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ETICS YEAR IN REVIEW

Matthew J. Madalo *

I. INTRODUCTION

"Progressive" is a term that is often used to describe the State of California's approach in many areas of legislation. This approach has often led to innovative, and sometimes controversial, ways of handling important issues that affect Californians' everyday lives. 1 Over the past year, the State Bar of California ("State Bar") has followed suit and implemented innovative approaches to deal with serious issues that affect the practice of law in California. 2 For example, the State Bar has taken an unprecedented step in opening up an attorney drug court, the only court of its kind for any professional regulatory agency in the country. 3 To compliment this court, the State Bar and the California legislature have created an attorney alcohol and drug diversion and assistance program. 4 While the State Bar has been busy making head-

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1. For example, in 1996 California voters overwhelmingly voted for Proposition 215 (Compassionate Use Act). See CAL. HEALTH & SAFETY CODE § 11362.5 (West 1997). This Act permits seriously ill Californians to obtain and use marijuana for medicinal purposes and allows the patient or the primary caretaker to cultivate the plant. See id. But see United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) (holding that medical necessity was not a defense to manufacturing and distributing marijuana in violation of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 or "Controlled Substances Act").

2. See infra Part II.


lines, the American Bar Association ("ABA") has been quietly wrapping up its proposed revisions to the Model Rules of Professional Conduct.\(^5\) The issue of multidisciplinary practice, however, still looms over the horizon as the ABA tries to grapple with this difficult and divisive issue.

This article will examine and discuss the ethical developments and trends in California and the nation over the past year. Part II of this review will examine the attorney drug court and the attorney diversion and assistance program recently introduced in California. Next, Part III will examine a few of the interesting formal ethics opinions issued by the State Bar of California Standing Committee on Professional Responsibility and Conduct in 2001. Part IV will examine the ABA's continuing debate over multidisciplinary practice and what it means for the legal profession. Part IV will also summarize the ABA's Ethics 2000 Final Report and discuss what the new changes will have in store for the legal practice in California.

II. THE ATTORNEY DRUG COURT AND ATTORNEY DIVERSION AND ASSISTANCE PROGRAM

A. Attorney Drug Court

The State Bar announced last year that it was implementing an attorney drug court to operate hand-in-hand with a diversion and assistance program signed into law by Governor Gray Davis.\(^6\) "Executives of the Office of the Chief Trial Counsel and the State Bar Court are developing... guidelines to govern who will be eligible, how lawyers before the court will be monitored, and how successful completion of the drug court program [will] affect possible discipline."\(^7\) Despite these organizational unknowns, the drug

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6. See S.B. 352 (Cal. 2001) and S.B. 479 (Cal. 2001). See also McCarthy, supra note 3, at 1.

7. See McCarthy, supra note 3, at 1.
court is certain to handle attorneys suspected or accused of misconduct involving drugs and/or alcohol. State Bar officials claim that they "would like to get attorneys into the drug court early in the process," either before charges are filed or before a full-blown prosecution takes place. But the most likely candidates to appear in the new drug court are attorneys who have been convicted of offenses such as driving under the influence, drug possession, or possession of drug paraphernalia.

Although the State Bar is blazing new trails, it is not reinventing the wheel when it comes to establishing these courts. There are currently 688 drug courts nationwide (132 in California, including thirteen juvenile drug courts), which served as models for the creation of the Attorney Drug Court. The Attorney Drug Court will operate in much the same way as regular California drug courts. An attorney diverted to the drug court will participate in an individual treatment plan "overseen by a therapeutic team including the drug court judge, prosecutor, counsel for the attorney, and a

8. See id.
9. See id. at 16.
10. See id.
11. See id.
12. See STEVEN BELENKO, NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 5 (2001). On its Web site, the Judicial Council of California explains that:

'Drug treatment courts' were developed in Florida in the early 1990s as an alternative to traditional criminal justice prosecution for drug-related offenses. These courts combine the close supervision of the judicial process with resources available through alcohol and drug treatment services. The two goals of these programs are to reduce recidivism of drug-related offenses and to create options within the criminal justice system to tailor effective and appropriate responses to offenders with drug problems.

Judicial Council of California, Programs: Drug Courts: Background Information, at http://www.courtinfo.ca.gov/programs/drugcourts/about.htm (last visited Apr. 9, 2002).

13. See McCarthy, supra note 3, at 16. The pre-plea diversion program suspends criminal proceedings while the defendant participates in a program involving counseling, drug testing, education, or other requirements. If the defendant successfully completes the program, the criminal charges are dismissed. See CAL. R. CT. § 36 (providing clarification for pre-plea diversion drug courts under CAL. PENAL CODE § 1000.5). Additional information on California Drug Court Standards is available at the Judicial Council of California Web site at http://www.courtinfo.ca.gov/programs/drugcourts/about.htm.
probation monitor." Successful completion of the program might result in a shortened probation period or a determination not to file charges of misconduct.

