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# Ethics Year in Review

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# ETHICS YEAR IN REVIEW

Christine V. Williams\*

## I. INTRODUCTION

The Chinese use the same word for “crisis” as they do for “opportunity.”<sup>1</sup> Some scholars now treat the field of law as a field in crisis.<sup>2</sup> A growing number of lawyers are unhappy with the reputation of their profession, and public faith in the profession has long since fallen away.<sup>3</sup> Lawyer jokes abound,<sup>4</sup> and a profession once considered noble, now advertises ambulance chasing on television, of course, accompanied by a 1-800 number and a picture of a lawyer handing a smiling client a check for damages.<sup>5</sup> Crisis or opportunity? Recently, the State Bar of California and the American Bar Association (ABA) have taken steps to reign in attorneys who may stray too far from the ethical rules governing the field.

This article will examine and review the year in ethical developments, focusing on California and national movements. First, this article will explain the ethics hotline available to attorneys in California. Next, this article will examine novel ethics opinions issued by the State Bar of California in the last year. Finally, this article will examine the ABA’s meeting, its new rules, and what they mean, specifically analyzing the impact on California lawyers.

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1. See Paul Reidinger, *It's the Money, Stupid: Law Professor Examines a Profession 'Permanently in Decline,'* A.B.A. J., Feb. 2001, at 76.

2. See *id.*

3. See *id.*

4. For example, Q: What are a thousand lawyers at the bottom of the sea? A: A good start. Q: What's the difference between a lawyer hit by a car and a snake hit by a car? A: There were skids marks in front of the snake. Q: What's the difference between a pit bull and a female lawyer? A: Lipstick.

5. See television commercial for the People's Attorney.

## II. THE ETHICS HOTLINE AND THE CALIFORNIA COMMITTEE ON PROFESSIONAL RESPONSIBILITY

To help lawyers identify and analyze professional responsibilities, the State Bar of California runs an ethics hotline as well as supports a California Committee on Professional Responsibility (the Committee).<sup>6</sup>

### A. *The Ethics Hotline*

The ethics hotline is a confidential research service run by the California Bar Association to help lawyers identify and analyze professional responsibilities.<sup>7</sup> Calls to the ethics hotline are generally confidential. However, staff members do not provide legal counsel, advice, or opinions.<sup>8</sup> Instead, staff members refer lawyers to statutes, rules, cases, and bar opinions that may help those callers make an informed decision in line with professional responsibility.<sup>9</sup>

The ethics hotline began guiding lawyers on professional responsibility in 1983.<sup>10</sup> The funding crisis of 1998 forced the shutdown of the hotline. However, in 1999 the hotline began operating again and has since answered questions for over twenty thousand callers.<sup>11</sup>

### B. *The Committee on Professional Responsibility and Conduct*

In addition to, and in conjunction with, the ethics hotline, the State Bar of California also has the Committee.<sup>12</sup> The Committee, consisting of fourteen attorneys and two members of the public, issues advisory opinions on ethics submitted by bar members, local bar associations, and the Board of Governors.<sup>13</sup> The advisory opinions provide guidance to laws and regulations concerning professional responsibility.<sup>14</sup> Two such novel opinions follow.

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6. *The State Bar of California: Ethics Hotline* (visited Mar. 12, 2001) <[http://www.calbar.org/2eth/3hotline/hotline\\_index.htm](http://www.calbar.org/2eth/3hotline/hotline_index.htm)>.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *Committees, Commissions, Ad Hoc Groups* (last visited Mar. 12, 2001) <<http://www.calbar.org/2ent/3gps/gps-f-b.htm>>.

