ETHICS 2.0: A SNAPSHOT OF THE REVAMPED RULES OF PROFESSIONAL CONDUCT

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"Weep not that the world changes—did it keep a stable, changeless state, it were cause indeed to weep."
-William Cullen Bryant

On November 1, 2018, California lawyers will embrace, willingly or not, a new set of rules of professional conduct. This is the culmination of a nearly two-decades long process that saw two separate Rules Revision Commissions, a full set of proposed rules get rejected outright by the California Supreme Court, and finally, a new set of rules proposed by the State Bar and approved by the California Supreme Court on May 10, 2018. The new rules can best be described as a hybrid between the current (soon to be old) California Rules of Professional Conduct and the ABA Model Rules—some version of which is in effect in the other forty-nine states.

Probably the first change many lawyers will notice is the numbering. California will now use the ABA Model Rule numbering format; so, for example, the confiden-

tiality rule will go from being Rule 3-100 to Rule 1.6. Yet another noticeable, albeit non-substantive, change is that references to "members" in the current rules will now be to "lawyers" instead.

Another change that may catch lawyers' eyes is that most defined terms are now included in a separate rule, Rule 1.0.1, rather than as part of the individual rules in which they appear. When a defined term appears in the text of another rule, it is surrounded by asterisks so the reader knows it is a defined term.

Beyond the numbering and other somewhat cosmetic changes, the new Rules also include substantive changes of which all California lawyers should be aware. In this article, we discuss some of the more noteworthy changes (but by no means all of the changes).

Conflicts of Interest

Rule 3-310 governing conflicts of interest, which is one of the more familiar to practicing lawyers, is among the most extensively changed in the new Rules. Most obviously, there are four new rules that encompass the matters addressed by the single Rule 3-310. Rule 1.7 covers current client conflicts, which are the subject of Rule 3-310(B) and (C). Rule 1.9 governs duties to former clients, which is the subject of current Rule 3-310(E). Aggregate settlements, which are addressed in Rule 3-310(D), are now addressed in Rule 1.8.7. And Rule 3-310(F), which governs receiving compensation from someone other than a client, is now Rule 1.8.6.

With respect to current client conflicts, the framework for analyzing conflicts has shifted from whether an existing or prospective client's interests actually or potentially conflict, to whether representation of a client will be "materially limited" by the lawyer's obligations to another current or former client, a third person, or the lawyer's own interests. Rule 1.7(b). Rule 1.7(a) incorporates expressly the prohibition on representing a client without informed consent if the representation is directly adverse to another client in a separate matter. While such representation has long been prohibited under California common law, it was not expressly contained in Rule 3-310. The circumstances under which written disclosure must be made under 3-310(B) are substantially the same in Rule 1.7(c).

With respect to duties owed to former clients, Rule 1.9 incorporates the substantial relationship test, prohibiting attorneys without informed consent from representing a new client in a matter where the interests of that new client are materially adverse to a former client's in the same or a substantially related matter. The Rule also expressly prohibits lawyers from using confidential information acquired by virtue of a former client's representation to the disadvantage of the former client, unless the "information has become generally known." This is a departure from the State Bar Act's section 6068(e), which does not contain a similar exception for disclosure of confidential information, and well-established California case law prohibiting not only the disclosure but also the use against former clients of confidential information acquired by virtue of the representation. It remains to be seen how the State Bar and California courts will harmonize these authorities with Rule 1.9(c).

Rule 1.8.7 governing aggregate settlements is substantially the same as Rule 3-310(D), except that the new rule expressly extends to aggregate agreements in criminal cases and excludes class action settlements subject to court approval. Rule 1.8.6 governing payment from one other than the client is substantially identical to Rule 3-310(F).

Imputation of Conflicts

Rule 1.10 governs imputation of conflicts of interests and is new to the Rules. Imputation of conflicts in California has previously been a matter of common law. Rule 1.10 now expressly provides that the Rule 1.7 current client conflicts of one attorney in a firm are generally imputed to all attorneys in the firm. Rule 1.10 further provides for imputation of former client conflicts under Rule 1.9, unless the former client was a client of the prohibited attorney's former firm, the prohibited attorney did not "substantially participate" in the matter at the former firm, is timely screened from participation in the matter, and notice is provided to the affected client. No definition of "substantially participate" is provided, and the phrase is one unique to California's

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articulation of Model Rule 1.10. The phrase is also not found in the few California cases addressing imputed conflicts of interest and ethical screening. How "substantially participate" will be interpreted by the courts, and what impact, if any, the new rule will have on California case law governing attorney disqualification, is unknown.