It is estimated that approximately twenty-eight percent of all attorneys in California suffer from alcohol or substance abuse problems. In fact, approximately 300 of the attorneys on disciplinary probation with the State Bar have an alcohol or drug related condition attached to probation. Although the costs associated with the operation of this Attorney Drug Court are a concern, the State Bar hopes that in the long run, they will save money by ultimately keeping lawyers out of the discipline system. Advocates of these programs argue that these savings will come about through a reduction in the number of disciplinary complaints by providing an effective alternative to disciplinary actions.

B. Attorney Diversion and Assistance Program

The Attorney Diversion and Assistance Program, which began on January 1, 2002 is modeled after the Medical Board of California’s successful program, which has been in operation for over twenty years. The State Bar instituted its program in response to the rising problems of alcoholism, drug

15. See id.
16. See California Senate Office of Research, Assisting Addicted Lawyers in Overcoming Substance Abuse 1-2 (Feb. 2001) [hereinafter SOR]. The American Bar Association estimates that fifteen to eighteen percent of attorneys in the United States battle alcohol and drug abuse. See id. Applying these statistics to California’s 135,805 licensed attorneys would equate to approximately twenty-eight percent, or 38,000 of the attorneys may suffer from alcohol or drug abuse. See id.
18. See McCarthy, supra note 3, at 2. Bar officials anticipate that the court will operate within the existing budget, however, additional costs could be incurred for attorneys who cannot afford treatment. See id. The California State Bar currently spends eighty percent of its annual budget on disciplinary matters. See SOR, supra note 16, at 2. In contrast, the State Bar spends less than one percent on drug and alcohol prevention, education and treatment. See id.
20. See STATE BAR, supra note 4. About 1,500 doctors have participated in the Medical Board of California’s program since it began in 1980. See Program Takes Shape, supra note 17, at 11. It has an overall success rate of sixty-nine to seventy-four percent. See id.
addiction, and other forms of substance abuse that affect many attorneys and judges in California. The goal of the program is simple: "To enhance public protection by identifying attorneys with impairment due to substance or alcohol abuse . . . and to provide treatment that will enable those attorneys to return to the practice of law in a manner that does not endanger public health or safety." Similar programs in other states have been very successful, which gives impetus to the belief that such a program is not only beneficial to attorneys, but necessary to protect the public interest.

Attorneys are permitted to enter the program either through the attorney discipline system or upon self-referral. Attorneys who enter the program through disciplinary proceedings will not be exonerated or given lenient treatment, but rather will be subject to the same restrictions to practice law and other obligations they would receive in traditional disciplinary matters. Participation in the program is closely monitored and can include frequent meetings with support groups (i.e., Alcoholics Anonymous) and random drug testing.

One of the biggest concerns, of course, is who will shoul

21. See STATE BAR, supra note 4.
22. See McCarthy, supra note 3, at 1.
23. See SOR, supra note 16, at 2-3. According to the Senate Office of Research report, the California State Bar notes that Lawyer Assistance Programs in other states are useful to:
   (1) Protect the integrity of the legal profession and significantly reduce the harm inflicted upon clients and the public by impaired lawyers;
   (2) Reduce the number of disciplinary complaints and malpractice claims against lawyers;
   (3) Provide an effective alternative to disciplinary actions;
   (4) Permit oversight of lawyers' compliance with requirements for treatment as part of disciplinary actions;
   (5) Raise public and peer awareness of potential reasons for lawyer impairment and community resources.
See id.
24. See CAL. BUS. & PROF. CODE § 6232 (Deering 2002). The identity of an attorney who refers himself or herself to the State Bar's Attorney Diversion and Assistance Program will remain confidential and the attorney will be able to continue to practice. See id. § 6234. The self-referral rate of the Medical Board of California's program is fifty-eight percent. See Program Takes Shape, supra note 17, at 11.
25. See STATE BAR, supra note 4. Attorneys who enter the program as a condition of discipline, will also bear the full costs of treatment and testing under the program. See id. However, no attorney will be turned down on the basis of inability to pay. See Program Takes Shape, supra note 17, at 11.
26. See Program Takes Shape, supra note 17, at 11.
der the cost of operating this program, which is estimated to cost about $1.3 million per year.\textsuperscript{27} The State Bar has earmarked ten dollars from the annual dues of every active member to fund the diversion program.\textsuperscript{28} However, advocates of the program argue that this will result in cost savings for attorney discipline actions and for legal services generally by reducing the costs of malpractice suits and inadequate representation.\textsuperscript{29} State Bar officials believe the program will save money in the end because it will: (1) cost far less for an attorney to enter into the Attorney Diversion and Assistance Program than it does to prosecute the same attorney, (2) discourage repeat offenders by addressing the problem rather than simply disciplining attorneys who will likely find themselves back in the disciplinary system.\textsuperscript{30} A Senate Office of Research report on the Diversion and Assistance program supports this assertion.\textsuperscript{31} The report notes that it costs the California Medical Board approximately $29,000 per physician for the investigation, attorney services, and administrative hearings; while in contrast, it only costs $3,225 per physician to rehabilitate them and return them to practice.\textsuperscript{32} Thus, if these cost savings are carried over to the attorney diversion program, it would cost $2.9 million per year to prosecute one hundred attorneys versus $320,000 per year to rehabilitate them.\textsuperscript{33}