13. *See id.*

14. *See id.*

1. *Engagement Agreement Restrictions on Client Settlement Authority*

One such ethics advisory opinion, published by the Los Angeles County Bar Association, was the "Engagement Agreement Restrictions on Client Settlement Authority."<sup>15</sup> In that case, a retired physician became an attorney in order to create a nonprofit organization.<sup>16</sup> He created the nonprofit organization to represent those patients denied medical treatment or given inadequate medical care by managed health care organizations.<sup>17</sup> The true goal of the organization was to improve managed care by exposing fraudulent practices and bringing attention to violations.<sup>18</sup> In order to meet that goal, the attorney would provide free or reduced fee legal services.<sup>19</sup> However, if a settlement occurred between the client and the managed care provider, the attorney required, as specified in an initial written agreement with the client, that the client would not keep the settlement confidential.<sup>20</sup> According to the terms of the agreement, the client would be required to pay the full fee for all the time spent on the case, in addition to the reimbursement of all expenses incurred by the attorney or the firm.<sup>21</sup> The agreement reads in pertinent part:

[Attorney's firm] and I agree that acceptance of money in return for silence about wrongdoing is repugnant, immoral, and possibly illegal. Therefore, as a matter of policy and in return for the very advantageous fee structure herein, I agree that neither [Attorney's firm] nor its attorneys will be required to agree to any clause in any proffered settlement which requires that they refrain from disclosing, to regulatory agencies or consumer groups, information about any acts or policies of HMO which they reasonably believe may adversely affect public health or safety, represent consumer fraud, or violate any regulations or laws. I authorize [Attorney's firm] to make this limitation known in advance to opposing counsel.

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15. Professional Responsibility and Ethics Comm., Los Angeles County Bar Association, Formal Ethics Opinion No. 505 (Aug. 21, 2000) [hereinafter Ethics Opinion No. 505], available at <<http://www.lacba.org/opinions/eth505.html>>.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See* Ethics Opinion No. 505, *supra* note 15.

I realize and accept that this may result in loss of an otherwise beneficial settlement, and I have been given the opportunity to seek alternate counsel.

If I nevertheless accept a settlement containing such a gag clause, as I have a right to do, and I cooperate in obtaining a judicial order binding [Attorney's firm] or its attorneys to it as well, then the waiver of fees outlined below will not occur, and I will pay [Attorney's firm], as the reasonable value of its services, its full fee for all the time spent on my case, plus reimbursement of its expenses, for which it will have a lien upon the settlement upon recovery.<sup>22</sup>

The true issue, the Committee found, was whether the gag clause of the settlement agreement and alternate fee agreement improperly restricted clients from settlement.<sup>23</sup> Generally, the Committee held, that the negotiation of an initial engagement agreement is an arm's-length transaction.<sup>24</sup> Absent duress, unconscionability, or the like, "the attorney is 'entitled to negotiate the terms on which he would accept employment' and the client has 'no cause to complain that the terms [the attorney] negotiated were favorable to him.'"<sup>25</sup> Although the law allows an attorney to negotiate terms of employment, it is against public policy and, therefore void, for an agreement between a lawyer and client to prohibit the client from settling without the attorney's consent.<sup>26</sup> However, in *Klein v. Lange*, the California appellate court determined "that a contingent fee agreement which provided for payment of an agreed amount in case of settlement, but did not prevent the client's settling the case at any time[,] was not illegal."<sup>27</sup> Moreover, "even 'assuming the invalidity of the entire contract by reason of the inclusion of [an illegal] provision' the attorney 'would be entitled to compensation based on the reasonable value of services performed.'"<sup>28</sup>

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22. *Id.*

23. *See id.*

24. *See id.* (citing *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904, 913 (1994)).

25. *Id.* (citing *Ramirez*, 21 Cal. App. 4th at 913).

26. *See id.* (citing *Calvert v. Stoner*, 33 Cal. 2d 97, 103 (1948); *Hall v. Orloff*, 49 Cal. App. 745 (1920)).

27. Ethics Opinion No. 505, *supra* note 15 (citing *Klein v. Lange*, 91 Cal. App. 400 (1928)).

28. *Id.* (quoting *Calvert*, 33 Cal. 2d at 105).

