, 2006 agenda materials posted at: http://ethics.calbar.ca.gov/Committees/RulesCommission/MeetingMaterials.aspx.)

As an overview of law firm discipline issues, the following also was presented.

> 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. (Memorandum to the Commission dated March 17, 2006 from subcommittee member Mark L. Tuft, refer to the Commission's April 7 & 8, 2006 agenda materials posted at: http://ethics.calbar.ca.gov/Committees/RulesCommission/MeetingMaterials.aspx.)

To facilitate discussion of law firm discipline, the Commission considered, among other references, the following: (1) an article entitled "Professional Discipline for Law Firms" (77

Cornell Law Review 1 (1991), by Ted Schneyer); (2) April 25, 1999 Draft Revisions to Law Firm Discipline prepared by the ABA Standing Committee on Professional Responsibility and submitted to the ABA Ethics 2000 Commission by letter dated April 29, 1999 from M. Peter Moser (Chair, ABA Standing Committee on Professional Responsibility) to the Honorable E. Norman Veasey (Chair, ABA Ethics 2000 Commission); (3) the relevant professional conduct rules adopted by the states of New York and New Jersey that are regarded as "law firm discipline rules;" (4) a symposium transcript of the Georgetown Journal of Legal Ethics 2002 Symposium entitled "How Should We Regulate Law Firms? Is a Law Firm Disciplinary Rule the Answer?" (16 Georgetown Journal of Legal Ethics 203 (2002)); (5) State Bar of California memoranda concerning a Discipline Evaluation Committee study recommending that when the name of a disciplined attorney is published, the law firms or offices where the attorney was affiliated at the time of the culpable violations should also be published; (6) Rules 6, 7, 9, 10, and 13 of the ABA Model Rules for Lawyer Disciplinary Enforcement (concerning law firm disciplinary remedies of reprimand, admonition, disgorgement of fees, and fines); and (7) published disciplinary cases involving law firm discipline. Also, among other interested persons, the Commission received direct input from the following persons who offered updated information on law firm discipline: the State Bar Office of the Chief Trial Counsel (letter from Scott J. Drexel to Harry B. Sondheim dated May 4, 2006; Ted Schneyer (e-mail message to Kevin E. Mohr dated November 3, 2009); and Sarah McShea (former President of the Association of Professional Responsibility Lawyers) (e-mail message to Kevin E. Mohr dated November 3, 2009).

One specific concept considered was the development of a new rule that would refer to other selected rules and state that a law firm must comply with the identified rules to the same extent as an individual lawyer. (Compare, Business and Professions Code section 6167 providing, in part, that 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.") Another specific concept considered was the aforementioned Discipline Evaluation Committee proposal for the publicizing of the name of the law firm affiliated with a disciplined lawyer. Neither of these specific concepts garnered the support of the Commission.

Although the Commission is not recommending adoption of a new rule on law firm discipline and is not recommending rule amendments to selected rules that would impose a compliance obligation on a law firm, the Commission is recommending versions of Model Rules 5.1, 5.2, and 5.3 (rules governing supervision, including duties of law firm partners and managers) and a revised version of current California Rule 2-400 (prohibiting discrimination in the management and operation of a law practice).

The Commission has concluded that none of the described approaches to law firm discipline satisfactorily address a complex policy issue of fundamental fairness. Such a rule could expose affiliated lawyers to Bar discipline for the misconduct of a firm lawyer who breached his or her professional duties in such a way that it was beyond the ability of the other members to control the breaching lawyer's actions. For example, a partner's misappropriation of client trust funds despite reasonable internal financial controls nevertheless might be treated as misconduct that is a basis for law firm discipline. The Commission also observes that public comments received on proposed Rule 5.1 included criticism that the Rule appears to establish a standard of vicarious disciplinary exposure for partners and managers. While the Commission disagrees with that interpretation of proposed Rule 5.1, the Commission is sensitive to the basic policy objection to a rule or rules that might hold non-actors liable for the misconduct of others and, furthermore, the

Commission believes that the State Bar can proceed with law firm discipline at a later time after California lawyers and the Bar's discipline system has had an opportunity to assess the impact of proposed Rules 5.1, 5.2 and 5.3, assuming these rules are adopted by the Board and approved by the Supreme Court.