C. Conclusion

The Attorney Diversion and Assistance Program and the Attorney Drug Court are a sign that California is moving in the right direction. Both programs mark a major step toward addressing the serious and increasing problem of alcohol and substance abuse among California attorneys. The State Bar hopes that such a significant investment will pay dividends in the long run and save money that would otherwise be spent

\textsuperscript{27} See id.
\textsuperscript{28} See id. There is no expected increase in the total amount of annual dues. See id.
\textsuperscript{29} See STATE BAR, supra note 4, at 2-3.
\textsuperscript{30} See STATE BAR, supra note 4.
\textsuperscript{31} See SOR, supra note 16.
\textsuperscript{32} See id. at 25.
\textsuperscript{33} See id. These figures assume that the treatment program would be three years in length but does not take into account any money that is reimbursed to the program by participating attorneys. See id.
on prosecuting attorneys through the normal disciplinary system. Ultimately, the onus will be on attorneys targeted for the diversion program to voluntarily seek help before their clients or members of the public are harmed. Hopefully, California attorneys in need of assistance will take advantage of this program.

III. FORMAL OPINIONS OF THE STATE BAR COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

The State Bar Standing Committee on Professional Responsibility and Conduct ("Committee") issues non-binding, advisory opinions on questions involving professional responsibility and ethics submitted by the Board of Governors, local bar associations or individual attorneys. The Committee issued three formal opinions in 2001.

A. Aspects of Professional Responsibility and Conduct When Providing an Internet Web Site Containing Information for the Public About Availability for Professional Employment: Formal Opinion 2001-155

In Formal Opinion 2001-155, the Committee states that an attorney's Internet Web site providing information about her availability for professional employment is a "communication" under Rule 1-400(A) of the California Rules of Professional Conduct, and an "advertisement" under Business and

34. See id.
36. See id. Rule 1-400 states:
   For the purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member of a law firm directed to any former, present, or prospective client, including but not limited to the following:
   (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
   (2) Any stationary, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or other lawyers; or
   (3) Any advertisement (regardless of medium) of such member of law firm to the general public or any substantial portion thereof; or
   (4) Any solicited correspondence from a member of law firm directed to any person or entity.

Under the facts presented, however, the Committee decided that a Web site is not a solicitation under Rule 1-400(B) even if it includes electronic mail facilities allowing direct communication to and from the attorney. Nevertheless, the attorney must be aware of the possibility that the Web site might be subject to regulation or might be considered to be unauthorized practice of law in other jurisdictions.

1. Facts

Attorney A has established and maintains an Internet Web site, which includes a description of Attorney A's private practice law firm, its history, and practice. The Web site lists the education, professional experience, and activities of the firm's attorneys, and allows for communication with any attorney in the firm via electronic mail. In addition, the Web site provides text and pictures that describe and illustrate various aspects of the firm's practice, providing the kind and scope of information normally found in printed lawyer directories. The Web site is publicly accessible and can be located through the use of search engines, but does not include any links, bulletin boards, or any other interactive functions.

2. Discussion

The facts concerning the maintenance of an Internet Web site raise a number of issues concerning its status as advertis-

37. See CAL. BUS. & PROF. CODE §§ 6157-6158.3 (Deering 2002). An “advertisement” is any communication, disseminated by television or radio, by any print medium including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.