Prospective Clients

Rule 1.18, which governs duties to prospective clients, is new to the Rules. Rule 1.18 prohibits lawyers from using or disclosing confidential information received from prospective clients who consult with the lawyer, even if an attorney-client relationship does not ensue. Lawyers are further prohibited without informed written consent from representing in the same or a substantially related matter any person whose interests are materially adverse to the prospective client's interests in that matter, and that prohibition is imputed to all lawyers in the firm. An exception to imputation exists if the conflicted lawyer "took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client," is timely screened, and gives notice to the prospective client. This concept of taking "reasonable measures" and screening in the prospective client situation is new to California, but is in Model Rule 1.18. Jurisdictions adopting this aspect of Model Rule 1.18 may give guidance on what measures will be deemed "reasonable" under the Rule.

Competence/Diligence/Delay

Rule 1.1, "Competence," is substantially the same as Rule 3-110, which prohibits lawyers from intentionally, recklessly, or repeatedly failing to perform services competently. Rule 1.1, however, also prohibits providing incompetent services "with gross negligence." How that differs from performing such services "recklessly" will presumably be developed through case law. Rule 3-110 defines competence as applying "the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance" of legal services. The concept of "diligence" is removed from the definition of "competence" in Rule 1.1 and is instead addressed in new Rule 1.2, entitled "Diligence." That rule prohibits lawyers from intentionally, recklessly, repeatedly, or with gross negligence failing to act with "reasonable diligence," as defined in the rule.

Rule 3.2, entitled "Delay in Litigation," is a new rule that did not previously exist in California. Rule 3.2 prohibits conduct in litigation "that has no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." Although this concept may not be new to California lawyers, it had not previously been included as a disciplinary rule in the Rules of Professional Conduct. Rather, it had been addressed in various forms in Civility Guidelines. How the State Bar will determine whether delay is the "substantial purpose" behind a lawyer's actions, and whether a lawyer should be disciplined on that basis, is anyone's guess.

Supervision

A lawyer's duty to supervise is incorporated into the current Rules in the Discussion following Rule 3-110 governing attorney competence. The new Rules contain a much more robust treatment of the duties of both supervising and subordinate lawyers, spelling out more clearly the obligations of both. Rule 5.1 governs Responsibilities of Managerial and Supervisory Lawyers, Rule 5.2 governs Responsibilities of Subordinate Lawyers, and Rule 5.3 governs Responsibilities Regarding Nonlawyer Assistants. For managing and supervising attorneys, these Rules generally require the lawyer to make reasonable efforts to have in place measures giving reasonable assurance of compliance with the rules and State Bar Act by all lawyers and nonlawyers in the firm. Supervising and managerial lawyers can be responsible for another lawyer's or nonlawyer's violation of the rules if the lawyer orders or ratifies the conduct or, once learning of the violation, fails to take reasonable remedial action while the violation's consequences may still be avoided.

Fees

Several of the new Rules concern legal fees. Like Rule 4-200, new Rule 1.5 prohibits lawyers from charging unconscionable fees, but, unlike 4-200, Rule 1.5 expressly permits charging flat fees and "true," *i.e.*, nonrefundable, retainers with client consent. Rule 1.15 requires a more typical retainer payment; that is, one made in advance for legal services to be provided in the future, to be deposited into a client trust account. This is a change from Rule 4-100, which requires only advance payment of costs and expenses to be deposited into a trust account. Rule 1.5.1 requires that fee-splitting agreements between lawyers be in writing, which is a new requirement, and that the client's consent to the fee split is obtained in writing, which is not a new requirement, at or about the time the lawyers enter into the fee-split agreement, which is a new requirement not found in Rule 2-200(A).

Withdrawal

The crux of Rule 3-700 can be found in new Rule 1.16. This includes the requirement that a lawyer "shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. . . ." Rule 1.16 also includes a list of factors warranting either mandatory or permissive withdrawal. The list of reasons for a mandatory withdrawal includes the same three reasons as in Rule 3-700. These are (1) where the lawyer knows or reasonably should know that the client is bringing or maintaining the action without probable cause and for the purpose of harassing or maliciously injuring a person; (2) the lawyer knows or reasonably should know that the representation will result in a violation of the State Bar Act or the Rules of Professional Conduct; or (3) the lawyer's mental or physical condition renders further representation unreasonably difficult. Rule 1.16 also adds a new, fourth reason: "[T]he client discharges the lawyer." There is no comment explaining why this seemingly obvious point is included in the rule.

Rule 1.16 also includes a list of ten reasons that would permit, but not mandate, a lawyer to withdraw from a representation. For the most part, this list is similar to the list that exists in Rule 3-700, but there are some notable differences. For example, Rule 3-700(C)(1)(b) permits withdrawal when the client seeks to pursue an illegal course of conduct. Rule 1.16(b)(2) expands this by also allowing withdrawal when the client seeks to pursue a "fraudulent" course of conduct. Also consistent with Rule 3-700, Rule 1.16 permits withdrawal when the client breaches a material term of an agreement with the lawyer—for example, by failing to pay the attorney's fees. Rule 1.16(b)(5), however, includes a limitation on this permissive basis for withdrawal: the lawyer only may withdraw for nonpayment of fees (or some other breach of the engagement agreement) if the lawyer first gives the client warning and an opportunity to cure.