4. Good Faith Reliance on Advice of Counsel Rule

Early in its deliberations, the Commission considered whether to codify in a disciplinary rule the concept of either not subjecting to discipline, or mitigating the sanction to be imposed on, a lawyer who can show that the lawyer has in good faith relied on advice that was provided by a disinterested lawyer. The proposed discussion draft provided:

> (A) A member may seek the advice of another lawyer on any question regarding compliance with the State Bar Act, with these Rules, or with professional ethical standards applicable to a client engagement.
>
> (B) No discipline shall be imposed upon, and no adverse action taken against, the member if the member acts in good faith reliance on the advice of counsel as provided in paragraph (A), provided:
>
> > (1) The consulted lawyer is disinterested and competent;
> >
> > (2) The applicability of the rule or ethical standard was not clear in light of the facts and circumstances;
> >
> > (3) The member made full and adequate disclosure to the consulted lawyer of all facts and circumstances relevant to the consultation;
> >
> > (4) The advice was sought before the conduct on which the disciplinary proceeding is based; and
> >
> > (5) The member had no reason to know or to believe that the advice of counsel was erroneous.
>
> *Discussion:*
>
> Even if advice of counsel is not a bar to discipline because the circumstances do not fall within paragraph (B), good faith reliance on the advice of competent counsel can be a fact in mitigation of discipline.
>
> This rule does not relieve the member of civil liability under otherwise established law.

The proponents of the Rule noted that it would encourage lawyers to consult with other lawyers on matters of professional duty, which should enhance the consulting lawyer's adherence to his or her professional obligations and further the client's compliance with the law. (Compare Model Rule 1.6(b)(4), which provides a lawyer may reveal confidential client information "to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's compliance with these Rules.") However, during the Commission's

deliberations on the discussion draft, several concerns were raised, including: (1) the effect of the consulting lawyer's disclosure on the confidentiality of the client information so disclosed, as California has no counterpart to Model Rule 1.6(b)(4); (2) whether the client's consent would be required before the consultation with the disinterested lawyer could take place, or whether merely disclosure would be sufficient; (3) whether the consultation should serve as an absolute bar to discipline or whether it should only be a factor to be considered in mitigation of discipline; (4) how the consulting lawyer could demonstrate that the disinterested lawyer is competent; (5) whether the Rule would simply permit a lawyer to "buy" an opinion from a lawyer to avoid imposition of discipline. In October 2003, after consideration of the discussion draft, the Commission voted 6-2-0 not to pursue consideration of the Rule at that time.

As part of its comprehensive review of the Model Rules, the Restatement, and rules from other jurisdictions that have no counterpart in the Model Rules, the Commission renewed consideration of an "advice of counsel" rule in 2009. As part of the Rule's reconsideration, the Commission reviewed Oregon Rule 8.6 ("Written Advisory Opinions On Professional Conduct; Consideration Given In Disciplinary Proceedings"), which provides:

> (a) The Oregon State Bar Board of Governors may issue formal written advisory opinions on questions under these Rules. The Oregon State Bar Legal Ethics Committee and General Counsel's Office may also issue informal written advisory opinions on questions under these Rules. The General Counsel's Office of the Oregon State Bar shall maintain records of both OSB formal and informal written advisory opinions and copies of each shall be available to the Oregon Supreme Court, Disciplinary Board, State Professional Responsibility Board, and Disciplinary Counsel. The General Counsel's Office may also disseminate the bar's advisory opinions as it deems appropriate to its role in educating lawyers about these Rules.
>
> (b) In considering alleged violations of these Rules, the Disciplinary Board and Oregon Supreme Court may consider any lawyer's good faith effort to comply with an opinion issued under paragraph (a) of this rule as:
>
> > (1) a showing of the lawyer's good faith effort to comply with these Rules; and
> >
> > (2) a basis for mitigation of any sanction that may be imposed if the lawyer is found to be in violation of these Rules.
>
> (c) This rule is not intended to, and does not, preclude the Disciplinary Board or the Oregon Supreme Court from considering any other evidence of either good faith or basis for mitigation in a bar disciplinary proceeding.

In November 2009, after consideration of the aforementioned discussion draft and Oregon Rule 8.6, the Commission again declined to recommend the adoption of an advice of counsel rule, but voted to recommend that this concept be studied further by the Committee on Professional Responsibility and Conduct ("COPRAC"), or another State Bar entity or staff group, after the completion of the Commission's work.

5. Waiver of Attorney-Client Privilege Rule

Following adoption by the United States Department of Justice of a policy that required business organizations to waive the attorney-client privilege as a predicate to favorable consideration of the criminal action against the organization and a possible plea bargain, the Commission explored whether it should recommend a rule that would prohibit a lawyer from offering, requesting, or making an agreement that would require the waiver of the attorney-client privilege. As first outlined, in 2003, in a memorandum from then Deputy Attorney General Larry D. Thompson to DOJ Department Heads and United States Attorneys (the "Thompson Memorandum"), the DOJ proposed a set of principles to guide federal prosecutors "as they make the decision whether to seek charges against a business organization." One "principle" in that determination that became the subject of immediate widespread criticism was "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection." This principle, as subsequently modified, eventually found its way into Federal Sentencing Guidelines and the United States Attorneys' Manual.