39. See id.

40. See id.

41. See id.

42. See id.

43. See id.
Because a Web site is a communication subject to the requirements for attorney communications under the California Rules of Professional Conduct, the Committee had to determine whether it is also a "solicitation" under rule 1-400(B). Rule 1-400(B) defines a "solicitation" as any communication:

1. Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
2. Which is
   a. delivered in person or by telephone, or
   b. directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

The Commission held that under the stated facts, even if it is presumed that pecuniary gain was a significant motive in establishing and maintaining the Internet Web site, neither of the requirements under Sections (B)(2)(a) or (B)(2)(b) were met. The Commission reasoned that while Section (B)(2)(a) provides a "bright line" test, neither the nature of the Web site communication nor the technology it employs to reach the public requires a different result. In addition, Section (B)(2)(b) is not satisfied by a communication that is made available to everyone but not directed to anyone in particular. Furthermore, the attorney must be the initiator of the communication, which is not the case where the attorney or firm merely includes e-mail facilities on the Web site. If a

45. See CAL. RULES OF PROF'L CONDUCT R. 1-400(B) (1999).
46. Id.
48. See id. Despite faster response time and greater interaction permitted through this medium, it does not create the risk that the attorney will be able to persuade or unduly influence a potential client's decision. Similarly, an e-mail's resemblance to a telephone discussion ends with the mechanism of transmission even though it occurs through telephone lines. Thus, the static nature and measured pace of an e-mail communication allows time for the potential client to analyze and reflect upon the message, as well as share and discuss the communication with others. See id.
49. See id.
50. See id.
visit to the Web site leads to a response from the attorney, that response, now directed to an identified person, would be a solicitation if the person is "known to the sender to be represented by counsel in a matter which is a subject of the communication."\(^{51}\)

Another issue was whether the maintenance of an Internet Web site violates the Rules of Professional Responsibility concerning interstate communications and the unauthorized practice of law in another jurisdiction.\(^{52}\) Rule 1-100(D)(1) addresses the implications of attorney communications outside the State of California.\(^{53}\) In addition, Rule 1-300(B) prohibits an attorney from practicing law "in a jurisdiction where to do so would be in violation of the regulations of the profession in that jurisdiction."\(^{54}\) Under the facts presented, Attorney A must be aware of the conflicts among the rules of different jurisdictions regarding the Internet Web site and comply with those rules, even if she is licensed only in California.\(^{55}\)

As Formal Opinion 2001-155 notes, this leaves two options for California attorneys who maintain Internet Web sites: they can either choose to use their Web site, subject to varying jurisdictional rules, to advertise in multiple jurisdictions, or they can take steps to make it clear that they are not advertising in other jurisdictions.\(^{56}\) Since there is no certain method or form of notice to assure that an attorney's Web site will not be determined to be an advertisement, the Committee made several recommendations.\(^{57}\) In order to avoid regulation in other jurisdictions, the Web site should include the following: 1) an explanation of where the attorney is licensed to practice law, 2) a description of where the attorney maintains

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51. Id. (citing Cal. Rules of Prof'l Conduct R. 1-400(B)(2)(b) (1999)).
52. See id.
53. See id. Rule 1-100(D)(1) states:
As to members: These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.
Cal. Rules of Prof'l Conduct R. 1-100(D)(1).
54. Cal. Rules of Prof'l Conduct R. 1-300(B).
56. See id.
57. These recommendations, however, may not comply with the rules of other jurisdictions. See id.
law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's Web site.  

3. Conclusion

More and more law firms are turning to the Internet to reach potential clients. But, California attorneys must be aware of the implications of its use. The Internet obviously makes cross-jurisdictional practice much easier, but it also increases the risk of violating the rules of other jurisdictions, or being found guilty of practicing law without a license in these jurisdictions. The Committee states that under current authority, attorneys should be especially sensitive to the rules of other jurisdictions, especially if they are licensed, maintain an office, seek clients, or provide legal services in another state. 

B. Conflicts of Interest Issues Among Constituent Sub-entities or Officials of a City Seeking Legal Advice on the Same Matter: Formal Opinion 2001-156

Formal Opinion 2001-156 addresses the issue of whether a conflict of interest arises under Rule 3-310(C) of the California Rules of Professional Conduct where a constituent sub-entity or officials of a city seek legal advice on the same matter and the constituents' positions are antagonistic. 

58. See id.
59. See id.
60. See id.
62. Rule 3-310(C) states:
A member shall not, without the informed written consent of each client:
   (1) Accept 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; or
   (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.
CAL. RULES OF PROF'L CONDUCT R. 3-310(C).
1. Facts

The charter of the City of Prosperity establishes it as a municipal corporation with the City Council as the governing body. The charter gives the city attorney, a full-time employee of the city, the power to represent the city in litigation and give legal advice to the city council, city officials, and other city bodies. The City of Prosperity faces a fiscal crisis, and a member of the council introduces a motion to supplement the city's general fund with a $100 million loan in earmarked funds. City law requires an ordinance to approve the loan, which the council duly passed after consulting with the city attorney, who opined that the loan would be lawful. The Mayor also consults with the city attorney. Upon hearing the same advice, the Mayor disagrees and accuses the city attorney of having a conflict of interest.

