

To: Rules Revision Commission
From: Rule 1-400 Drafting Team
Re: Model Rule 7.6 – Recommendation Not To Adopt
Date: March 17, 2016
For consideration at March 31/April 1, 2016 Meeting

The drafting team has studied Model Rule 7.6, reviewing the rule, its legislative history, the extent to which other jurisdictions have adopted the Rule, and the first Commission's notes in support of declining to recommend the rule's adoption. After considering the foregoing, the drafting team declines to recommend that Model Rule 7.6 be adopted for the following reasons:

1. There is no evidence there is a problem in California that requires such a rule.
 - a. E.g., no public comment was received on the rule by RRC1 except two comments that supported its rejection.
 - b. OCTC has not identified "pay to play" as a problem in the legal profession.
2. As noted by RRC1, Model Rule 7.6's "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."
3. Very few jurisdictions have adopted such a rule (only 8 jurisdictions have adopted a rule derived from Model Rule 7.6)
4. The rule requires proof of the lawyer's "purpose" in giving money, making it difficult to prove a violation (in fact, the disciplinary bar raised that as a problem during ABA deliberations to adopt the rule).
 - a. First, the difficulty of proof makes such a rule a poor candidate for a rule that is a minimum standard of discipline. (See Commission Charter).
 - b. Further, because of the "purpose" requirement, the rule would not be able to stand by itself but would require extensive comments to determine when and how the rule should be applied, which also conflicts with the Commission's charter.
5. The rule might be unconstitutional in light of *Citizens United*.
6. Question whether California has a problem that arises in other jurisdictions with appointments by judges; in many other jurisdictions, judicial elections are partisan, while in California they are non-partisan and most are not contested.
 - a. In fact, the Association of the Bar of the City of New York was the principal proponent of of a rule prohibiting "pay to play" in 1997. At the time, pay to play was viewed as a major problem in New York.

Attached:

Model Rule 7.6

Excerpt re Model Rule 7.6 from RRC1 Memo re Concepts Considered But Rejected

Legislative History of Model Rule 7.6, excerpted from Steven Gillers, Roy D. Simon and Andrew M. Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2010 Ed.)

Rule 7.6 Political Contributions to Obtain Legal Engagements or Appointments by Judges (ABA Model Rule)

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.

**Model Rule 7.6 Political Contributions to Obtain Government
Legal Engagements or Appointments by Judges
(Excerpt from the First Commission's Rules and Concepts
that were Considered but are not Recommended for Adoption)**

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.

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

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.

Canon and Code Antecedents

ABA Canons of Professional Ethics: No comparable Canon.

ABA Model Code of Professional Responsibility: No comparable Disciplinary Rule.

Cross-References in Other Rules

None.

Legislative History of Model Rule 7.6

1983 Rule: As originally adopted in 1983, the ABA Model Rules did not contain Rule 7.6 or any close equivalent.

1997 Proposal and Resolution: At the ABA's August 1997 Annual Meeting, the Association of the Bar of the City of New York proposed that the ABA adopt a detailed and highly restrictive "pay-to-play" rule. As described in a later ABA report:

The practice commonly known as "pay-to-play" . . . is a system whereby lawyers and law firms are considered for or awarded either government legal engagements or appointments by a judge only upon their making or soliciting contributions for the political campaigns of officials who are in a position to "steer" such business their way. . . .

The heart of the 1997 proposal provided as follows:

3. Prohibitions on Certain Government Finance Engagements

(a) No lawyer shall undertake a Government Finance Engagement awarded by an Official of an Issuer within two years after making either a Political Contribution or a Political Solicitation; provided, however, that this Rule shall not prohibit a lawyer from undertaking a Government Finance Engagement with a particular Official of an Issuer if:

(i)(A) the only Political Contribution made by the lawyer to that Official of an Issuer within the previous two years was (I) for a position for which the lawyer was entitled to vote and (II) not in excess of \$250 for each stage of the electoral campaign (i.e., primary and general election) and (B) the lawyer did not make any political contribution in excess of \$1,000 to any political party or committee of the State or of any political subdivision, agency or instrumentality thereof; or

(ii) the only Political Solicitation made by the lawyer on behalf of that Official of an Issuer or any political party or committee of the State or of any political subdivision, agency or instrumentality thereof, was for Political Contributions made within the previous two years for an Official of an Issuer for whom the lawyer was entitled to vote, no Political Contribution solicited was in excess of \$100 to the Official of an Issuer for each complete electoral campaign (primary and general election combined), and the aggregate of all Political Contributions solicited in any such campaign within the previous two years did not exceed \$2,500. . . .