Considering the gag clause did not restrict settlement, but provided an alternate and negotiated fee agreement, the Committee found the gag clause was ethical as long as the attorney restricts the fees to reasonable value of services and makes full disclosure of the agreement in the initial contract.<sup>29</sup>

2. *An Attorney's Duty to Follow a Client's Explicit Instruction Not to Disclose Confidential Information in the Context of a Minor Client's Disclosure of On-going Sexual Abuse in Dependency Proceedings*

In the second case, the court appointed an attorney to represent a minor child in dependency court proceedings.<sup>30</sup> There was not a guardian ad litem appointed for the minor child, and the attorney failed to disclose the age of the child when asking the Committee for advice.<sup>31</sup> During a confidential communication between the attorney and the child, the child told the attorney that the child was being sexually assaulted in the home where the court had placed the child.<sup>32</sup> The minor client then explicitly directed the attorney not to disclose this information to anyone.<sup>33</sup> The attorney was uncertain as to whether he had an ethical duty to follow the minor client's explicit instruction, or whether he had a duty to disclose his client's circumstances because non-disclosure may not be in the best interest of his client.<sup>34</sup> Specifically, the attorney asked the Committee for guidance on the following questions:

1. How should the attorney handle the perceived legal and ethical responsibilities?
2. Are the express wishes of the minor child controlling?
3. Is the age of the minor client a factor to be considered?
4. Is there an implicit exception to the attorney-client privilege for court-appointed dependency counsel in this type of situation?
5. Is it appropriate for the minor client's attorney to

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29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See Ethics Opinion No. 505, supra* note 15.

34. *See id.*

disclose the information to the Court in confidence with the intention of protecting the minor client's best interests and providing the Court with the necessary evidentiary basis for an order that the minor client be placed in another home, that contact with the abuser be appropriately restricted, and that the minor client be provided counseling?<sup>35</sup>

The Committee chose not to respond to any specific legal issues raised in the inquiry, but instead focused on the ethical questions listed above.<sup>36</sup> The Committee found,

[This] inquiry presents an example of the tensions that arise if one seeks to define an attorney's role not merely as the client's legal adviser and advocate, but also as an advocate of the position the attorney believes is in the best interests of the client, regardless of the client's express wishes.<sup>37</sup>

Because the minor client disclosed the sexual abuse in a confidential setting, the attorney was bound not to disclose this information to anyone, according to section 6068(e) of the California Business and Professions Code.<sup>38</sup> The inquiry may have ended there. However, under ABA Model Rules of Professional Conduct 1.4(a) and rule 3-110 of the California Rules of Professional Conduct, the attorney also has a duty to represent a client "competently."<sup>39</sup> Specifically, it is the duty of the attorney, on any matter that requires client understanding, to "take all reasonable steps to insure that the client comprehends the legal concepts involved and advice given, so that the client is in a position to make an informed decision."<sup>40</sup> Moreover, the Committee, in agreement with

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35. *Id.*

36. *See id.*

37. *Id.* (citing generally to Martin Guggenheim, *The Right to Be Represented but not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984); *In re Rose Lee Ann L.*, 718 N.E.2d 623 (1999)).

38. Professional Responsibility and Ethics Comm., Los Angeles County Bar Association, Formal Ethics Opinion No. 504 (May 15, 2000) [hereinafter Ethics Opinion No. 504], available at <<http://www.lacba.org/oinions/eth504.html>>. Section 6068(e) of the California Business and Professions Code provides that every attorney has an ethical obligation to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." Without the client's informed consent, the attorney must maintain information about the minor client's sexual abuse because that information constitutes a client's secret. *See* Ethics Opinion No. 504, *supra*.

39. *See* Ethics Opinion No. 504, *supra* note 38.