2. Discussion

The main issue here is when a constituent or official ought to be characterized as a client of the city attorney. Although attorneys in the public sector are governed by the same conflict of interest rules as attorneys in private practice, the application of the rules must take into account factors peculiar to the government context. Rule 3-310(C)(1) addresses an attorney's potential conflicts in representing two or more clients in the same matter. In this case, however, it is necessary to identify the clients in order to determine if any potential conflicts exist. Rule 3-600 provides some guidelines in determining this issue by stating that when "representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself.

64. See id.
65. See id.
66. See id.
67. See id.
68. See id.
70. See id. (citing Ward v. Superior Court, 70 Cal. App. 3d 23, 30 (1977)). Application of the conflict of interest rules do not fit the realities of a public attorney's practice and is complicated by the difficulty of identifying the client. See id.
71. See supra note 62.
This rule provides some guidance when analyzed in the context of the leading case in this area, Civil Service Commission v. Superior Court. This case is instructive in determining when a constituent or official of a governmental agency ought to be characterized as a client apart from the main entity.

In Civil Service Commission, the court addressed the issue of the identity of the client in the context of a dispute in which the public attorney advised both sides. The facts of this case arose out of a dispute between the County of San Diego and the San Diego County Civil Service Commission (“SDCCSC”) over two employees who were involuntarily dismissed. The SDCCSC ordered the reinstatement of the employees and the County of San Diego promptly sued. The SDCCSC sought to disqualify the County Counsel’s office, which had advised both parties, from representing the County of San Diego. The court held that a public attorney’s advising of a constituent government agency does not give rise to an attorney-client relationship that is separate and distinct from the attorney’s relationship to the overall government entity. There is an exception, however, when an attorney advises or represents a public agency with respect to a matter as to which the agency has independent authority, such that litigation may occur between the agency and the overall entity. The key to analyzing this exception is to examine the constituent agency’s independent right of action. If there is a right to act independently of the entity under the city charter or governing law and both parties have contrary positions, then the potential for a conflict of interest is increased. The SDCCSC was “quasi-independent” from the county, and therefore litigation between the two entities could

72. See id. (citing CAL. RULES OF PROF’L CONDUCT R. 3-600 (1999)).
75. See Civil Serv. Comm’n, 163 Cal. App. 3d at 75.
76. See id. at 73-75.
77. See id.
78. See id. at 76.
79. See id. at 78.
80. See id.
82. See Civil Serv. Comm’n, 163 Cal. App. 3d at 78.
ensue. The court held that the SDCCSC could and did become a client of the county counsel; thus, the county counsel’s office could not also represent the County of San Diego in the matter.

Under the facts presented, the Committee determined that the city attorney did not have a conflict of interest. In this instance, the city charter required the attorney to provide legal advice to the Mayor and City Council for all legal matters involving the city. Accordingly, the charter contemplates the city as a single municipal corporation with responsibility divided among various officers, none of whom can act independent of the city. Therefore, neither the Mayor nor the City Council can establish an attorney-client relationship independent of the city entity because neither had the potential to become the city attorney’s client against the other.

3. Recommendation of the State Bar of California
   Standing Committee on Professional Responsibility and Conduct

The complexities of representation in the realm of municipal practice make the ability to identify conflicts of interest imperative to being an effective advocate for a governmental entity. Formal Opinion 2001-156 provides a two-part test to help identify potential conflicts of interest under rule 3-310(C). The test asks whether constituent sub-entities or officials (a) have a right to act independently of the governing body of the entity under the city charter or other governing law so that a dispute over the matter may result in litigation between the agency and the overall entity and (b) have contrary position in the matter. The opinion concludes that "[e]ven when both elements are present, the result for disqualification purposes is not always predictable under current law."
C. Ethical Duties of an Attorney Concerning the Retention of Former Clients' Files: Formal Opinion 2001-157

After several years of practice, it is common for attorneys to accumulate files, documents and other papers relating to their clients' cases. An important question concerns what ethical duties an attorney has regarding the retention of these files and whether he is required to retain them for a specific length of time following the completion of representation.

In regard to original papers and other property received from a former client, the attorney's duties are governed by the law relating to bailments or by the Probate Code. In Formal Opinion 2001-157, the Committee addressed the extent of an attorney's duties as to other "client papers and property" to which the former client is entitled under rule 3-700. The Committee concluded that absent a previous agreement, an attorney must make reasonable efforts to obtain the former client's consent to any disposition of the client's files and records. Furthermore, since a client's file may contain a variety of items, an attorney may have an obligation to examine the contents of the file before it is destroyed.