The Commission was particularly concerned with the consequences of such a waiver. Although characterized as a "limited" waiver of privilege only as between the government and the organization that agreed to the waiver, courts have nearly universally held that such an agreement waives the privilege as to the world. See, e.g, *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal. App. 4th 1229. Despite these concerns, the Commission's initial consideration of a privilege waiver Rule was continued in deference to initiatives that were pursued at the national level, including the formation of an ABA Attorney-Client Privilege Task Force and the introduction of a Senate Bill that would have prohibited the practice of seeking waivers of the attorney-client privilege. In 2005, and again in 2006, the ABA House of Delegates adopted resolutions that opposed "policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine" and "the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage." In each term of Congress, Senator Arlen Specter has reintroduced a bill that would prohibit or severely limit the practice, most recently in 2009. See Senate Bill 445 (2/13/09). In light of this opposition, the DOJ twice modified the policy espoused in the Thompson Memorandum on seeking waiver of a business organization's attorney-client privilege. See December 12, 2006 Memorandum from Deputy Attorney General Paul J. McNulty to DOJ Department Heads and U.S. Attorneys ("McNulty Memorandum") and July 9, 2008 Letter from Deputy Attorney General Mark Filip to U.S. Senate Judiciary Committee on Changes to DOJ Policy on Corporate Compliance ("Filip Letter"). Both the McNulty Memorandum and Filip Letter attempted to address some of the flaws in the Thompson Memorandum.

In 2009, the Commission again considered whether it should recommend a Rule of Professional Conduct that would prohibit lawyers from offering, requesting or making an agreement that would require the waiver of the attorney-client privilege. The Commission's deliberations did not involve consideration of specific language but rather concerned a consideration of the concept of such a rule. Ultimately, the Commission decided not to recommend such a rule. In reaching that conclusion, the Commission considered the aforementioned actions that have been taking place at the national level and also the fact that the concerns raised by the DOJ's principles are already adequately addressed in other proposed rules, e.g., Rules 3.4 (Fairness to Opposing Party and Counsel), 4.2 (Communication with Person Represented by Counsel) and 4.3 (Dealing with Unrepresented

Person). In particular, both Rule 4.2 and Rule 4.3 require that a lawyer respect the attorney-client privilege of a represented organization.

Minority. A minority of the Commission favors adoption of some form of a rule addressing this concept. The minority explains that the concept of the proposed new rule is intended to stop widely reported demands by law enforcement officials, primarily though not exclusively at the federal level, for such waivers in the context of criminal and other law enforcement negotiations. The minority does not argue that attorney-client privilege or work product protection should be unwaivable, but that any waiver should be entirely the client's own decision, made free of outside pressure or demands. A separately written statement of the minority's position is provided as Appendix A to this report.

6. Use of Private Will Depositories

In 2008, the State Bar of California's Executive Director transmitted to the Board of Governors a memorandum recommending that the Board appoint a Task Force to study appropriate steps the State Bar might take to address the age-related issues that the profession will confront in the coming decades as the relative proportion of older Bar members increases with the aging of the "Baby Boom" generation. (See June 18, 2008 Memorandum from Judy Johnson to Members of the Board of Governors and Members of the Board Committee on Member Oversight [the "Johnson Memo"]). The Johnson Memo identified several ways in which the Rules of Professional Conduct might be enhanced to address age-related impairments "in a manner that protects client interests while preserving the dignity of a valued member of the legal community." (Id. at page 2). Among the concepts suggested was: "Whether the rules should be changed to facilitate a lawyer's use of private will registries and depositories. Retention of client files that include original wills, trusts or other instruments are a longstanding practice management concern and the use of private will registries and depositories may ease the burden of file retention and better protect client interests."

Among the materials the Commission considered in relation to a rule that might facilitate use of private will depositories was a recent COPRAC opinion, Formal Opinion 2007-173, concerning a lawyer's use of a will depository or will registry. In that opinion COPRAC concluded under the facts presented, which involved a client with whom the lawyer had not been in communication with for over 30 years and whom the lawyer could not locate, the lawyer was precluded from depositing client's will in a will depository or registering the will in a will registry without the client's informed consent. The overriding concern the Committee expressed related to the effect that depositing a will or registering a client's information would have on the lawyer-client privilege specifically, and the lawyer's duty to preserve the confidentiality of the client's information more generally.

Although implicit in the opinion's discussion is the conclusion that a lawyer may utilize either a will depository or registry with the client's consent, the Commission declines to recommend a rule that would facilitate use of private will registries and depositories. Aside from the privilege and confidentiality concerns expressed in the COPRAC opinion, concerns were raised about the viability of a private will depository. For example, what would happen if a lawyer deposited estate planning documents with such a depository, and the depository later went out of business? Would the contents of the depository be escheated? Or would the depository's creditors be able to seize them? The Commission concluded that until there is assurance of

the longevity of such depositories and registries, a rule facilitating their use by California lawyers should not be pursued.

