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PROPOSED CHANGES IN CONDUCT RULES NEED LAWYERS' COMMENTS

Focus Column

By Jeremiah Reynolds

All lawyers practicing in California are required to obey the California Rules of Professional Conduct. Violations of the rules can bring a variety of disciplinary measures imposed by the State Bar, including disbarment, suspension, and public reproof.

Given the importance of the rules, it is surprising that many California lawyers are completely unaware that the rules are being rewritten and that deadlines for public comment on the proposed new and amended rules are approaching fast. With so much potentially at stake, lawyers from all fields should be aware of the proposed changes to the rules and be involved in the comment process for the new and amended rules.

Five years ago, the State Bar assigned a Special Commission for the Revision of the Rules of Professional Conduct to study developments in the field of attorney responsibility and recommend comprehensive revisions to the rules. The commission has completed work on a series of proposed changes, and it plans to issue the proposed new and amended rules for public comment in four batches.

The first batch of 27 proposed new and amended rules is available on the State Bar Web site (www.calbar.ca.gov/state/calbar/calbar_home.jsp). A public hearing on these proposed rules is set for Oct. 7. The deadline for public comments is Oct. 16.

The largest change being contemplated by the commission is the adoption of the format, structure and numbering system of the American Bar Association Model Rules of Professional Conduct. This adjustment is long overdue. California is the only state that has not adopted ethical rules based on the format of the ABA Model Rules. This presents needless difficulties and complexities for California lawyers. For example, lawyers attempting to obtain admission to the California Bar are required to take and pass the Multistate Professional Responsibility Examination, even though the exam is based on the ABA Model Rules, not the California rules. As a result, new lawyers are forced to study the California rules and the ABA Model Rules simultaneously, a process that can be needlessly confusing and difficult.

Similarly, California lawyers who work at national law firms or practice in several states are required to keep track of two sets of rules and to determine which of the rules applies in different contexts. Again, these complexities will be reduced by adopting the format of the ABA Model Rules.

In addition to format changes, the proposed new rules also will involve major substantive changes to the California rules, many of which surely will be controversial. For example, lawyers who serve as mediators and arbitrators should pay particular attention to proposed Rule 2.4. Unlike the ABA's version of this rule, which only alerts lawyers to other standards for neutral and arbitrator conduct, the commission proposed incorporating various standards of conduct for mediators and arbitrators into Rule 2.4.

Thus, under Rule 2.4, it would be an ethical violation for mediators and arbitrators to violate standards of conduct governing disclosures of conflicts of interest, confidentiality, marketing, compensation, and ex parte communications. While this may be a desirable change, lawyers who

serve as mediators and arbitrators should be involved closely in the public comment process for Rule 2.4.

Senior lawyers in law firms also should take a close look at Rules 5.1 and 5.3, which impose personal responsibility on supervisory lawyers for the acts of other lawyers and nonlawyers in their law firm. For instance, Rule 5.1(a) would require that lawyers with managerial responsibility in law firms implement procedures that provide reasonable assurance that all lawyers in the law firm conform to the Rules of Professional Conduct. It would be an independent basis for discipline if such procedures were not implemented.

Proposed comment 3 to Rule 5.1 should be discussed in detail and revised before it is adopted. It states that “[p]aragraphs (a) and (b) [of Rule 5.1] are also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules.”

It is unclear what policies and procedures the commission has in mind. Is the commission concerned that practices such as awarding bonuses for a certain number of billable hours may induce a violation of the rules of professional conduct by encouraging overbilling? If so, the commission should state its concerns more clearly. In its current form, this comment would lead only to confusion.

Law firm principals (for example, partners and shareholders) will want to scrutinize the language of Rule 5.6, which sets forth a general rule prohibiting agreements that restrict a lawyer’s right to practice after leaving a law firm (currently in Rule 1-500) and the exceptions to the general rule. Most of the text of, and comments to, Rule 5.6 have been newly drafted by the commission based on relevant case law, including the California Supreme Court’s decision in *Howard v. Babcock*, 6 Cal.4th 409 (1993), which held that a partnership agreement that requires a reasonable payment by a departing partner who continues to compete against his or her former partners does not necessarily violate Rule 1-500.

There should be debate and comment regarding whether Rule 5.6 correctly interprets the relevant case law in this area.

The commission’s proposed rules regarding the marketing of legal services (Rules 7.1 to 7.5) also require close examination. For example, Rule 7.1 contains the general rule prohibiting lawyers from making false and misleading communications regarding the availability of the lawyer’s services. Unlike ABA Model Rule 7.1, the commission has declined to adopt a requirement that the misrepresentation be material. Thus, any untrue or misleading statement in a communication regarding the availability of legal services could subject a lawyer to discipline, no matter how inconsequential (nor does Rule 7.1 contain a knowledge requirement on the part of the lawyer regarding the falsity of the communication).

The commission said it declined to adopt a materiality requirement in Rule 7.1 because the existing California rule has no such requirement. Nevertheless, it should be a matter for debate as to whether any untrue or misleading statement in a communication regarding the availability of legal services, as opposed to just material statements, should potentially subject a lawyer to discipline.

The commission’s proposed revisions to ABA Model Rule 8.4 should be the subject of lengthy examination and significant revision. In paragraph (e) of Rule 8.4, the commission recommended adopting a new provision that would prohibit a lawyer from “knowingly manifest[ing], by words or conduct, bias or prejudice on the basis of race, sex, religion, national

origin, disability, age or sexual orientation, if prejudicial to the administration of justice.”

This new language seems to be directed at the discriminatory use of peremptory challenges by lawyers. However, in the comments to the rule, the commission stated that “[a] trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).” Thus, the one type of conduct that clearly would seem to be prohibited by Rule 8.4(e) is apparently not within the scope of the rule (the other comments to Rule 8.4(e) do not provide further clarification as to what type of conduct the commission is attempting to prohibit).

Before Rule 8.4(e) is adopted, the commission needs to explain more clearly what type of conduct it is attempting to proscribe. If no changes are made, the rule will be susceptible to being held unconstitutional for vagueness.

The commission’s effort to revise the California rules to bring them closer to the rest of the nation’s is a worthy enterprise. But many controversial proposed changes to the rules need to be analyzed or revised before they are adopted. With deadlines for public comment quickly approaching, lawyers from all fields should take time to review the proposed rules and comment upon those that are most important to them.

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