AGENDA MATERIALS FOR

III.D. Rule 3-100 [1.8.2]
(Use of Information Related to Representation)

- Drafting Team's Report & Recommendation on Rule 3-100 [1.8.2]

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.8.2

Lead Drafter: Zipser
Co-Drafters: Brown, Harris, Stout, Tuft
Meeting Date: August 14, 2015

I. CURRENT ABA MODEL RULE

Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules

* * * * *

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

* * * * *

Comment

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Use of Information Related to Representation

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

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II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed new rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE (CLEAN)

Rule 1.8.2 Use of Current Client's Information

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

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Comment

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

IV. PROPOSED RULE (REDLINE TO CURRENT ABA MODEL RULE 1.8(b))

~~Model~~ Rule ~~1.8(b)~~1.8.2 Use of Current ~~Clients: Specific Rules~~Client's Information

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

Comment

~~[5]~~ Use of information ~~relating to the representation~~ protected by Business and Professions Code § 6068(e)(1) to the disadvantage of ~~the~~ a client violates the lawyer's duty of loyalty. ~~Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3~~.

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

  [Comments on current rule 3-100 have been requested and are expected to be submitted. It is not known whether such comments will address the issue of use of confidential information.]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

  OCTC made the following comments concerning the first Commission's proposed rule 1.8.2:

  1. OCTC supports the rule and especially the use of informed written consent. Comment 1, however, seems unnecessarily long. The examples could either be stricken or tightened.

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- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- Pennsylvania Rule 1.8(b) is identical to Model Rule 1.8(b).

  Rule 1.8 Conflict of Interest: Current Clients: Specific Rules.

  * * * * *

  (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

  * * * * *

The ABA State Adoption Chart for Model Rule 1.8, which addresses use of information related to representation by comparing paragraph (b), is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf

- 35 jurisdictions have adopted Model Rule 1.8, paragraph (b) verbatim (AZ, AR, CO, CT, DE, FL, ID, IL, IN, IA, KS, KY, LA, ME, MD, MN, MO, MT, NE, NV, NH, NM, NY, NC, OK, PA, RI, SC, SD, TN, UT, VT, WA, WI, WV); 12 jurisdictions have adopted a rule provision substantially similar to 1.8(b) (AL, AK,DC, HI, MA, MI, NJ, OH, OR, TX,[1] VA, WY); three jurisdictions have adopted a rule substantially different from Model Rule 1.8(b) (GA, MS, ND); and only one jurisdiction has not adopted any version of Model Rule 1.8(b) (CA).

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. General: Adopt a new rule that prohibits the use a client's information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent. Drafting team consensus.
   - Pros: The existing duties of confidentiality and loyalty in the rules and State Bar Act do not state this precise type of client protection. The present provisions are lacking to the extent that they might be narrowly construed to prohibit improper disclosure of client information (confidentiality) or actual representation of an adverse interest (conflicts of interest). This could impair disciplinary actions that would otherwise address this type of misconduct.

[1] Texas's corresponding rule provision is Texas Rule .1.05(b)(2).

- Cons: A new rule may be unnecessary because section 6068(e)(1) is not limited to protection of client information. It is broad enough to encompass the trust and confidence that a client reposes in an attorney. Compare the following to the proposed rule: (i) the discussion of existing law duties owed to a former client in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256]; and (ii) Rest. (3d), Law Governing Lawyers, § 60, com. c(i).

2. Include a client consent provision in the new rule. Drafting team consensus.
   - Pros: In recognition of the authority of a client, the new rule should not be an inflexible ban the use of client information. It should provide for the client's ability to give informed consent and authorize an attorney's use of client information.
   - Cons: This Rule is intended to prohibit a lawyer from disadvantaging a client's interests. It should not include a client consent option as some of the circumstances that would trigger the Rule's application might involve facts constituting an "unwaivable" conflict.

B. Concepts Rejected (Pros and Cons):

1. Require that client authorization be by "written" informed consent. Drafting team consensus.
   - Pros: Written consent provides added protection to the client as it elevates the perception of its importance and would operate to assure greater understanding on the part of the client. It also facilitates the disciplinary application of the rule as a writing would serve as evidence in a disciplinary proceeding.
   - Cons: A writing requirement is rigid and burdensome to both clients and lawyers. A written consent requirement should only be warranted when the adverse consequences of providing the consent are not apparent so that highest degree of precaution is needed to understand the potential harm. In general, situations that would trigger the new rule – the use of the information is to the client's disadvantage – should not require an explicit written explanation.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. This is a proposal for a new rule that has no direct current California counterpart. It would add a new duty requiring a lawyer to seek a client's informed consent to use client information in certain situations.
   In addition, substantive changes to the Model Rule include: substituting the broad "information protected by Business and Professions Code § 6068(e)(1)" for the more narrow "information relating to the representation" in the Model Rule; and deleting the reference to use of information "required" by the rules as there is no required "use" of information in California of which the drafting team is aware.

D. Non-Substantive Changes to the Current Rule:

1. This is a proposal for a new rule that has no direct current California rule counterpart. However, non-substantive changes to the Model Rule include: including the clarifying word "current" in the rule title in referring to a client to clarify that this rule applies to

current clients; and designating a tentative rule number of "1.8.2." The first Commission recommended giving separate rule numbers (1.8.1, 1.8.2, etc.) to rules corresponding to the individual paragraphs in Model Rule 1.8 (e.g., 1.8(a), 1.8(b), etc.), which is a compilation of diverse rules that have in common their statement of lawyers' duties owed to current clients. This Commission has not yet determined whether to number the 1.8 paragraphs similarly. Drafting team consensus to tentatively number the rule 1.8.2.

2. Regarding the comment to the Model Rule (Cmt. [5] to Model Rule 1.8), the proposed rule deletes that text that is simply repetitive of the black letter or gives illustrations and examples as the Commission's charter is to recommend only commentary that is necessary to explain a rule. The drafting team determined that neither the examples nor the other deleted text add to the understanding of how the rule applies.

E. Alternatives Considered:

1. The only alternative considered was to not recommend this new rule. See section VIII.A.1, above.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

None.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

None.

Zipser

- [Date]: Email Comment
- [Date]: Email Comment

Brown

- [Date]: Email Comment
- [Date]: Email Comment

Harris

- [Date]: Email Comment
- [Date]: Email Comment

Stout

- [Date]: Email Comment
- [Date]: Email Comment

Tuft

- [Date]: Email Comment
- [Date]: Email Comment

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XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1.8.2 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1.8.2 in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)