The Commission's research did reveal that a number of states, e.g., Illinois, Idaho, Louisiana, and New Jersey, have enacted public registries, typically overseen by the jurisdiction's Secretary of State. The State Bar might consider such an approach, in cooperation with the Legislature. However, given the current pace of the Commission's work, the Commission determined there was not sufficient time to explore this possibility.

The Commission members unanimously approved the foregoing recommendation.

7. Practice Succession Plan

In addition to a rule facilitating the use of private will depositories, the Johnson Memo also suggested that the Commission explore the following concept: "Whether the rules should require a lawyer to have a "succession plan" (such as an estate plan pursuant to Probate Code §2488 that allows for the appointment of a law practice administrator) that would address issues of sudden death or disability." After consideration of this concept, the Commission decided not to recommend a rule that would require a lawyer to have a "succession plan."

Among the reservations expressed about such a rule are the following: (i) the only way the State Bar Court could enforce such a rule would be by auditing all lawyers to see whether they have adopted a "succession plan." If the lawyer had not, or if the State Bar deemed the plan inadequate," a lawyer could be disciplined even though a client might not have been harmed by the absence of such a plan. (ii) The demands of a practice succession plan rule and the consequences of not satisfying its standards would fall uniquely and disproportionately on solo practitioners, as lawyers who practice together will likely have addressed such issues in their partnership agreement. Should such a rule also require that partnership agreements be subject to State Bar audit to assess their adequacy? (iii) What sanction would be imposed on a deceased or impaired lawyer who was found not to have an adequate practice succession plan? In light of the foregoing, the Commission concluded that a disciplinary rule requiring that lawyers have a practice succession plan would not significantly enhance the client protections already available under Business and Professions Code sections 6180 et seq. Finally, even if such a rule might be beneficial, the current pace of the Commission's work does not permit sufficient time to adequately explore the feasibility of the proposal.

The Commission members unanimously approved the foregoing recommendation.

8. Lawyer Acting As Lobbyist

Although there is no rule counterpart in the Model Rules, the Commission studied the concept of a rule that would regulate lawyers who act as lobbyists. The Commission explored the possible adoption of such a rule only because the Commission, as part of its charge, researched rules which other jurisdictions had adopted but which have no Model Rule counterpart. Research had disclosed that two jurisdictions had adopted either a rule or comment that concerned lobbying activity by lawyers. After consideration of these provisions from other states, the Commission determined that there is no need for such a rule in California.

The two jurisdictions that have adopted provisions concerning lobbying are Pennsylvania and the District of Columbia. Pennsylvania Rule 1.19 was promulgated following an imbroglio between the Pennsylvania Legislature and the Pennsylvania Supreme Court. The court had taken issue with the legislature's attempted infringement of the court's authority to regulate lawyers, and in 2002 struck down a lobbying statute. Subsequently, the Legislature enacted a new statute and in response, the court promulgated new Rule 1.19, which provides:

> Pennsylvania Rule 1.19 Lawyers Acting as Lobbyists
>
> (a) A lawyer acting as lobbyist, as defined in any statute, or in any regulation passed or adopted by either house of the Legislature, or in any regulation promulgated by the Executive Branch or any agency of the Commonwealth of Pennsylvania shall comply with all regulation, disclosure, or other requirements of such statute, resolution, or regulation which are consistent with the Rules of Professional Conduct.
>
> (b) Any disclosure of information relating to representation of a client made by the lawyer-lobbyist in order to comply with such a statute, resolution, or regulation is a disclosure explicitly authorized to carry out the representation and does not violate RPC 1.6.

The Commission determined that, aside from the vagueness of a rule that requires compliance "with all regulation, disclosure, or other requirements of such statute, resolution, or regulation ***which are consistent with*** the Rules of Professional Conduct," paragraph (a) (emphasis added), paragraph (b) conflicts with California's strong policy of protecting a client's confidential information by carving out a further exception to California's nearly absolute duty of confidentiality. See Rule 3-100 and Business and Professions Code section 6068(e). Conversely, Pennsylvania, unlike California, has already carved out numerous express exceptions to confidentiality. The Commission therefore concluded that adoption of a rule similar to Pennsylvania Rule 1.19 would not be a good fit for California.

The District of Columbia Rule 1.0(h) defines "matter" to include "lobbying activity":

> (h) "Matter" means any litigation, administrative proceeding, ***lobbying activity,*** application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule.

