

1-1-2000

Ethics Year in Review

Sheara Gelman

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Sheara Gelman, Ethics Review, *Ethics Year in Review*, 40 SANTA CLARA L. REV. 1219 (2000).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol40/iss4/11>

This Ethics Review is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

ETHICS YEAR IN REVIEW

Sheara Gelman*

I. INTRODUCTION

As most California attorneys are aware, the issues of professional responsibility and attorney discipline have been hotly debated in the past several years. The State Bar of California ("State Bar") has come under tremendous scrutiny leading to a funding crisis and much criticism.¹ Although the State Bar's shutdown happened two years ago,² its impact is still being felt in this year's ethics developments. The California Supreme Court's intervention into the state's attorney discipline system marked a trend toward continuing control over attorneys and their activities. While the American Bar Association ("ABA") seems to be relaxing the standards regulating attorneys,³ the State Bar and state courts have issued decisions that reaffirm the reach of regulations affecting attorneys.⁴

Part II of this review briefly examines the pivotal California Supreme Court case of *In re Attorney Discipline Sys-*

* Ethics Editor, Santa Clara Law Review, Volume 40. J.D. candidate, Santa Clara University School of Law; B.A., University of Maryland, College Park.

1. See *infra* Part II.

2. See *infra* notes 10-14 and accompanying text.

3. For example, the ABA's Commission on Multidisciplinary Practice has recommended relaxing the restrictions on fee sharing with non-lawyers in order to allow lawyers and non-lawyers to form partnerships. See *infra* Part III.B.

4. Compare ABA Comm'n on Multidisciplinary Practice, *Report to the House of Delegates*, (visited Feb. 8, 2000) <<http://www.abanet.org/cpr/mdprecommendation.html>> (recommending that lawyers be allowed to deliver legal services through a multidisciplinary practice and share fees with non-lawyers) [hereinafter ABA Comm'n on MDP, *Report to House of Delegates*], with State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999) (opining that to the extent a lawyer performs legal services, he or she is prohibited from sharing fees with a non-lawyer).

tem⁵ that provided emergency funding for the State Bar.⁶ Part III examines the advisory opinions of the State Bar of California Committee on Professional Responsibility and Conduct and compares those opinions to national trends.⁷ Part IV looks at California cases that have impacted the rules of professional responsibility.⁸ Finally, Part V examines the ABA's activities including the advisory opinions it has issued.⁹ Although not exhaustive, these sources highlight the most important ethical issues affecting California attorneys in 1999.

II. CONFLICT OVER THE CALIFORNIA STATE BAR REACHES THE CALIFORNIA SUPREME COURT

The State Bar of California, created by statute in 1927, is traditionally funded by fee assessments imposed by the legislature on attorneys licensed to practice in the state.¹⁰ By statute the State Bar is authorized to collect \$77 in annual dues from attorneys; however, only \$27 of that may be used for the attorney discipline system.¹¹ In 1997, then-Governor Pete Wilson vetoed a bill that would have increased the annual dues to \$458.¹² In 1998 the California Legislature adjourned without passing a fee bill.¹³ Feeling its current funding for an attorney discipline system inadequate, the State Bar petitioned the California Supreme Court to impose a special fee assessment in order to properly fund the discipline system.¹⁴

After concluding that an attorney discipline system is essential to protect the public¹⁵ and that the current system was

5. *In re Attorney Discipline Sys.*, 967 P.2d 49 (Cal. 1998).

6. *See infra* Part II.

7. *See infra* Part III.A-C.

8. *See infra* Part IV.

9. *See infra* Part V.

10. *See Attorney Discipline Sys.*, 967 P.2d at 52.

11. Forty dollars is expressly allocated by statute to the Client Security Fund and its administration, while \$10 is reserved for either staff facilities or major capital improvements. *See id.* at 53.

12. *See id.*

13. *See id.* at 53. The State Bar continued to be authorized by statute to collect \$77 in annual dues. *See id.*

14. *See id.* at 51.

15. *See id.* at 65. The court found that "the objective of the discipline system is not punishment of the attorney, but protection of the public." *Id.* Some have argued that a separate discipline system is not necessary because the

inadequate,¹⁶ the court exercised its inherent powers and imposed a special fee assessment.¹⁷ Rejecting the argument that court action would violate separation of powers¹⁸ the court found that when the legislature has not acted, the court "appropriately may decide to take action to avert a shutdown of the disciplinary system."¹⁹

Although the court's decision is by no means unique,²⁰ it highlights the court's commitment to professional responsibility by ensuring that the attorney discipline system properly functions to protect the public. In the background of each ethics-related decision is the notion that:

[a]n unregulated profession soon may lose its right to call itself a profession, as public doubts about the fairness of the practice of law and of the courts increase. The courts suffer not only as such doubts in the integrity of the profession and the legal system grow, but suffer also because the courts rightfully may be considered responsible when

public has recourse, in the form of civil and criminal remedies, for abuses committed by attorneys. *See id.* However, the court noted that "society has found that the regulation of various professions through licensing is an essential companion to the relief available through civil and criminal litigation." *Id.* at 66. Leaving the civil and criminal justice systems as the only recourse for injured clients would encourage litigation, increase the burden on courts, and would not prevent future abuses. *See id.* at 65.