(b) Notwithstanding subsection (a), any lawyer who is personally involved in the undertaking of Government Finance Engagements who solicits Political Contributions in any amount at the request of an Official of an Issuer or one of the Official's subordinates, is prohibited from undertaking a Government Finance Engagement awarded by that Official of an Issuer for a period of two years. . . .

(c) To the extent that a lawyer is prohibited from undertaking a Government Finance Engagement by operation of this Rule, the law firm employing such lawyer (whether or not

that lawyer is admitted to practice in New York) shall also be prohibited from undertaking a Government Finance Engagement. . . .

(d) If a law firm or a political action committee controlled by a law firm itself makes a Political Contribution or a Political Solicitation that would operate to prohibit a lawyer from undertaking certain Government Finance Engagements, the law firm is likewise prohibited from undertaking such Government Finance Engagements for the same two year period that would be applicable to a lawyer prohibited through operation of the Rule.

The ABA House of Delegates did not approve the New York City Bar's proposal. Instead, the House of Delegates approved a resolution (a) condemning pay-to-play practices wherever they existed, and (b) calling for the creation of a Task Force that would study the problems created by a pay-to-play system, develop appropriate professional standards or rules on the subject, and report to the House of Delegates within a year.

The next month, in keeping with this resolution, the ABA President appointed a Task Force on Lawyer's Political Contributions. The twelve-member Task Force was chaired by John W. Martin, Jr., Vice-President and General Counsel of Ford Motor Company, and included such distinguished members as former CIA and FBI Director William H. Webster, former United States Senator Howard H. Baker Jr., and SEC General Counsel Harvey J. Goldschmid. The Task Force collected and reviewed empirical data and media reporting on pay-to-play practices and considered possible ways to discourage or prevent such practices.

1998 Resolution: Shortly before the ABA's 1998 Annual Meeting, the ABA Task Force on Lawyer's Political Contributions issued a report unanimously condemning pay-to-play practices, urging the ABA to adopt a new Model Rule making pay-to-play practices unethical, and recommending broader disclosure of campaign contributions. However, the Task Force was sharply divided as to whether a new Model Rule alone would be sufficient, and what the new Model Rule should say. Six of the twelve Task Force members favored a strict rule that would

(a) disqualify both lawyers who made political contributions and their law firms, (b) require lawyers to publicly disclose their political contributions, and (c) require lawyers facing disciplinary charges to show that their political contributions were not made to obtain government legal work.

Five other Task Force members believed that requiring lawyers to disclose their contributions and to prove that the contributions were not made to obtain government work would be ineffective and would have an undue chilling effect on the First Amendment rights of lawyers to take part in the political process. In the face of this split, the House of Delegates did not adopt a new Model Rule but adopted the following resolution:

RESOLVED, That the American Bar Association urges the following actions be taken to address any conduct by lawyers making or soliciting campaign contributions to public officials for the purpose of being considered or retained for government legal engagements.

(1) All state, territorial and local bar associations should unequivocally condemn any arrangement under which the selection or consideration of lawyers to be retained for government legal engagements depends, in whole or in part, on whether the lawyer has made or solicited campaign contributions.

(2) State, territorial and local government entities should create, establish and maintain full and effective systems for the reporting and disclosure of campaign contributions to candidates for elective public office so that the public may have reasonable notice of contributions made by lawyers or law firms, and where they have not, bar and disciplinary

authorities should adopt rules that require disclosure of campaign contributions by lawyers and law firms to government officials in a position to influence the award of legal engagements to the contributor.

(3) Merit procurement processes should be adopted for the selection of lawyers performing legal services for government agencies as a means of ensuring that no political contribution or solicitation has influenced the selection.

(4) The Standing Committee on Ethics and Professional Responsibility is directed to report to the House of Delegates by its 1999 Annual Meeting a proposed Model Rule that declares that a lawyer or law firm shall not make a political contribution or solicitation for the purpose of obtaining or being considered for a legal engagement. . . .

Regarding paragraph (4) of the resolution, a motion was made to give the Standing Committee “discretion” to address the problem of pay-to-play either by amending the comment to an existing rule, by issuing a formal ethics opinion, or by proposing a new model rule. That motion failed by a vote of 158-151.