However, no other jurisdiction that includes a definition of "matter" in its terminology section (Alaska, New York, North Dakota and Oregon) includes "lobbying" or "lobbying activity." Moreover, the Commission has not recommended that the Rules include a definition of "matter."

Perhaps most important, there has been no concern expressed by Commission members, the public, or other interested parties in having a California Rule of Professional Conduct regulating lawyer lobbying activities. Absent a compelling reason to do so, the Commission does not recommend adoption of such a rule.

The Commission members unanimously approved the foregoing recommendation.

9. Proposed Rule 1.11, Paragraph (e). Special Conflicts of Interest for Former and Current Government Officers and Employees (requiring imputation of conflicts when government lawyer has moved from private practice and use of an ethical wall or screen to rebut imputation).

During the initial public comment distribution, the Commission recommended adoption of a version of Model Rule 1.11 that would have included paragraph (e), which has no counterpart in the Model Rule. Paragraph (e) was intended to address the duties of government lawyers who had left employment in the private sector or other non-government employment. In response to concerns expressed by the Department of Justice concerning paragraph (e), it was revised following the initial round of public comment to provide:

> (e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government agency as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:
>
> (1) the personally prohibited lawyer is timely screened from any participation in the matter; and
>
> (2) as soon as practicable after the need for screening arises, and unless prohibited by law or a court order, the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements.

The comments corresponding to paragraph (e) provided:

> [2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. [Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.] Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Similarly, paragraph (e) provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening and notice in certain situations.
>
> * * *
>
> **Screening of Current Government Lawyers Pursuant to Paragraph (e)**
>
> [9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely screened and notice is given as soon as practicable to the former client to

enable it to ensure the government's compliance with the screen. But see Comment [9D]

[9C] Paragraph (e)(2) recognizes that, in some circumstances, it may not be practicable for the government agency to provide prompt notice to the former private client. The government agency may not be able to locate the former client. An investigation by the government may be compromised if the fact of the investigation is not kept confidential. For example, if notice that the former lawyer of the target of the investigation is being screened would pose a significant risk that the investigation would be compromised, the government agency may delay providing notice of the screen. However, not providing notice promptly under paragraph (e)(2) should be the exception.

This Rule Not Determinative of Disqualification

[9D] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].

The Commission included a slightly different version of paragraph (e) in the initial public comment draft of proposed Rule 1.11 in recognition of California case law that expressly provides for imputation within government offices and requires screening to avoid the consequences of such imputation. E.g., *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864]. Following the initial round of public comment, the Commission made the aforementioned changes in response to the Department of Justice Comment. However, the Board of Governors Committee on Regulation and Admissions considered the Commission's recommendation at its May 14, 2010 meeting and the Board Committee determined not to recommend that the Board adopt paragraph (e) and instead conform the Rule more closely to the Model Rule. As with other rules concerning ethical screens, the Board Committee took the position that the law of screening of lawyers who move from the private sector or other non-government employment to government employment should be developed through court decisions. To facilitate the development of case law, the Board Committee recommended, and the Board of Governors adopted, a comment with no counterpart in the Model Rule that is intended to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because this Rule does not expressly provide for screening. See Comment [9C] to the ALT1 version of Rule 1.11. The Board Committee, relying on the concerns expressed by the Department of Justice, also expressed concern that, notwithstanding the changes the Commission made to the Rule following the initial round of public comment, the provision in paragraph (e) that requires notice to the former client might compromise ongoing investigations of a screened lawyer's former client. This revised version of the Rule was issued for a subsequent round of public comment.

After a subsequent round of public comment that ended on June 15, 2010, the Commission considered public comments received on the revised version of proposed Rule 1.11 which, as noted, did not include a paragraph (e) imputation and screening provision. After further

discussion, the Commission voted to request that the Board of Governors reconsider including paragraph (e) in proposed Rule 1.11. In particular, the Commission believed that revisions to the notice provision in the Rule and addition of a clarifying comment following the initial public comment adequately addressed the concerns expressed by the Department of Justice and the Board Committee about paragraph (e)'s notice requirement. At its meeting on July 22 – 24, 2010, the Board again determined that paragraph (e) should not be included in the Rule. In accordance with the Board's decision, proposed Rule 1.11 does not include paragraph (e) and leaves the issue of imputation and screening within a government agency to case law development.