1. Facts

Attorneys Smith and Jones are dissolving their partnership. Neither attorney wants to pay to store the closed civil and criminal case files they have accumulated throughout their partnership. All active files have been transferred to other law firms, as neither attorney plans to continue to prac-
2. Discussion

Rule 3-700 governs an attorney's obligations with regard to closed client files.99 According to Rule 3-700(D)(1), upon the client's request, an attorney must promptly release all client papers and property in the attorney's possession.100 It is well settled in California that such property belongs to the client and not to the attorney.101 A former client is entitled to the papers and property even if the attorney has not received payment for his services.102

An attorney must use all reasonable means to notify the former client of the existence of the file, his rights to examine and retrieve the contents, and that the attorney intends to destroy the file if not claimed by the former client.103 If the attorney has reason to believe that the file includes information or items necessary to the former client to establish a right or a defense to a claim, the attorney is required to keep those

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98. See id.
100. Rule 3-700(D) states:

Papers, Property, and Fees.
A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. “Client papers and property” includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee, which is paid solely for the purpose of ensuring the availability of the member for the matter.

CAL. RULES OF PROF'L CONDUCT R. 3-700(D).


103. See State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2001-157 (2001). Although there is no authority which circumscribes what this notice should contain, the purpose of the notice is clear if it plainly states that the files in question will be destroyed unless there is notice to the contrary, gives a specific deadline to reply, and gives the client reasonable opportunity to respond. See id.
items for the period prescribed by law. Alternatively, if the attorney has no reason to believe that the file includes information or items necessary to the former client, the attorney may destroy the file. This immediately raises the question of what is the duration of an attorney’s obligation to save former clients’ files. For example, foreseeability that another dispute could arise in the future suggests that an attorney’s obligation cannot be measured in all cases by a fixed time-period. The American Bar Association Committee on Ethics and Professional Responsibility provides further insight into the fixed time period issue, stating that “good common sense,” among other considerations, should provide answers as to whether to preserve files.

The Committee’s opinion also seems to suggest that an attorney may have an obligation to inspect the file contents before they are destroyed. An attorney would have to examine the contents of a file before making a determination as to whether the client will have a “reasonably foreseeable” need for the file.

In criminal matters, special consideration must be given to the nature of information contained in the file, because the attorney cannot foresee the future utility of the information contained therein. Recent legislation such as California’s “Three Strikes” law and other measures make it imperative to preserve a client’s file in criminal cases, especially matters involving prior convictions. Thus, an attorney must obtain the former client’s consent before the file can be destroyed.

104. See id.
105. See id.
106. See id.
107. See id.
108. Among the considerations are: (1) whether the information to be destroyed or discarded may still be useful in the assertion or defense of the client’s position in a matter for which the statute of limitations has not expired; and (2) whether the information is that which the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the attorney. See ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1384 (1977).
109. See id.
110. See id.
111. See id. (citing Los Angeles County Bar Ass’n Comm. on Legal Ethics, Formal Op. 420 (1983)).
112. See id.
113. See CAL. BUS. & PROF. CODE § 6068(e) (Deering 2002). This section governs the manner in which files are stored, handled and ultimately destroyed.
3. Conclusion

In this opinion, the Committee strives to strike the delicate balance between the need to preserve information and the ability of an attorney to make the vital determination of whether client information will have future relevance. In the realm of criminal law, the answer is simple: absent client consent, an attorney may not destroy a client's file.\(^{114}\) In civil matters, the determination of what information in a client's file will be reasonably necessary is difficult to make. Unlike the bright-line rule for criminal matters, the civil attorney must make a weighty decision as to which material may or may not be destroyed after making every reasonable attempt to reach the former client. In essence, this imposes a duty upon an attorney to examine each file before making a determination of what is reasonably necessary to the client.\(^{115}\) Of course, written fee agreements can be drawn up to relieve an attorney of the burden and expense of preserving former client files, but such agreements are not appropriate in all circumstances.\(^{116}\)

IV. AMERICAN BAR ASSOCIATION

While the State Bar has been busy working on its Attorney Assistance and Diversion program, the ABA has been quietly wrapping up its five-year effort to revise the Model Rules of Professional Conduct.\(^{117}\) This process entered the final phase last August when the ABA's House of Delegates began considering the Ethics 2000 Commission's recommendations.\(^{118}\) Although these proposed changes will not have an

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See id. Accordingly, an attorney must destroy a file in a manner that will ensure that no breach of confidentiality will occur. See id.

114. See supra notes 111-13 and accompanying text.

115. See supra notes 109-10 and accompanying text.

116. For example, it would be inappropriate for an attorney to draw up such an agreement if he were being retained to write a will or hold documents for safekeeping under the applicable Probate or Civil Code provisions. See State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2001-157 (2001).