40. *Id.*

ABA Model Rules of Professional Conduct 1.14(a), found the "client's age and maturity are significant factors controlling how an attorney must discharge the ethical obligation of communicating with the client."<sup>41</sup> Namely, the Committee found, the client must communicate to the attorney some reason why the client wants the communication confidential, and the attorney must judge that the minor client is competent to make that decision.<sup>42</sup> Granting great deference to the judgment of the child, the Committee held, "[i]n general, the authority to make material decisions affecting the direction of legal proceedings is exclusively that of the client, and, if made within the framework of the law, such decisions are binding on the attorney."<sup>43</sup> Even if the attorney does not believe that the minor's decision is in the minor's best interest, the attorney may not ethically permit disclosure of the information.<sup>44</sup> However, if the matter becomes a disagreement so strong between the attorney and the client that the effectiveness of counsel is in jeopardy, the attorney may seek to withdraw, in accordance with the California Rules of Professional Conduct 3-700(C)(1).<sup>45</sup> In withdrawing, the attorney still may not disclose the sexual abuse.<sup>46</sup>

Even in this very dark scenario, however, there is some light. If the attorney believes, in good faith, that the minor client is incapable of making an informed decision, "especially on a matter potentially impacting the minor client's physical and emotional health—the attorney is not ethically precluded from undertaking appropriate action to protect the client's interests, provided that in doing so the attorney also maintains in confidence the client's confidential information."<sup>47</sup> In deciding what action, if any, should be appropriate for the attorney to take, the attorney must consider the mandate of the Welfare and Institutions Code section 300.2, which, in relevant part, reads:

Notwithstanding any other provision of law, the purpose

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41. *Id.*

42. *See id.*

43. *Id.* (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (2000)).

44. *See id.*

45. *See* Ethics Opinion No. 504, *supra* note 38 (citing CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-700(C)(1)).

46. *See id.*

47. *Id.*

of the provisions of this chapter relating to dependent children is to provide the maximum safety and protection for children who are currently being physically, sexually or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection and physical and emotional well-being of children who are at risk of that harm. . . . In addition, the provisions of this chapter ensuring the confidentiality of proceedings and records are intended to protect the privacy rights of the child.<sup>48</sup>

Taking into consideration section 300.2 of the Welfare and Institutions Code, and California Business and Professions Code section 6068(e), the attorney now squarely encounters an ethical dilemma as to which duty outweighs the other. Rather than address this dilemma directly, the Committee instead recommended that the attorney seek to have a guardian ad litem appointed by the court. Under the circumstances, the Committee found that the attorney is not ethically prohibited from seeking the appointment of a guardian ad litem because the attorney is taking action in the best interest of the client without disclosing the client's confidential information.<sup>49</sup>

Once a guardian ad litem is appointed, the dilemma faced by the attorney seems to lighten.<sup>50</sup> The Committee found, for the purposes of this opinion and in accordance with the governing law, the guardian ad litem would be in a position to control and direct the minor's litigation and the minor's attorney-client privilege.<sup>51</sup> Therefore, the attorney may discuss the sexual abuse with the guardian and allow the guardian to instruct the attorney, thereby alleviating the attorney's ethical conflict.<sup>52</sup>

Both the Engagement Opinion with the non-confidential settlement clause, and the minor client's confidential report of sexual abuse, were novel questions of law that needed answering by attorneys trying to do their jobs. In both cases,

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48. CAL. WELF. & INST. CODE § 300.2 (West 2000).

49. See Ethics Opinion No. 504, *supra* note 38.

50. See *generally id.*

51. See *id.*

52. See *id.* If the guardian makes the decision and instructs the attorney not to disclose the sexual abuse, the attorney must follow those instructions. However, if the guardian decides that the attorney should disclose the sexual abuse, the attorney may ethically disclose such information, even if the disclosure conflicts with the wishes of the minor. See *id.* (citing *De Los Santos v. Superior Court*, 27 Cal. 3d 677, 682 (1980)).

the State Bar of California provided effective assistance to attorneys. Crisis became opportunity. In contrast, the American Bar Association's (the ABA) proposed changes to the Model Rules of Professional Conduct have been criticized as turning opportunity into mediocrity.