10. Special Provisions for the Regulation of Nonrefundable Advance Fees Under Proposed Rule 1.5 (Fees For Legal Services)

Unlike the Model Rules, the proposed rules concerning fees for legal services and client trust bank accounts do not require that fees paid as compensation for future legal services ("advance fees") must be held in a client trust account until services have been rendered. Instead, proposed Rule 1.15 (Handling of Funds and Property of Clients and Other Persons) expressly states that: "(d) A lawyer may, but is not required to, deposit an advance for fees in a trust account." This approach to a lawyer's handling of advance fees is consistent with longstanding disciplinary case law. See *Baranowski v. State Bar* (1979) 24 Cal.3d 153, [154 Cal.Rptr. 752]. In connection with the decision to maintain this difference with the Model Rules, the Commission considered the concept of new standards in the rules that would help avoid situations where an advance fee is paid, not held in the client trust account, and then later is unavailable to be refunded to a client when a determination is made by the State Bar Court or a fee arbitration panel that a lawyer has not earned all or a portion of the advance fee. In particular, the Commission studied jurisdictions that have rules specifically regulating advance fees designated as "nonrefundable" or "earned on receipt."

During each round of public comment, members of the California criminal defense bar and some of their representative organizations criticized several separate proposals by the Commission to regulate in the Rules of Professional Conduct a common practice among certain lawyers to denominate fees as "nonrefundable" or "earned on receipt." The Commission took the position that the commenters who disagreed with the Commission's treatment of nonrefundable and earned on receipt fee arrangements misinterpreted current California law, which clearly makes fixed and flat fees refundable. During the initial public comment period, the aforementioned criminal defense bar objected to the Commission's proposed absolute prohibition on fees denominated as non-refundable or earned on receipt, except for "true retainers."

In response to this criticism, the Commission proposed a rule based on Washington Rule 1.5. The new version, which was circulated with the second round of public comment, still prohibited the denomination of a fee as nonrefundable or earned on receipt, but permitted the charging of a flat fee, so long as certain disclosures were made in writing to the client. The criminal defense bar also took issue with this second public comment draft. In response to that criticism, the Commission made further revisions to the Rule in an attempt to balance the competing interests that had been identified: the interests of clients in taking advantage of the certainty of a flat fee agreement, while still being able to discharge their lawyers at any time without the threat of losing the fee that was advanced to the lawyer whom the client seeks to

discharge, and the interests of preventing attachment by third parties of fees advanced by the client.

Using Arizona Rule 1.5(d)(3) as the starting point, the Commission proposed a third revised draft that addressed the issue of nonrefundable fees in two separate paragraphs and several explanatory comments. Paragraph (e) of that draft permitted the use of the terms "nonrefundable," "earned on receipt," or similar terms, but only if the lawyer provided specific written disclosures intended to prevent the client from being misled as to the client's rights to discharge the lawyer at any time and potential right to a refund. Paragraph (f) limited the kinds of fee agreements that could be denominated as "nonrefundable" or "earned on receipt" to true retainers and flat (or fixed) fee arrangements. This third treatment of the nonrefundable fee issue was presented to the Regulation and Admissions Committee after the subsequent public comment period which ended on June 15, 2010.

At its meeting on July 22 – 24, 2010, the Board discussed the Commission's proposal and also considered input from representatives of the criminal defense bar who asserted that the Commission's proposal would be bad policy because it would facilitate jeopardy tax assessments, attorney fee forfeiture, attorney fee restraint by government agencies or creditors, and impair a criminal accused's constitutional right to retain counsel of choice. Following discussion, the Board adopted a modified version of the proposed rule, which deleted the Commission's proposed provisions for expressly regulating nonrefundable, earned on receipt, or similarly-denominated fee arrangements.

APPENDIX A

MINORITY REPORT IN SUPPORT OF A NEW RULE RESTRICTING REQUESTS FOR A WAIVER OF THE LAWYER-CLIENT PRIVILEGE

The Commission voted not to adopt a proposal to recommend creation of a rule which would forbid any action by a lawyer which would demand or suggest that a party which is not that lawyer's client, waive its attorney-client privilege or that opposing party's attorney's work product confidentiality protection. The proposal was intended to stop widely reported demands by law enforcement officials, primarily though not exclusively at the federal level, for such waivers in the context of criminal and other law enforcement negotiations. The recent case *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal. App. 4th 1229, held that disclosure of privileged or of protected work product material to law enforcement waives that protection for all purposes. Some had thought that disclosure of such material to law enforcement was a limited waiver which would not strip the material of such protection with respect to third parties; but the courts have properly held otherwise.

There is precedent for such a disciplinary rule. Current Rule of Professional Conduct 1-500 provides that a member of the California Bar "shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law [subject to certain exceptions concerning non-substantive arrangements, as through payments on retirement of a lawyer/partner from the active practice of law]." That rule, which has not been challenged, has ended what had previously been a practice whereby a defendant, sued for some major product defect, would settle a plaintiff's case on terms acceptable to the plaintiff but would obtain the silence of the plaintiff's lawyer who had learned the details of the product defect, by making it a condition of the settlement that the lawyer not accept like cases in the future.