117. See supra note 5. See also MODEL RULES OF PROF'L CONDUCT (1983).

immediate effect on California, the State Bar's Commission for the Revision of the Rules of Professional Conduct is just beginning to review and reconsider the California rules, therefore, the ABA's Ethics 2000 proposal will likely have a significant impact on that process. This review will examine the most significant Ethics 2000 proposals and how the House of Delegates has resolved these proposals.

In addition, this review will also revisit the age-old debate over multidisciplinary practice. The debate over multidisciplinary practice was thought to be resolved when the ABA's House of Delegates defeated a proposal to allow lawyers and other non-legal professionals to form partnerships.

But, the American Institute of Certified Public Accountants is pushing for the approval of a "cognitor" credentialing project, which will enable holders to perform a wide range of services, ranging from accounting to business law. If this is approved, the implications on the debate over multidisciplinary practice could be enormous.

A. Ethics 2000's Final Proposals on Client Confidences

The ABA House of Delegates considered several proposed changes to Rule 1.6 of the Model Rules of Professional Conduct. The most radical of the Ethics 2000 Commission's proposals would permit an attorney to reveal confidential information to prevent a client from committing a crime. This proposal would also permit an attorney to reveal confidential information where a client abuses a lawyer's services to perpetrate a fraud. However, the House of Delegates over-

119. California does not follow the ABA Model Rules but occasionally uses them as a model for its own Rules of Professional Conduct. See id.
120. Multidisciplinary practice refers to the partnership and sharing of fees between lawyers and non-legal professionals in a practice that delivers both legal and non-legal professional services. See ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates (July 2000).
122. See Morgan, supra note 118, at 1.
123. See id.
124. See id.
whelmingly rejected this proposed change to Rule 1.6, opting instead to permit an attorney to disclose client confidences to prevent "reasonably certain death or substantial bodily harm." A further proposal expected to gain approval from the House of Delegates is the express permission of an attorney to seek legal advice about his ethical duties, even if the attorney must divulge client confidences to the attorney's counsel. While these changes are in direct conflict with current California rules, they are bound to provoke considerable debate for the State Bar's Commission for the Revision of the Rules of Professional Conduct.

B. Ethics 2000's Final Proposals on Conflicts of Interest

The ABA's House of Delegates also considered several changes to the rules governing conflicts of interest. The Ethics Commission's first proposal would have required that all client consents under Rules 1.7 and 1.9 be confirmed in writing. This would still have permitted disclosure of the conflict to the client and the client's consent to be given orally, so long as the attorney sends a confirming letter to the client. California requires all conflicts and potential conflicts to be disclosed in writing. Although the first proposal from the Ethics 2000 Commission would bring the ABA Model Rules more in line with California conflict rules, it is the second proposal that could generate controversy in revising the California rules.

The second proposal, also rejected by the House of Delegates, would have permitted law firms to use ethical walls to handle conflicts arising from attorneys who move laterally to other firms. Currently the ABA Model Rules of Professional Conduct do not permit screening as a means to control the

125. See id. (emphasis added).
126. See SeLegue, supra note 118.
127. See id. California Business and Professions Code § 6068(e) states: "an attorney must maintain inviolate the confidence, and at every peril to himself or herself to preserve secrets, of his or her client." See CAL. BUS. AND PROF. CODE § 6068(e) (Deering 2002).
128. See SeLegue, supra note 118.
129. See MODEL RULES OF PROF'L CONDUCT R. 1.6 & 1.9 (1983). See also Se-Legue, supra note 118.
130. See SeLegue, supra note 118.
132. See SeLegue, supra note 118.
133. See id.
automatic implication of a conflict from one attorney to the whole firm. This would have serious implications for the revision process in California, because California case law does not permit screening as a means to cure conflicts, absent express client consent. But, with the use of disqualification motions as a tactical device and increasing lateral movement of lawyers between firms, the State Bar’s Commission for the Revision of the Rules of Professional Conduct might be inclined to rethink the general rule.

Whatever proposals California’s Commission for the Revision of the Rules of Professional Conduct comes up with, it is sure to generate some controversy. As with the ABA’s Ethics 2000 Commission, the process will be long and many issues will continue to be revisited long after the final draft proposals are submitted for approval. The ABA’s House of Delegates will continue to debate several key revision proposals throughout 2002, and it is quite possible that several issues already discussed will be revisited throughout the year. Although its impact on California will not be immediate, Ethics 2000 will definitely be on the minds of those on California’s Commission responsible for revising the Rules of Professional Conduct.