### III. THE NEW MODEL RULES

The ABA's Model Rules of Professional Conduct have been adopted, in one form or another since their inception in 1986, by thirty-nine states and the District of Columbia.<sup>53</sup> For the past three years, the ABA's rules have been debated and rewritten.<sup>54</sup> The ABA Board of Governors appointed the Ethics 2000 Commission to revamp the fourteen-year-old Model Rules of Professional Conduct (the Rules).<sup>55</sup>

#### A. *The Proposed Changes to the Rules*

This four hundred-page document, full of thousands of recommendations, must go to the ABA's House of Delegates for adoption.<sup>56</sup> The proposed changes would:

Allow discretionary disclosure of client confidences to prevent death or substantial bodily harm, even when the danger is not imminent, or to correct or prevent fraud.

Generally allow law firms to continue to represent a client when a lawyer moving laterally has a conflict of interest. The new lawyer would have to be screened from the matter, but the client would not have to consent.

Require that all fee agreements and conflict waivers be put in writing.

Ban sex between a lawyer and a client unless the relationship began before the representation.

Subject law firms to disciplinary action when all partners share responsibility for wrongdoing, when no single lawyer has personal responsibility for the violation.

Create "safe harbors" that would make it easier for a lawyer to practice across [state lines].

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53. See Mark Hansen, *The New Rule Models* (visited May 10, 2001) <<http://www.abanet.org/journal/jan01/fethics.html>>.

54. See *id.*

55. See *id.*

56. See *id.*

Ban real-time electronic solicitation, as occurs in Internet chat rooms.

Norman Veasey sat on the ABA Commission evaluating the Model Rules of Professional Conduct.<sup>57</sup> Veasey stated:

Our goal has been to develop a set of rules that make sense to the public and provide clear guidance to practitioners. Our desire was to preserve all that is valuable and enduring about the existing Model Rules, while at the same time adapting realities of modern law practice and the limits of professional discipline.<sup>58</sup>

### B. *Critics of the Proposed Rule Changes*

Some critics argue that not all the good things about the current rules have been kept. Notably, the new Rules allow referral fees between attorneys without requiring division of work or shared responsibility.<sup>59</sup> The new rule on referral fees, however, is not what angers critics the most.

An outspoken critic of the proposed Rules is HALT, a self-proclaimed organization of Americans for legal reform.<sup>60</sup> HALT "seeks to promote increased accountability in the legal profession."<sup>61</sup> HALT alleges that Americans file over 100,000 disciplinary complaints against attorneys each year.<sup>62</sup> These complaints include allegations of over-charging and excessive fees, neglect, lying, and/or misrepresenting evidence.<sup>63</sup> HALT, according to its website, advocates legislation that requires attorneys to include the "Legal Consumer's Bill of Rights in their contracts and retainer agreements."<sup>64</sup> The Legal Consumer's Bill of Rights "spells out four basic rights that every American citizen should expect from the civil justice system: the right to control your own legal affairs, the right to affordable legal services, the right to competent legal representation, [and] the right to an accessible and

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57. See E. Norman Veasey, *Summarizing the Fine Print* (visited Mar. 24, 2001) <<http://www.abanet.org/journal/jan01/fethics.html>>.

58. *Id.*

59. *See id.*

60. See HALT, *Legal Consumers Bill of Rights Project* (visited Mar. 24, 2001) <<http://www.halt.org/BOR/borhome.html>>.

61. *Id.*

62. *See id.*

63. *See id.*

64. *Id.*

accountable legal system.”<sup>65</sup> To that end, legal reformers have been successful in New York, Florida, and Illinois, all requiring, in one form or another, that lawyers provide consumer information to their clients.<sup>66</sup>

HALT wrote a scathing letter in response to the proposed ABA rules, covered in the American Bar Association Journal’s January issue.<sup>67</sup> The criticism in the letter is direct and to the point, and seems to indicate that the crisis faced by the ABA will not turn into opportunity.