The problem identified by the proposed rule is of much graver nature. It addresses primarily the criminal or civil prosecution of corporations, although it would also apply to individuals. Such a prospective defendant may have retained counsel to investigate the alleged wrongdoing, and counsel may have obtained extensive material and formed extensive conclusions about the scope of wrongdoing, if any. Such material must be communicated to the client so that the client can – as in every other situation which warrants the advice of counsel – make informed decisions about its options based on the *candid, unvarnished, and completely private and confidential* advice of its attorneys. But if the client is at risk of criminal or civil prosecution and as long as the prosecuting attorneys may demand the waiver of attorney-client privilege and of work product protection, counsel may be concerned that they are providing, not confidential advice to their client but a roadmap for action for the client's adversaries. This is not limited to law enforcement, since the McKesson case correctly holds that once disclosed to *any* third party, none of the material remains privileged in – for example – follow-on third party litigation.

This practice is of a kind with, but much graver than, the demand for an opposing lawyer to bury his or her information so that it may not be used against the settling party, which Rule 1-500 forbids. The dissenters do not argue that attorney-client privilege or work product protection should be unwaivable, but that any waiver should be entirely the client's own decision, made free of outside pressure or demands. (***Facts*** which may be made known to a lawyer or discussed by the lawyer with the client within the scope of the privilege are not themselves privileged, so that no evidence will be made unavailable to any governmental

authority if the proposed rule were adopted. See Witkin, California Evidence, Witnesses, § 128, and cases there cited.)

The Commission heard two arguments against the adoption of the proposed rule, neither of which withstands examination. One argument was that the subject should remain one of prosecutorial discretion because it "would restrict access to information necessary to ensure that the public is protected from criminal activity." This argument fails on two counts: because ***facts*** are not protected by the privilege and protection in question, as just explained, and secondly because of the crime-fraud exception to the attorney-client privilege. In other words, where the attorney's services have been used in support of criminal or fraudulent conduct, there is no privilege. But while the context of the proposed rule has arisen in respect to corporate investigations, the thought that there should be no privilege where the lawyer has knowledge from his/her service to a client which, if known, would "protect the public from criminal activity," would do away with the confidentiality of ***all*** knowledge a lawyer has from representation of a criminal defendant, such as perhaps a private admission of guilt by the client to his/her lawyer. **That argument would do away with the Sixth Amendment altogether**; and the dissenters are dismayed that the Commission gave it support.

The other argument was that the point of the proposed rule was well taken but that it was already provided in ABA Model Rules 4.3, 4.4 and "perhaps" 4.2. That statement is not correct, as the briefest inspection of those rules will show. Rule 4.3 addresses "dealing with unrepresented persons," and thus is not conceivably related to any issue concerning an opposing party's right to privacy in its relations with its attorney. Rule 4.4 states that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or *use methods of obtaining evidence that violate the legal rights of such person.*" The italicized phrase, and only that phrase, could possibly address the issue of the proposed rule. But in the absence of a rule forbidding third party pressure to surrender or waive the privileges under discussion, there may be an absence of any "legal right" not to be pressured to waive those privileges. Without an established body of law which would firmly cement those rights in place, Rule 4.4 is too far from the mark of the present problem, and does not afford the required protection.

Finally, Rule 4.2 forbids discussion of a "subject of the representation" directly with an opposing party represented by a lawyer, like current Rule 2-100. That rule provides no protection at all against the problem in hand, since the demand may well be made to the target's counsel, who would have a duty to pass it on to his or her client.

APPENDIX B

MINORITY REPORTS IN SUPPORT OF ADOPTION OF A CALIFORNIA COUNTERPART TO ABA MODEL RULE 4.1

DISSENT A. A minority strongly disagrees with the narrow vote to recommend against adoption of proposed Rule 4.1(a). Proposed Rule 4.1(a), which largely tracks Model Rule 4.1, provides important protection by prohibiting a lawyer from knowingly making a false statement of material fact or law to a third person and by failing to disclose a material fact when disclosure is necessary to avoid assisting a client's criminal or fraudulent act unless disclosure is prohibited by Rule 1.6. The rule is an important part of the Model Rules and is intended to work with other rules proscribing similar conduct in other situations, such as Rule 3.3 (candor to the tribunal) and Rule 1.2(d) (advising a client regarding criminal or fraudulent conduct). Every jurisdiction, with the exception of California and North Carolina, has Rule 4.1 with minor variations in a few states. The rule is not redundant and its absence will send the wrong message to lawyers and the public.

