

**UPDATES TO ETHICAL ISSUES FOR TRUST AND ESTATE LAWYERS
New and Revised Rules of Professional Conduct on the Way (We think!)**

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INTRODUCTION

**The Rules Revision Commission and New Guide to the Rules of Professional
Conduct**

In 2001, the State Bar reconstituted the Commission for the Revision of the Rules of Professional Conduct (the "RRC") and charged it with evaluating the existing California Rules of Professional Conduct in their entirety (the "Rules"), in light of developments in the attorney professional responsibility field since the last comprehensive revision of the Rules occurred in 1989 and 1992, including the Final Report and Recommendations of the American Bar Association's ("ABA") Ethics 2000 Commission and the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers ("Restatement"), as well as other authorities relevant to the development of professional responsibility standards.

The Commission was specifically charged to also consider Multi-Disciplinary Practice ("MDP"), and Multi-Jurisdictional Practice ("MJP"), among other issues. At its formation, the RRC was envisioned to last for five years and to report new rules to the Supreme Court, after public comment, soon after that time. Although it is making progress, the RRC clearly will not have final rules to report to the Supreme Court for at least another year, and likely more than that. Notably, the prior iteration of RRC commenced its work in 1985, reporting new rules in 1989 and revised rules in 1992, approximately a seven year span in total. Once RRC has finalized the Rules, they will be sent to the California Supreme Court for approval as rules approved by the Supreme Court are enforceable by the State Bar pursuant to Business & Professions Code Section 6007.

According to its website, accessible through the State Bar website, under Attorney Resources, Ethics Information, Commission for the Revision of the Rules of Professional Conduct, the charge for RRC is to develop proposed amendments to the Rules that:

1. Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
2. Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
3. Promote confidence in the legal profession and the administration of justice; and
4. Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

The RRC has now issued three batches of new and revised proposed rules, the first batch of which has then been revised pursuant to public comment. It anticipates releasing a fourth batch of rules, considering all the public comments on the various rules and then reissuing all of the rules for further public comment. After that final comment period, the new and revised Rules will be sent to the Supreme Court for approval. It is likely that the earliest that all of this could be accomplished is 2010.

The major changes to the Rules to date involve conversion of the numbering system of the Rules to the system used by the ABA. For trusts and estates attorneys used to referencing the ABA ethical rules, this change will provide useful reference points. However, the new Rules will not be identical to the ABA Rules and, for that reason, may surprise the unwary practitioner. From the viewpoint of an attendee at a number of the meetings, it is clear that, while the RRC takes seriously its charge to consider and to eliminate and avoid unnecessary differences between California and other states, the devil is in the details. “Unnecessary” is a word easily fit to many interpretations and it is the general view of the RRC, apparently, that many of the differences between California and the rest of the states, as well as the ABA, are differences to be celebrated.

Additionally, in 2008, the State Bar of California Trusts & Estates Section issued its 2008 edition of the Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (the “Guide”). Although the RRC’s work was well under way, the Trusts & Estates section decided that the eleven year break between the first and the second edition should not be any longer, even if it becomes necessary to revise the Guide in the relatively near future.

With that background, this presentation will address the new rules proposed to be added to the Rules which are not comparable to any existing rule, and the modifications to the Rules of particular significance to trusts and estates practitioners.

THE RRC PROPOSED NEW AND REVISED RULES

The RRC proposed the following new or substantially new rules, which rules conform to existing ABA Rules. From the 2006 batch: 2.4 Lawyer as a Third Party Neutral, 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers, 5.2 Responsibilities of a Subordinate Lawyer, 5.3 Responsibilities Regarding Non-Lawyer Assistants, 8.4 Misconduct and in the 2008 batch: Rule 4.3 Dealing with an Unrepresented Person.

The RRC proposed no completely new rules in the 2007 batch, a batch consisting of only five revised rules addressing gifts from clients, payment of personal items and expenses for clients, relationships with another party's attorneys, purchases of property from a judicial foreclosure or judicially supervised sale and prohibited discrimination in law practice management.

In addition to the completely new rules, the RRC proposed revised versions of 35 other rules in the 2006 and 2008 batches of rules. Among the revised rules of interest to trusts and estates practitioners are the revised Rule 1.1 (formerly 3-110) involving competency and Rule 1.7 (formerly 3.310) involving conflicts of interests with regard to current clients.

New Rules

Rule 2.4 Lawyer as Third Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

(c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.5 [impartiality, conflicts of interest,

disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], 1620.8 [marketing], and 1620.9 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs. A lawyer serving as a third-party neutral in a mediation shall also comply with Rule 1620.4 [confidentiality] of those Standards.