C. The Continuing Debate Over Multidisciplinary Practice

Model Rule 5.4 prohibits lawyers from sharing fees or forming partnerships engaged in the practice of law with non-lawyers. In 2000, however, the ABA Multidisciplinary

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135. See SeLegue, supra note 118.
136. See id. A recent Ninth Circuit Court opinion suggests that the California Supreme Court may reconsider permitting firms to screen lawyers from conflicts. See County of Los Angeles v. United States Dist. Court, 223 F.3d 990 (9th Cir. 2000).
137. See SeLegue, supra note 118.
138. See id.
139. See MODEL RULES OF PROF’L CONDUCT R. 5.4 (1990). This rule states that:

(a) A lawyer shall not share legal fees with a non-lawyer, except that:
(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-
Commission tried unsuccessfully to persuade the ABA's House of Delegates to allow such partnerships to form, "provided that lawyers have the control and authority necessary to assure lawyer independence in the legal services." At the time, opponents argued that allowing lawyers to form partnerships providing legal services with non-lawyers would pressure those lawyers to act in a way that would not be in the best interest of their clients. This issue was thought to be resolved until a new accounting credential program, introduced in 2001, renewed the debate over whether multidisciplinary practice should be permitted.

The new credential, called a "cognitor," put forth by the American Institute of Certified Public Accountants ("AICPA"), would recognize the credential holder's ability to provide a range of professional services, from accounting to business law. If all goes according to plan, the first ever "cognitor" credential could be awarded by the summer of 2002.

upon purchase price; and
(3) a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a non-lawyer is a corporate director or officer thereof; or
(3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

Id.

140. See Report to the House of Delegates, supra note 120.
142. See Hansen, supra note 121.
143. See id. The AICPA projects that there will be approximately 700,000 cognitors by 2005.
144. See id. To qualify as a "cognitor", a candidate would have to complete an acceptable level of higher education in a field recognized by the credentialing body, at least five years work experience, and two letters of recommendation from two credential holders. See id.
Needless to say, this has caught the ABA off guard. Supporters of multidisciplinary practice point to the fact that accountants have seized an opportunity to be a "one-stop" supermarket to serve a client's personal and commercial needs. They also argue that the "cognitor" project will mark the beginning of multidisciplinary practice despite the ABA's best efforts to prevent it. If the legal profession refuses to recognize this trend, the public may simply turn to other sources to get their legal services, where they can get the services they want, often at a lower cost.

Supporters of multidisciplinary practice often point to Europe, where many lawyers are already practicing law in non-legal settings, as an example of how it can be successful. They further argue that Europe will become the future hub of legal commerce because many multinational companies, including U.S. corporations, will turn to multidisciplinary practice firms. In Europe, many firms, including the "Big Five" accounting firms provide both legal and non-legal services within a single firm. Logically, there would seem to be a great demand for such firms in the United States with the globalization of commerce and corporations' need for integrated services. In the meantime, however, the prospects of multidisciplinary practice becoming a reality appear far off on the horizon.

V. CONCLUSION

The past year has certainly proved that the California State Bar is progressive and open in its approach towards many ethical dilemmas confronting the practice of law. The

145. See id.
146. See id.
147. See id. (quoting Robert W. Minto, Jr., president of the Attorneys Liability Protection Society).
148. See id. (quoting Robert W. Minto, Jr., president of the Attorneys Liability Protection Society).
149. See Cahill, supra note 141. However, a recent decision in the European Court of Justice has held that lawyers in the Netherlands can be restricted from partnering with accounting firms. See id.
150. See Prince, supra note 121, at 254.
151. See id. at 253-56. The "Big Five" accounting firms are Arthur Andersen, Deloitte and Touche, Ernst & Young, KPMG, and PricewaterhouseCoopers. See Marion Konegis et al., Sources of Financial Information and Data--Beyond Financial Statements, 1284 PLI/CORP. 123, 142 (2002).
152. See Prince, supra note 121, at 253-54.
Attorney Diversion and Assistance Program is a move in the right direction toward ensuring that the legal profession is taking the necessary steps to protect the public. At the same time, the Attorney Drug Court is a good sign that the legal profession is willing to help members from its own ranks, who have fallen prey to the vicious scourge of alcohol and drug abuse. The State Bar has shown that true rehabilitation, rather than stigmatization, will pay dividends in the long run. In addition, the formal opinions of the State Bar also reflect a continuing dedication to addressing the all important ethical issues that practicing attorneys face in California.

The ABA, in its own right, has also been dealing with important ethical issues that affect practicing attorneys. The ABA House of Delegates is mulling over many of the final proposed revisions to the Model Rules of Professional Conduct. While the debate over the proposed rule changes continues, the issue of multidisciplinary practice waits to be revisited. Despite the ABA's rejection of multidisciplinary practice in principle, the world trends cannot be ignored. The question remains whether the ABA will be progressive in its approach to this issue or continue to ignore these trends.