The argument that there are State Bar Act provisions that might apply in situations governed by Rule 4.1(a) is no more valid a reason for opposing this rule than it would be in regard to other proposed rules that overlap with one or more statutes in the B & P Code. If this argument were a valid ground for recommending against adopting a Model Rule, many rules the RRC has proposed for adoption would be eliminated, including Rule 3.3 (candor to the tribunal), Rule 8.2 (duties to judicial and legal officers), Rule 4.3 (dealing with an unrepresented person), Rule 1.2(d) (counseling or assisting unlawful or fraudulent conduct), and Rule (8.4) (misconduct). Each of these rules overlaps in one way or another with provisions in the State Bar Act; however, that has never been a ground (until now) for recommending against adoption of a particular Model Rule.

Rule 4.1(a) is a universal rule of lawyer conduct that has gained national acceptance. The rule provides lawyers in modern practice with needed guidance and the public with greater protection. Business and Professions Code section 6068(d) employs 19th Century language that is hardly a model of clarity for lawyers in modern practice ("to employ…those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"). Section 6128(a) is also an inadequate substitute because it is limited to acts of deceit or collusion that constitute criminal misconduct. Section 6106 employs the amorphous concept of moral turpitude, dishonesty or corruption and could apply to conduct proscribed by many of the rules the RRC has proposed. The importance of Rule 4.1(a) is that it informs lawyers in advance of specific conduct that is prohibited in understandable terms that lawyers will recognize. The proposed rule is consistent with case law in California and the rules governing lawyers in virtually every jurisdiction. California lawyers and the public deserve to have a precise rule that provides adequate notice of conduct that is prohibited in advance of a lawyer being charged with discipline.

Model Rule 4.1 has been in existence for over 25 years and has been shown not to chill legitimate advocacy. See Restatement (3d) The Law Governing Lawyers §98 and the ABA Annot. Model Rules. The purpose of proposed Rule 4.1(a) is to prohibit a lawyer from lying to a third person about a material fact or law that the lawyer knows to be false. As with other rules, the intent is to protect against fraud and assisting the client in criminal or fraudulent conduct. See the definition of "fraud" in proposed Rule 1.0.1(d). The conduct prohibited by paragraph (a) is not protected speech and does it interfere with legitimate advocacy. Other rules, aside from Rule 4.1(a), restrict what lawyers can say or do in the course of representing clients. See, e.g., Rules 1.2(d) (advising or assisting criminal or violent conduct), Rule 3.3 (candor to the tribunal), Rule 3.5 (prohibit ex parte communications with a judge or juror), Rule 3.6 (extra-judicial communications that have a substantial likelihood of materially prejudicing an adjudicative proceedings), Rule 4.2 (communicating with represented person), and Rule 4.3

(dealing with unrepresented person). Proposal 4.1(a) is no less important or overly restrictive on legitimate advocacy than other core principles reflected in the Model Rules. For example, Comment [2] to the Model Rule explains that certain statements in negotiations are ordinarily not taken as statements of material fact under generally accepted conventions in negotiation. see ABA Formal Opinion 06-439. No valid reason exists for California not to adopt this universally accepted rule.

DISSENT B. The public comment version of Rule 3.9 required lawyers to do two things: to announce in certain legislative and administrative circumstances that they are acting as advocates for others (because failing to do so would be dishonest), and to comply with Rule 4.1. The public comment version of Rule 4.1, in turn, generally required that lawyers may not make false statements to others (because doing so would be dishonest). The requirement of lawyer honesty is long-standing and currently is found in Business and Professions Code section 6106. That section subjects a lawyer to discipline for any ". . . act involving moral turpitude, dishonesty or corruption . . . ."

The Commission finally decided to recommend against adoption of Rule 4.1 and to modify Rule 3.9 to eliminate the duty of honesty previously found in its cross-reference to Rule 4.1. A minority of the Commission dissents from both decisions. While the minority hopes that the lawyer's section 6106 duty of honesty remains in the circumstances described in Rules 3.9 and 4.1, the Commission's vote will make this unclear to many readers. The complete absence of any Rule 4.1 naturally will lead readers to think that the Commission intended to say that lawyers have no such duty of honesty. If that duty does remain, it will be hidden in the Business and Professions Code, outside the easier reference of the Rules and therefore less likely to be known to lawyers.

We want to note that the Commission's Rule 3.9 recommendation was to adopt the N.Y. version of Rule 3.9, but the Commission has substantively strayed from N.Y. Although N.Y. Rule 3.9 does not refer to Rule 4.1, N.Y. did adopt Model Rule 4.1(a) (the prohibition on making any false statement of material fact or law to others). Thus, the crucial duty of honesty is absent from the Commission's proposal but is found in N.Y. Rule 4.1, and N.Y. Rule 4.1 by its terms would cover the Rule 3.9 circumstances. While the Rule 3.9 minority differs as to how stringent its requirements should be, it is unanimous that it should at the very least expressly require compliance with the duty of honesty found in Model Rule 4.1(a).