1999 Proposal: At the ABA’s August 1999 Annual Meeting, the ABA Standing Committee on Ethics and Professional Responsibility proposed a new Rule 7.6, but the ABA House of Delegates voted 164 to 146 to reject the proposed rule. We reprint below substantial excerpts from the report submitted by the ABA Standing Committee on Ethics and Professional Responsibility in support of the proposal that the House of Delegates rejected.

*ABA Committee Report Submitted in Support of Rejected Rule 7.6**

[A]lthough lawyers and their political contributions are an important component of the pay-to-play system, lawyers are not the most important players in such a system. The primary actor in any pay-to-play situation is the public official who . . . may be acting in dereliction of official duties. For this reason, the rules of professional conduct governing lawyer behavior should not be relied upon as the primary method of preventing the practice of pay-to-play. Rather, consistent and diligent enforcement of statutory provisions governing fair campaign finance practices and the conduct of public officials is the most fundamental method of addressing the problem of pay-to-play. The fundamental harm done by a pay-to-play system is the harm that befalls the public when a government official, motivated by campaign contributions, chooses lawyers or law firms that may not be the best qualified to perform legal services on the public’s behalf. Thus it is the integrity of a basic governmental process, and not just the integrity of the legal profession, that is undermined when such action by a public official is tolerated.

[A] second method of protecting against the evils of a pay-to-play system exists, and it also lies outside the scope of rules governing lawyer conduct: the use of uniform procurement or acquisition procedures for the placement of legal services engagements by government entities and the granting of appointments by judges. The Association has strongly supported . . . fundamental principles of competition in public acquisitions. . . .

The Standing Committee therefore notes emphatically that where there is aggressive enforcement of prohibitions against pay-to-play conduct by public officials, and where there is reliance on uniform procurement codes and procedures in the placement of legal engagements and in appointments by judges, the need to focus on lawyer conduct will be diminished. . . .

BACKGROUND FOR DEVELOPING A MODEL RULE

. . . In carrying out its charge, the Task Force expanded the scope of its investigation in two important ways. Initial concerns had focused on the existence of the phenomenon in the area of municipal finance engagements. The Task Force's review revealed at least some evidence that the practice occurs in a wider range of practice areas. Early proposals for a Model Rule limited in application to lawyers engaged in municipal finance work were therefore put aside and the Task Force focused on developing a Rule of wider application.

The Task Force also discovered that a similar system was sometimes in evidence as well in the context of appointments of lawyers made by judges following the making or soliciting of substantial contributions to the judges' election campaigns.

DEVELOPMENT OF THE PROPOSED RULE

The Committee . . . develop[ed] two possible "trial" rules addressing lawyers' roles in the pay-to-play system. One was . . . prohibiting political contributions when the purpose of such contributions was the obtaining of legal business. Because the Committee questioned the wisdom of basing the restriction solely on a lawyer's purpose for making political contributions, and recognized the difficulty of proving "purpose," it developed a second rule . . . prohibiting lawyers from accepting legal engagements where the awarding of the engagements was based upon lawyer's political contributions. Each draft rule was accompanied by extensive commentary that was intended, among other things, to establish criteria whereby a contributing lawyer's "purpose" could be proven.

. . . The following summary . . . explains the Committee's ultimate decision to advance the proposed Model Rule presented here, which represents a combination of its two initial alternative proposals with refinements.

CONSTITUTIONAL ISSUES

. . . The Committee undertook a review of recent First Amendment jurisprudence treating legislatively-enacted campaign contribution limits. It found, not surprisingly, that limitations on the making and solicitation of political contributions must be predicated on the need to protect a valid state interest; that they must be narrowly drawn; and that their language must be sufficiently clear as to provide fair notice of when and how they operate, thereby satisfying the requirements of due process. . . .

ENACTED OR PROPOSED REGULATIONS

The Committee examined numerous regulations that have been either adopted or proposed in different forums to regulate lawyers' contributions to political campaigns in connection with "pay-to-play" type problems. They ranged from federal criminal statutes (18 U.S.C. Sec. 201) relating to the most egregious violations (bribery or the giving of illegal gratuities) to a considerably more narrowly-drawn Association of the Bar of the City of New York proposal which, like Municipal Securities Rulemaking Board Rule GS-37, applicable to municipal finance professionals, would prohibit a lawyer or law firm from undertaking a municipal finance engagement within a certain period of time after having made a contribution in excess of a de minimis amount to a public official capable of influencing the public finance engagement.

