

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.8.2

Commission Drafting Team Information

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I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 1.8(b),
from which proposed Rule 1.8.2 is derived.]**

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

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- (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.

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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. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.8.2

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.8.2

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 1.8.2 (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.

Comment

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

IV. COMMISSION'S PROPOSED RULE 1.8.2 (REDLINE TO CURRENT ABA MODEL RULE 1.8(B))

Rule 1.8.2 ~~Conflict Of Interest:~~Use of Current ~~Clients: Specific Rules~~Client's
Information

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~~(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.

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COMMENT

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

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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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V. RULE HISTORY

Although the origin and history of Model Rule 1.8(b) was not the primary factor in the Commission's consideration of proposed Rule 1.8.2, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 193 - 228, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

There is no direct California rule counterpart to Model Rule 1.8(b). Nevertheless, there are statutes and rules that embody the policies underlying proposed Rule 1.8.2. See Section VIII.A, below.

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):
 1. OCTC supports the rule and especially the use of informed written consent.
 2. The Comment, which is a philosophical discussion of the reasons for the rule, is obvious and unnecessary.
- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Four comments, including the above comment from OCTC, were received. Three agreed with the proposed rule, one comment agreed, only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE 1.8(B) ADOPTIONS

A. Related California Law

There is no direct counterpart to Model Rule 1.8(b) in California. Nevertheless, there are statutes and rules that embody the policies underlying proposed Rule 1.8.1. The primary principles underlying the proposed rule are a lawyer's duties of loyalty and confidentiality owed to a client.¹ These principles are reflected in current rules 3-100 (Confidential Information of a Client) and 3-310 (Avoiding the Representation of Adverse Interests), section 6068(e), and California case law.

1. Business And Professions Code Section 6068(e)

Section 6068(e), subdivision (1) requires every lawyer "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Current rule 3-100, in concert with subdivision (2) of section 6068(e), provides a narrow exception that permits a lawyer to "reveal" confidential client information "to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." The mandate in subdivision (1) goes beyond a general prohibition on "revealing" that information. The mandate is to maintain inviolate and preserve client information, which necessarily precludes the unauthorized "use" of such information.

2. Current Rule 3-100

Current rule 3-100 is the rule complement to section 6068(e). Current rule 3-100 recognizes that a lawyer's duties of loyalty and confidentiality are related concepts. Paragraph (a) of rule 3-100 generally prohibits a member from revealing information protected from disclosure by section 6068(e)(1) without the informed consent of the client. Discussion paragraph [12] to current rule 3-100 cautions that in deciding whether to *reveal* information to prevent a life-threatening criminal act, a lawyer "should consider his or her duties of loyalty and competency (rule 3-110)." This statement recognizes that rule 3-100 encompasses loyalty concerns.

3. Current Rule 3-310(E)

Current rule 3-310(E) provides:

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by

¹ Proposed Comment [1] provides in relevant part:

Use of information protected by Business and Professions Code section 6068(e), whether or not confidential, to the disadvantage of the client violates the lawyer's duty of loyalty.

reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

The rationale underlying the prohibition is that in representing the second client, the lawyer might feel obligated to use the material confidential information to the disadvantage of the first client. (See, e.g., *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671 [14 Cal.Rptr.3d 618], quoting Rest. (3d) Law Governing Lawyers § 134 (“there exists a ‘substantial risk’ the present representation will involve the use of information acquired during the prior representation ‘where it is reasonable to conclude that it would materially advance the [present] client’s position in the subsequent matter to use confidential information obtained in the prior representation.’”))

Rule 3-310(E) is limited to situations involving a second client. Proposed rule 1.8.2 and model rule 1.8(b), on the other hand, are not limited to a lawyer’s subsequent employment by another client.

4. *Oasis West Realty, LLC v. Goldman*

California case law recognizes a proscription on a lawyer’s use of a former client’s information outside of a lawyer-client relationship. *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] (“Oasis West”) held that a lawyer breached the duties of loyalty and confidentiality by using confidential client information to oppose, on his own behalf, a former client’s development project, for which the lawyer had previously been retained. In *Oasis West*, Goldman, the lawyer, had been retained to help a developer obtain local government approvals for a development project. After the representation had ended, however, Goldman opposed the project on his own behalf. The Court rejected the Court of Appeal’s position that whatever alleged use the lawyer made of the information was outside of a subsequent representation and therefore did not violate any duty.

Although *Oasis West* involved a former client, this Court’s statements regarding a lawyer’s duties owed to clients when using confidential information to the client’s disadvantage are highly relevant to a consideration of proposed rule 1.8.2. This Court set forth the general principles regarding the lawyer’s duties to the former client:

Oasis contends that Goldman, as its lawyer, was “a fiduciary ... of the very highest character” and bound “to most conscientious fidelity—uberrima fides.” (*Cox v. Delmas* (1893) 99 Cal. 104, 123, 33 P. 836.) Among those fiduciary obligations were the duties of loyalty and confidentiality, which continued in force even after the representation had ended. (*Wutchumna Water Co. v. Bailey*, *supra*, 216 Cal. at pp. 573–574, 15 P.2d 505.) As we have previously explained, “[t]he effective functioning of the fiduciary relationship between attorney and client depends on the client’s trust and confidence in counsel. [Citation.] The courts will protect clients’ legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship.” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146–1147, 86 Cal.Rptr.2d 816, 980 P.2d 371.) Accordingly, “an

attorney is forbidden to do either of two things after severing [the] relationship with a former client. [The attorney] may not do anything which will injuriously affect [the] former client in any matter in which [the attorney] formerly represented [the client] nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship.”