Lost in the din of self-congratulatory phrase in ‘The New Rule Models,’ January, page 50, is the fact that nothing has really been changed by the latest round of ‘improvements’ to the Model Rules of Professional Conduct. Even if all the recommendations of the Ethics 2000 commission and even if every state follows suit, consumers are still left in the dark.

The strongest ethics rules in the world are worthless if consumers don’t know about them. Yet nowhere in the hundreds of pages of new rules is there any requirement that lawyers provide clients any information about their ethical responsibilities.

Lawyers should fully inform clients about their professional responsibilities both as a matter of ethical duty and as a sound business practice. At a minimum, clients should be told in advance what they will be charged, what is and is not acceptable attorney behavior, and where to turn if problems develop.

Requiring lawyers to include such basic consumer information in retainer agreements would do more to improve legal ethics and enhance lawyer accountability than any other action the ABA could take. Unfortunately, the commission summarily rejected this common sense proposal.

Also, to be effective, the ethics rules should represent a per se standard of care for purposes of establishing liability in malpractice cases. But the vast majority of states have adopted disclaimers that protect lawyer from liability based on violations of the rules of professional

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65. *Id.*

66. See HALT, *supra* note 60.

67. James Turner & Theresa Meehan Rudy, *No Real Ethics Changes*, A.B.A. J., Mar. 2001, at 12.

responsibility, a situation the commission ignored.

Until the ABA gets serious about enforcing professional conduct rules and endorses these two basic reforms, little will change, including the widespread public distrust of the legal profession. In short, Ethics 2000 is an abject failure.<sup>68</sup>

The criticism by HALT may seem unduly harsh. However, considering what the changes mean for jurisdictions like California, the skepticism may be justified.

### C. *What the Changes Mean in California*

California Rules of Professional Conduct both mirrors the ABA Rules and departs from them.<sup>69</sup> The proposed changes in the ABA Rules do not really affect California's Rules.<sup>70</sup> Notably, the ABA's proposed rule requiring that conflicts and possible conflicts of interest be disclosed in writing is already required in California under section 3-310 of the California Rules of Professional Conduct.<sup>71</sup> Likewise, the ABA's proposed rule prohibiting sexual relations with a client, unless the sexual relation began before representation,<sup>72</sup> already exists in section 6109.6 of the California Business and Professions Code (Business and Professions Code).<sup>73</sup>

However, the proposed ABA Rules do stand in conflict with at least one provision of the California Business and Professions Code. Specifically, the new ABA Rules would allow the discretionary disclosure of client confidences to prevent death or substantial bodily harm, even when the danger is not imminent, or to correct or prevent fraud.<sup>74</sup> In contrast, the California Business and Professions Code section 6068(e) requires the attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."<sup>75</sup> Plainly speaking, the attorney is obliged to keep silent, regardless of the peril to

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68. *Id.*

69. See generally RICHARD ZITRIN & CAROL LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW: RULES, STATUTES AND COMPARISONS (1999).

70. See *id.*

71. See generally *id.*

72. See Veasey, *supra* note 57.

73. See generally ZITRIN, *supra* note 69, at 354.

74. See Veasey, *supra* note 57.

75. CAL. BUS. & PROF. CODE § 6068(e) (West 2000).

herself or others.<sup>76</sup>

In sum, the ethical rules guiding California attorneys are either stronger than the proposed changes to the ABA rules or are simply overridden by stronger language within the California Business and Professions Code.

#### IV. CONCLUSION

In examining this past year in ethical trends, it is clear that this has been an active year both nationally and in California. Going further, in contrasting and comparing the ability to respond to the ethics questions raised by attorneys and guidelines established for attorneys, it is readily apparent that California provides resources and opinions more effective in aiding attorneys facing dilemmas. Although the past three years have seen heated debate about the scope of the ABA changes, the changes in the proposed rules may be remembered for what they could have done, rather than what they did. The proposed changes to the rules may still have attorneys asking the question, "Crisis or opportunity?"

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76. See ZITRIN, *supra* note 69, at 345.

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