Conflicts With Federal Law

Although it has not been approved by

the Supreme Court yet, Rule 1.2.1, entitled "Avoiding the Violation of Law," will be a significant expansion of Rule 3-210. The State Bar has re-submitted for public comment two versions of Rule 1.2.1, but the heart of the rule is the same in both versions, and likely will be approved by the Court.

Rule 1.2.1 addresses situations where a state law conflicts with a federal law. The most obvious example—and the one that apparently drove the direction of Rule 1.2.1—is the cannabis law. Under California law, cannabis can be legally sold and consumed. Those same acts are prohibited by federal law. Lawyers in California have grappled with how to reconcile that conflict of laws when approached by a client in the cannabis business. Under Rule 1.2.1 as proposed in both versions, a lawyer may not counsel a client to engage in a criminal act, but may discuss the legal consequences of any proposed course of conduct. Comment 6 to Rule 1.2.1 provides what may be the most significant aspect of the proposed rule, providing that a lawyer facing a conflict between state and federal law must advise clients that their actions conflict with federal law, and may be required to provide legal advice about that conflict.

Whichever version of Rule 1.2.1 eventually is adopted by the Supreme Court, lawyers generally will be able to advise clients in the cannabis industry without running afoul of California ethics rules. Whether they become subject to federal criminal prosecution for their advice and assistance remains to be seen.

Sex With Clients

No article on the new Rules would be complete without a discussion about Rule 1.8.10—the "no sex with clients" rule. Under Rule 3-120, a lawyer was not prohibited from having sexual relations with a client in all circumstances. Rather, the approach under the Rules was to prohibit sexual relations only when the sex was *quid pro quo* to the legal services or where the lawyer employed coercion, intimidation, or undue influence. The State Bar Act, Business and Professions Code section 6106.9, provides language that is essentially identical to Rule 3-120.

Notwithstanding that Section 6106.9 remains the law, Rule 1.8.10 does away with the nuanced consideration of whether there is coercion, undue influence, or some other improper basis for the sexual relationship between a lawyer and client. Wiping away any gray area, Rule 1.8.10 provides a bright line rule that a lawyer may not engage in sexual relations with a current client (other than where the client is the lawyer's spouse or registered domestic partner, or where a consensual sexual relationship preexisted the attorney-client relationship). This includes even all "constituents" of an organization client, where that constituent "supervises, directs or regularly consults with that lawyer concerning the organization's legal matters." Rule 1.8.10 cmt. [3]. So, if a lawyer represents a large organization, the list of people to keep at arms' length may be long.

Harassment/Discrimination

One of the new rules that generated the most attention and discussion was Rule 8.4.1, which addresses discrimination and harassment on the basis of a protected characteristic. Although an anti-discrimination rule already existed in Rule 2-400, discipline under that Rule could only be imposed, or a claim of discrimination even investigated, if a final adjudication of discrimination against the lawyer was entered by a separate tribunal. For many, this extra requirement of adjudication by a separate tribunal—which did not exist in connection with any other rule violation—was an unnecessary burden on the State Bar's ability to discipline attorneys for discriminatory conduct.

Under Rule 8.4.1, discriminatory conduct, including harassment on the basis of a protected characteristic, remains unethical and subject to discipline. But the prerequisite of a prior tribunal adjudication has been removed, so the State Bar can investigate and, if appropriate, commence disciplinary proceedings against a lawyer who is alleged to have engaged in prohibited discrimination. It remains to be seen, of course, how the State Bar will handle such allegations.

Conclusion

The Rules that will go into effect on November 1, 2018 are more expansive than the current Rules of Professional Conduct. This is true not only in sheer number (there are sixty-nine new rules, as compared to forty-six existing rules), but also as to the lawyer conduct the Rules address. While the new Rules do not necessarily impose new standards for lawyer conduct, they do expand the bases for potential lawyer discipline. For example, lawyers have long been required as fiduciaries not to use client confidential information against a client without consent, to provide clients with sufficient information throughout the representation to permit the client to make informed decisions about the representation, and to abide by a client's decision whether to settle a matter. Lawyers have also long been prohibited from defrauding or deceiving others in the course of representing clients. Those principles, however, are now expressly encompassed within the disciplinary rules. See Rules 1.2(a), 1.4(b), 1.8.2, and 4.1. From this perspective, the Rules may be viewed as more client protective. On the other hand, the new Rules expressly permit screening (Rules 1.10 and 1.18) and contain a modified duty of confidentiality to former clients (Rule 1.9(c)(1)) that some may view as more lawyer protective. From whatever perspective, however, the new Rules encompass changes that have been a long time in coming and must be studied carefully.

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