(d) A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], 12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

This rule has no current California counterpart and is modeled after the ABA rule. Of note, rather than using the ABA model of referring to other bodies of law and rules which might result in discipline for the third party neutral, this rule as initially published, incorporated those standards into the rule itself. In its public comment section, the RRC noted that this approach was one used in other rules and statutes governing lawyer conduct in California. The RRC also noted that the absolute rules of confidentiality in mediation might serve as a bar to effective discipline and requested public comment on that issue.

After public comment was received, the RRC issued its revised set of rules, in which it dropped reference to incorporated standards, thus eliminating paragraphs c and d of the originally proposed rule. The post-comment rule does not address the issue of enforceability. Given the reluctance of the courts to breach the confidentiality of the mediation process, it is difficult to see how this rule will ultimately be enforced.

Rules 5.1, 5.2 and 5.3 Managing, Supervisory and Subordinate Lawyer and Non-Lawyer Roles

This set of new rules, while not uniquely relevant to trusts and estates attorneys, will impact any lawyer in working in an office of more than one lawyer and will impact those who have supervisory authority over non-lawyers. The text of the new rules is as follows:

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with [knowledge] of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and [knows] of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2 Responsibilities of A Subordinate Lawyer

(a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.

(b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with [knowledge] of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and [knows] of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action

Essentially, these rules require that a lawyer not only comply with the Rules him- or herself, but also require that a lawyer who has any position of authority, insure that other lawyers over whom the lawyer has that authority, comply with the Rules. A lawyer supervising non-lawyers, has the further duty to insure that those persons are complying with the standards set forth in the Rules. Obviously, those working extensively with paralegals and other non-lawyer employees should be familiar with these provisions. The rules allow a subordinate attorney to avoid discipline if that attorney relies on a supervisory attorney who has made a decision which constitutes a "reasonable resolution of an arguable question of professional duty." The comments make clear that each attorney is separately responsible for complying with the Rules, but that the supervisor can take responsibility for making the call on an unclear issue and the subordinate attorney can rely upon that call unless the subordinate believes that the proposed resolution of the question would result in a violation of the Rules.

Rule 8.4 Misconduct

The proposed new rule reads as follows:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;

(b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;

(e) knowingly manifest, 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. Legitimate advocacy respecting the foregoing factors does not constitute a violation of this Rule.

(f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or

(g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Sections a through d of this rule merely recast the current provisions of Rule 1-120. However, sections e through g include new material not currently present in any California Rule. Sections f and g track the ABA Rules barring a lawyer from suggesting the ability to or attempting to improperly influence government agencies or officials in violation of the Rules and barring a lawyer from assisting a member of the judiciary in violating the Rules.

The new rule also includes within it a bar to exhibiting bias or prejudice with regard to race, sex, religion, national origin, disability, age or sexual orientation, although allowing those issues to be raised in connection with legitimate advocacy. This provision is not found in the ABA Rules but was viewed by the RRC as in conformity with the status of California law.

RRC also followed California law, rather than the ABA Rule by continuing the reference to crimes of "moral turpitude", a standard that has been abandoned as obsolete by many jurisdictions. The RRC considered the standard to be so steeped in California law and statute as to be worth maintaining.

Rule 4.3 Dealing with an Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of an unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

(b) In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

In its draft released for public comment, the RRC noted that the purpose of this Rule was to prohibit the lawyer from making misleading statements or omissions when dealing with unrepresented persons. This rule is adapted from ABA Rule 4.3 and bears some similarities to the current California rules regarding representing a corporation as a client. The proposed rule tracks the ABA Rule in its first paragraph, including the addition of the last sentence of the current ABA rule importing to the rule the concept of conflicts of interest. As discussed in the current edition of the Guide, this last sentence provides trusts and estates attorneys with a useful guidance in dealing with the various unrepresented parties frequently encountered in probates and other non-litigation situations. As suggested by the Guide, the key lesson to be learned is to discuss with unrepresented persons at the outset of a matter, the role of the attorney and who the attorney represents. The ABA Rule and the proposed California Rule both make clear that the lawyer's only available action, once there appears to be a conflict, is to advise the unrepresented party to obtain an attorney.

The second proposed paragraph is somewhat less clear in the trusts and estates context. Would this rule make it a violation for the attorney to obtain, for instance, privileged tax information necessary to finalize an estate? The answer is not obvious; and there is no guidance from the ABA rules, as this provision does not exist in the ABA rules. The comments to the proposed California Rule also provide little guidance.