[I]n some circumstances, the Model Rules of Professional Conduct already apply to lawyers' participation in pay-to-play. For example, the prophylactic effect of criminal statutes potentially applicable to pay-to-play participation by lawyers already has a parallel in the Model Rules of Professional Conduct: a lawyer whose style of participation in pay-to-play is so egregious as to result in conviction of bribery or a similar serious crime would also violate Model Rule 8.4 ("Misconduct"). Model Rule 7.2(c), which prohibits a lawyer from giving anything of value to another for recommending the lawyer for employment, may in some pay-to-play circumstances also be applicable. . . .

The House has, however, adopted the Task Force's position that the Association should adopt more stringent restrictions on pay-to-play than these Model Rules would afford. The Rule submitted herewith accords with that position.

ENFORCEMENT ISSUES

. . . A common and understandable concern of the bar counsel was the number of elements that would need to be proven in order to find that a lawyer's conduct in making political contributions constituted a violation of either draft rule. In this regard, bar counsel comment echoed that of other commentators, both proponents and opponents of either draft rule.

The successful enforcement of each of the draft proposals was considered to depend on the ability of disciplinary counsel to prove an element of purpose, whether it were the purpose of the lawyer making the contribution, or the purpose of the official or judge in giving the engagement or appointment to reward the lawyer's contribution. . . .

The lawyer's purpose in making or soliciting political contributions was deemed by many commentators to be the most significant test in determining if a Rule violation exists. Hence, it has been retained in the submitted Rule along with carefully crafted standards in the Comments designed to explain how "purpose" will be identified.

Disciplinary counsel . . . also appeared generally unpersuaded that pay-to-play exists as a significant problem. Hence self-enforcement of this Rule to stem pay-to-play practices by lawyers and law firms is an even more important consideration than it is in enforcement of certain other Model Rules.

2000 Amendment: In 2000, the House of Delegates voted 266-157 to adopt the very same version of Rule 7.6 and its Comment that the delegates had rejected in 1999. In 2000, however, the proposed rule was sponsored not only by the ABA Standing Committee on Ethics and Professional Responsibility (which had been the sole sponsor in 1999), but also by the ABA Section of Business Law, the ABA Section of State and Local Government Law, and the Association of the Bar of the City of New York. (The New York City Bar had sponsored the original proposal to add a pay-to-play rule back in 1997.) The report submitted in support of the new rule was nearly identical to the report submitted in 1999, but it began with the following passages explaining the 1999 proposal and why it failed:

*ABA Committee Report Submitted in Support of Rule 7.6 as Adopted**

. . . At the 1999 Annual Meeting, the House of Delegates, by a vote of 164 to 146, rejected the Standing Committee's proposal.

The Sponsors believe that the very important issue of pay-to-play should be reconsidered by the House. The [1999] vote was taken very late in the session after a substantial number of delegates had departed (only 310 of the 530 members of the House were present and voting) and without adequate opportunity for balanced debate (only one "pro" speaker, other than the moving sponsor, was recognized before a tired House called the question). Accordingly, the Sponsors resubmit the proposed Model Rule 7.6 governing lawyers' political contributions to the House of Delegates at the 2000 Midwinter Meeting.

2002 Amendments: The ABA Ethics 2000 Commission did not propose any changes to Rule 7.6 or its Comment.

Selected State Variations

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: In the Rules effective April 1, 2009, New York omits Rule 7.6. However, Comment 5 to New York Rule 7.2 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.

Comment 6 complements Comment 5 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.” (The Comments have been adopted only by the New York State Bar Association, not by the courts, but Comments 5 and 6 have special status. In an extraordinary press release in March of 2000 explaining why the courts were rejecting a proposed pay-to-play Disciplinary Rule, the courts expressly endorsed the language of old Ethical Considerations 2-37 and 2-38, and these ECs have been incorporated verbatim into Comments 5 and 6 to Rule 7.2.)

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.”

Related Materials

Municipal Securities Rulemaking Board Rule G-37: This rule, entitled “Political Contributions and Prohibitions on Municipal Securities Business,” was cited in the 1999 and 2000 ABA Committee Reports submitted in support of Rule 7.6. In essence, Rule G-37 prohibits brokers and dealers from engaging in municipal securities business with any issuer of municipal securities for two years after contributing in excess of \$250 to such an issuer. Rule G-37 is available online at www.msrb.org/msrb1/rules/ruleg37.htm (In 2006, the SEC approved amendments to the definition of “solicitation” in Rule G-37. See <http://sec.gov/rules/sro/msrb/2006/34-53960.pdf>.)

Restatement of the Law Governing Lawyers: The Restatement has no provision comparable to ABA Model Rule 7.6.