16. Without a fee bill, the State Bar is only authorized to allocate \$27 towards a discipline system. *See Attorney Discipline Sys.*, 967 P.2d at 53. The court found that this was inadequate, as evidenced by the mounting backlog of complaints. *See id.* at 52.

17. *See id.* at 77 ("Each active member shall pay a mandatory regulatory fee of one hundred seventy-three dollars (\$173) to the Special Master's Attorney Discipline Fund. . . . This \$173 assessment is in addition to the mandatory fees currently authorized by statute.").

18. Governor Wilson argued that because the State Bar was created by statute and since funding was traditionally provided for by the legislature, the court did not have the power to assess fees in order to provide a discipline system. *See id.* at 55. While recognizing that the State Bar has traditionally been regulated by the legislature, the court stated, "[O]ur traditional respect of legislative regulation of the practice of law, based upon principles of comity and pragmatism, is not to be viewed as an abdication of our inherent responsibility and authority over the core functions of admission and discipline of attorneys." *Id.* at 62.

19. *Id.* at 64. In reaching this decision, the court rejected Governor Wilson's argument that by providing for funding the court was substituting its judgment for that of the legislature. *See id.* at 70.

20. Other states considering this issue reached the same conclusion. *See, e.g.,* *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); *In re Integration of Bar of Haw.*, 432 P.2d 887 (Haw. 1967); *Board of Overseers of Bar v. Lee*, 422 A.2d 998 (Me. 1980); *Matter of Miss. State Bar*, 361 So. 2d 503 (Miss. 1978).

they fail to act to protect the public despite their authority to do so. *Thus, the interests of the public, the legal system, and the courts all benefit from the existence of a functioning and effective attorney disciplinary system.*²¹

III. ADVISORY OPINIONS OF THE STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

The State Bar of California Committee on Professional Responsibility and Conduct ("Committee") issues advisory opinions in response to questions posed by attorneys that implicate issues of professional responsibility. These opinions are non-binding. This year, the Committee issued two formal opinions and one interim opinion.

A. *Simultaneous Representation of a Corporation and a Shareholder in an Action Brought by Another Shareholder: Formal Opinion 1999-153*²²

In Formal Opinion 1999-153, the Committee addressed the potential conflict of interest a corporate attorney faces when dealing with a small corporation. Under the facts presented the Committee decided that a lawyer might represent both the corporation and a shareholder in an action brought by another shareholder.²³

1. *Facts*

The corporation was comprised of two shareholders, A and B.²⁴ Shareholder A served as president and CEO with the power to oversee daily operations.²⁵ A was also authorized to obtain legal counsel for the corporation and oversee that representation.²⁶

A and B were in disagreement over business matters.²⁷ Unable to resolve the dispute, B filed a lawsuit against both the corporation and A individually.²⁸ A hired an attorney to

21. *Attorney Discipline Sys.*, 967 P.2d at 66 (emphasis added).

22. State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-153 (1999).

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See* State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-153 (1999).

represent both *A* and the corporation in the lawsuit.²⁹ The attorney had never represented the corporation before this matter.³⁰

2. Discussion

The facts presented raise a number of issues. First, may the attorney represent both the corporation and shareholder *A*?³¹ Generally, a lawyer representing a corporation does not represent the individual shareholders.³² This fact is reinforced by Rule 3-600 of the California Rules of Professional Conduct which states, "[i]n representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body or constituent overseeing the particular engagement."³³ Because a corporate counsel's primary duty is to the corporation, California courts have held that counsel should not get involved in disputes between shareholders.³⁴

At first glance, the attorney's representation of *A* in a dispute with *B* is in violation of Rule 3-600. However, the attorney representing the corporation must follow the instructions of the highest officer authorized to oversee the corporation, which in this case is *A*.³⁵ In this limited situation, the attorney may represent both *A* and the corporation, provided that the two do not have conflicting interests³⁶ and that the attorney only takes action in the lawful interest of the corporation.³⁷ It is no problem that during the course of representation the corporate counsel will take action adverse to a shareholder, in this case *B*, because "a lawyer is not prohibited from taking actions on behalf of the corporation that

29. *See id.*

30. *See id.*

31. *See id.*

32. *See Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627 (1991); *Meehan v. Hopps*, 301 P.2d 10 (Cal. Ct. App. 1956).

33. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-600(A) (1999).

34. *See State Bar of California Comm. on Professional Responsibility and Conduct*, Formal Op. 1999-153 (1999); *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*, 43 Cal. Rptr. 2d 327 (Ct. App. 1995); *Skarbrevik*, 282 Cal. Rptr. at 627; *Woods v. Superior Court*, 197 Cal. Rptr. 185 (Ct. App. 1983).

