

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- | | | | |
|------------------------------------|-----------------------------------|--------------------------------|--|
| Rule 1.0.1 [1-100] | Rule 1.11 [n/a] | Rule 4.1 [n/a] | Rule 6.5 [1-650] |
| Rule 1.4.1 [3-410] | Rule 1.17 [2-300] | Rule 4.4 [n/a] | Rule 7.6 |
| Rule 1.8.4 [n/a] | Rule 1.18 [n/a] | Rule 6.1 [n/a] | Rule 8.2 [1-700] |
| Rule 1.8.9 [n/a] | Rule 3.9 [n/a] | Rule 6.2 [n/a] | Discussion Draft [all rules] |

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

OFFICE USE ONLY.

* Date

02/19/2010 

Period

PC

File :

F-2010-381f Sandra McIntyre [7.6]

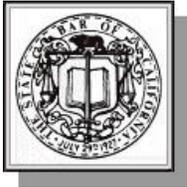
Commented On:

Specify:

Submitted via:

Online

* Required



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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

We support the Rule Revision Commission recommendation not to adopt this proposed rule.

OFFICE USE ONLY.

* Date

03/01/2010 

Period

PC

File :

F-2010-382n SCCBA [7.6]

Commented On:

Specify:

Submitted via:

Online

* Required

Model Rule 7.6 [1-400]

RECOMMENDATION: NO ADOPTION

“Political Contributions to Obtain Legal Engagements or Appointments by Judges”

(Draft # -- N/A)

Summary: Model Rule 7.6 is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission does not recommend its adoption for the reasons stated in the Introduction.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input checked="" type="checkbox"/> ABA Model Rule substantially rejected	<input checked="" type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule for Adoption 1
Opposed Rule for Adoption 10
Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority Position Included. (See Introduction): Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

December 2009

(Draft rule following initial round of public comment)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same for the use of firm names and letterheads. **The Commission, however, declines to recommend any rule analogous to Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge.**

3. The Commission recommends that Model Rule 7.6 not be adopted because its substance is addressed by Business & Professions Code § 6106, a catchall for corruption, and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer who violates these statutory prohibitions would be in violation of other rules the Commission has proposed, such as Rules 3.5 and 8.4. In addition the Commission is concerned with uneven application of the Rule. Further, the Rule would be ineffective. The Rule does not reach the improper conduct itself. It does not prohibit a lawyer from contributing money to a political campaign to get an appointment or engagement, but rather prohibits the lawyer from accepting the appointment or engagement.
4. Variation in Other Jurisdictions. Model Rule 7.6 is the least adopted of the Model Rules. As of December 1, 2009, only seven jurisdictions have adopted the Rule (Colorado, Delaware, Idaho, Iowa, Maine, Missouri, Washington).

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>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.</p>	<p>Please refer to Introduction for this Rule.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	<p>Please refer to Introduction for this Rule.</p>
<p>[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.</p>	<p>[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.</p>	<p>Please refer to Introduction for this Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	<p>Please refer to Introduction for this Rule.</p>
<p>[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.</p>	<p>[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.</p>	<p>Please refer to Introduction for this Rule.</p>
<p>[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</p>	<p>[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</p>	<p>Please refer to Introduction for this Rule.</p>

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<p>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.</p>	<p>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.</p>	
<p>[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.</p>	<p>[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.</p>	<p>Please refer to Introduction for this Rule.</p>

Rule 7.6: Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona, California, the District of Columbia, Illinois, Michigan, New Jersey, Ohio, Pennsylvania, Texas, and Virginia (among others) have no rule equivalent to ABA Model Rule 7.6.

New York has no Disciplinary Rule like ABA Model Rule 7.6, but EC 2-37 provides as follows:

Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office,

government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

[J]ust as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

EC 2-38 complements EC 2-37 by setting forth seven factors to consider in determining “whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement...” For example, the factors include “(a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a ‘Request for Proposal’ process” and “(c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate.”

Ohio omits ABA Model Rule 7.6, explaining as follows: “The substance of Model Rule 7.6 is addressed by provisions of the Ohio Ethics Law... and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer or law firm that violates these statutory prohibitions would be in violation of other provisions of the Ohio Rules of Professional Conduct, such as Rule 8.4.”