Revised Rules of Particular Interest to Trusts and Estates Attorneys

Rule 1.1 Competence

Proposed Rule 1.1 continues Rule 3-110 and deals with the competence of the attorney. Notably, in revising this Rule, the RRC chose *not* to adopt the ABA standard, which imposes discipline for acting incompetently. By contrast, the California rule imposes discipline for acting incompetently only where the lack of competence is an intentional, reckless or repeated act. To date, the RRC has not published a proposed Rule 1.3. Under the ABA Rules, the concept of diligence is found in Rule 1.3, but in California, it is subsumed into the definition of competence as is reflected in the first paragraph of the Rule.

The proposed new rule reads as follows:

Rule 1.1: Competence

(a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(b) For purposes of this Rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

Rule 1.7 Conflicts of Interest

The proposed new Rule 1.7 reads as follows:

Rule 1.7: Conflict Of Interest: Current Clients

(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which the lawyer’s representation of that

client in that matter will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.

(b) Representation of multiple clients in one matter. A lawyer shall not, without the informed written consent of each client:

(1) Accept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.

(c) Representing a client's adversary. A lawyer shall not, while representing a client in a first matter, accept in a second matter the representation of a person or organization who is directly adverse to the lawyer's current client in the first matter, without the informed written consent of each client.

(d) Disclosure of relationships and interests. A lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The lawyer knows or reasonably should know that:

(a) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the lawyer's representation; or

(3) The lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity the lawyer knows or reasonably should know would be affected substantially by resolution of the matter; or

- (4) The lawyer has or had a legal, business, financial, or professional interest in the subject matter of the representation.

[To be placed in a “global” definitions section:

Definitions of “disclosure” and “informed written consent.”

- (1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances to the client or former client;
- (2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;
- (3) “Written” means any writing as defined in Evidence Code section 250.]

The RRC notes in its release for publication of this Rule that, although the Rule follows the ABA numbering system, it does not track the ABA Rule, particularly with regard to the issue of current conflicts. The RRC further notes that it is intending to release additional rules which address other aspects of conflicts and that it may, still, adopt global definitions for all of the rules. Such global definitions would presumably then include such definitions as disclosure and informed consent, now present in the proposed rule. The RRC further noted that it had eliminated the requirement that a current conflict require that the lawyer be in possession of confidential information before a conflict arises. This is a major shift from the current California rule and engendered significant discussion in the RRC deliberations. It is not clear that the RRC is completely comfortable with the current handling of this issue, nor with any clear definition of confidential information.

Finally, in its revised comment section, the RRC proposed eliminating a comment dealing with the representation of multiple parties, such as a husband and wife, in connection with estate planning. The Trusts & Estates Section submitted comments to this proposed elimination, requesting that the comment be added back.

AN UPDATE ON OTHER ETHICAL ISSUES

As has been previously reported, the RRC has, among other projects adopted a proposed Rule 1.14 addressing the issue of clients with diminished capacity. The proposed rule is the result of ongoing work by the RRC with the input of members of the Trusts & Estates Section.

Unfortunately, although work on the proposed rule was substantially complete approximately two years ago, it has not yet come out for publication. As detailed in the Guide, California has no rule addressing the impact of a client with diminished capacity on the attorney's ability to act as an advocate for the client. The proposed rule would adopt the ABA Rule 1.14 with peculiarly California flavor, for instance precluding a lawyer from instituting a conservatorship over a client. While the Trusts & Estates Section worked with RRC, it is not clear that the proposed rule will meet with approval from all quarters and it is likely that substantial public comment will be generated. Moreover, RRC and the Trusts & Estates section are in agreement that Business & Professions Code Section 6068.5 will need to be amended to allow enactment of a new Rule 1.14.

CONCLUSION

The current RRC has been in place for at least seven years now, longer by a year than the prior commission's entire process. With the publication of the first batch of new rules, the RRC stated that it planned on completing the publication of all of the batches of rules by 2008 or 2009, with the first three batches consisting of revisions to existing rules and the fourth batch consisting of new rules with no counterpart in current California Rules. Of course, even with the first publication, the RRC changed that process, including within the first set, new rules adapted from ABA rules. Although the first batch of rules has now been completed, at least one batch of rules is yet to be published. There is no clear indication whether the fourth batch will include all of the new rules or whether there will be subsequent publications. Clearly, the RRC has a tremendous task, and is diligently working to complete it. It seems unlikely, however, that reform to the Rules will occur before 2010. In the meantime, as was the case with the crime/fraud exception to 6068.5 and the duty of confidentiality, other persons interested in the system may push ahead with proposed revisions, preventing the RRC from accomplishing its goal of a uniform review of the Rules.