(*Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at p. 821, citations omitted.)

The Court rejected the Court of Appeal’s conclusion that the foregoing duties were limited to circumstances “(1) where the attorney has *undertaken a concurrent or successive representation* that is substantially related to the prior representation and is adverse to the former client, or (2) where the attorney has *disclosed* confidential information,” (emphasis added):

[N]either defendants nor the Court of Appeal offer any justification for limiting an attorney’s duty to a former client in this manner, especially where the attorney has *used* the former client’s confidential information to actively oppose the former client with respect to an ongoing matter that was the precise subject of the prior representation. It is well established that the duties of loyalty and confidentiality bar an attorney not only from using a former client’s confidential information in the course of ‘making decisions when representing another client,’ but also from ‘taking the information significantly into account in framing a course of action’ such as ‘deciding whether to make a personal investment’—even though, in the latter circumstance, no second client exists and no confidences are actually disclosed.

Id. at pp. 822-823, quoting Rest. (3d), Law Governing Lawyers, § 60, com. c(i), p. 464. (Emphasis added.)

It is instructive that this Court relied on a comment in the Restatement. Moreover, the Court recognized the need to “protect clients’ legitimate expectations of loyalty to preserve [the] essential basis for trust and security in the attorney-client relationship” by not using information learned by virtue of the lawyer-client relationship, (*Oasis West*, *supra*, 51 Cal.4th at p. 821, quoting *Speedee Oil Exchange Systems*, *supra*, 20 Cal.4th at pp. 1146 – 1147). Thus, the *Oasis West* reasoning would apply equally to current clients.

B. ABA Model Rule 1.8(b) Adoptions

The ABA State Adoption Chart for Model Rule 1.8(b), revised December 1, 2016, 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.authcheckdam.pdf [Last visited 1/8/2017]

- Thirty-five jurisdictions have adopted Model Rule 1.8(b) verbatim;² 12 jurisdictions have adopted a rule provision substantially similar to Model Rule 1.8(b);³ three jurisdictions have adopted a rule substantially different from Model Rule 1.8(b)⁴. California remains the only jurisdiction that has not adopted any version of Model Rule 1.8(b).

IX. **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.
 - Pros: The existing duties of confidentiality and loyalty in the Rules and State Bar Act do not expressly state this type of client protection. The current provisions are lacking to the extent that they might be narrowly construed to prohibit improper *disclosure* of client information (confidentiality) or the actual *representation* of an adverse interest (conflicts of interest). This could impair disciplinary actions that would otherwise address this type of misconduct.
 - Cons: A new rule may be unnecessary because § 6068(e)(1) is not limited to protection of client information. The language of § 6068(e)(1) 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.
 - Pros: In recognition of the client's authority, the new rule should not be an inflexible ban on the use of client information. The Rule should permit the client to give informed consent and to authorize an attorney's use of client information.

² The 34 jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and Wisconsin.

³ The 12 jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Massachusetts, Michigan, New Jersey, Ohio, Oregon, Texas, Virginia, and Wyoming. (Texas's corresponding rule provision can be found at Texas Rule .1.05(b)(2).)

⁴ The three jurisdictions are Georgia, Mississippi and North Dakota.

- 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.

- Pros: Written consent (which requires written disclosure) provides added protection to a client because a writing elevates the perception of the importance of the client's consent and would operate to assure greater understanding on the part of the client. The written requirement would also facilitate 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 required when the reasonably foreseeable adverse consequences of providing the consent are not apparent. Under such circumstances, the highest degree of precautionary disclosure would be needed to help the client understand any potential harm. In general, situations that would trigger the proposed rule – when the use of the information is to the client's disadvantage – should not require an explicit written explanation because the adverse consequences to the client would be apparent.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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 require a lawyer to seek a client's informed consent to *use* client information in certain situations. As discussed in section VIII.A. of this Report, however, the policies and principles underlying the proposed rule are already entrenched in California law, so the rule would not appear to create any new duties.

D. Non-Substantive Changes to the Current Rule:

1. This proposal for a new rule has no direct current California rule counterpart. However, non-substantive changes to the Model Rule include: (i) including the clarifying word "current" in the rule title in referring to a client to clarify that this rule applies to current clients; and (ii) 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. The Commission's tentative consensus is to number the rule 1.8.2.

2. Regarding the comment to the Model Rule (Cmt. [5] to Model Rule 1.8), the proposed rule includes only the first sentence of the Model Rule comment, converted to the active voice to conform to California rule drafting style. The proposed comment does not include the remaining Model Rule 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 Commission 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.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.2 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.2 in the form attached to this Report and Recommendation.