35. *See State Bar of California Comm. on Professional Responsibility and Conduct*, Formal Op. 1999-153 (1999).

36. *See id.*

37. *See id.* at n.4.

negatively impact the interests of a shareholder or other constituents."³⁸ Further, by bringing a lawsuit against the corporation, *B* is not entitled to representation by the corporate counsel in connection with the suit.³⁹

Having resolved that the attorney may represent both *A* and the corporation, the second issue is whether the attorney needs the informed written consent of both. Because the attorney will represent two distinct clients, Rule 3-310(c)(1) and (2) apply.⁴⁰ Under the facts presented, informed written consent will be required if *B* or another person obtains control of the corporation⁴¹ or if it is reasonably possible that the attorney may need to reveal confidential information to someone other than *A*.⁴²

The third issue concerns who can consent on behalf of the

38. *Id.* See also *Skarbrevik*, 282 Cal. Rptr. at 627; *Meehan v. Hopps*, 301 P.2d 10 (Cal. Ct. App. 1956).

39. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-153 (1999).

40. See *id.* The rule 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 interest 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 PROFESSIONAL CONDUCT Rule 3-310(C) (1999).

41. This triggers the possibility that the attorney could receive conflicting instructions from the corporation and from *A*. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-153 (1999).

42. See *id.* The opinion identifies six situations that create conflict when representing multiple clients:

- (1) conflicting instructions of the clients in which the lawyer cannot follow one client's instruction without violating another client's instruction; (2) conflicting objectives of the clients in which the lawyer cannot effectively advance on client's objective without detrimentally affecting another client's objective; (3) advocacy of antagonistic position of the clients in which the lawyer is called on to advocate both sides of a negotiation or a legal position at the same time; (4) inconsistent expectations of a confidentiality in which one client expects the lawyer not to disclose information the lawyer would be required to impart to the other client; (5) a preexisting relationship with one client that would adversely affect the lawyer's independent judgment on behalf of the other client; and (6) conflicting demands by the clients for the original file once the representation has ended.

Id.

corporation if a potential conflict of interest does arise. This question is governed in part by Rule 3-600(E), which states:

A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual of constituent who is to be represented, or by the shareholder(s) or organization members.⁴³

Thus, consent, if necessary, can be given either by a constituent other than the one being represented or by a shareholder.⁴⁴ The rule gives no indication as to which shareholders can give consent and there is no limitation that it must be a shareholder other than the one being represented. The committee said, "at a minimum, the shareholder or shareholders must have sufficient authority to execute an agreement to the joint representation for the corporation."⁴⁵

Under the facts presented, the Committee believed it was unreasonable to require *B*'s consent since that would allow an opposing party to dictate who can represent the corporation.⁴⁶ *A* could consent because he is the only other shareholder, and as the president of the corporation *A* was authorized to hire and oversee corporate counsel.⁴⁷

3. Conclusion

Under the narrow facts presented the Committee decided that the attorney may represent both *A* and the corporation in the action brought by *B*.⁴⁸ The Committee cautioned that there may be circumstances where the controlling shareholders owe the minority shareholders a fiduciary duty that would prevent *A* from seeking joint representation.⁴⁹ Also, this case does not concern a shareholder derivative action, which would

43. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-600(E) (1999).

44. *See id.*

45. State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-153 (1999).

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*; *see also, e.g., Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464 (Cal. 1969).

implicate different policy concerns.⁵⁰

B. *Advertising Legal Skills to Market Non-Legal Services: Formal Opinion 1999-154*⁵¹

The issue of multi-disciplinary practice ("MDP") is a hot topic in today's legal community. The ABA defines an MDP as:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services.⁵²

The legal community has been paying close attention to MDPs as more and more alliances have been created between law firms and "Big Five accounting firms"⁵³ and as many experienced lawyers have been leaving U.S. firms in order to join MDPs operating abroad.⁵⁴ The ABA noticed this trend and its Commission on Multidisciplinary Practice ("Commission") recommended that the Model Rules of Professional Conduct be revised to allow lawyers to deliver legal services through MDPs and to share fees with non-lawyers.⁵⁵

Unlike the ABA, the State Bar of California Committee on Professional Responsibility and Conduct has shown no

50. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-153 (1999).

51. State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999).

52. ABA Comm'n on MDP, *Report to House of Delegates*, *supra* note 4.

53. See ABA Comm'n on Multidisciplinary Practice, *Updated Background and Informational Reports and Request for Comments* (visited Feb. 8, 2000) <<http://www.abanet.org/cpr/febmdp.html>>. For example, law firms Morrison & Foerster and Horwood, Marcus & Berk have entered into a strategic alliance with KPGM. See *id.* In addition, Bingham Dana, LLP has merged its money-management practice with Legg Mason, Inc., in what is reported as "the first partnership between a law firm and an asset management firm in the United States." *Id.*

54. See ABA Comm'n on MDP, *Report to House of Delegates*, *supra* note 4. MDPs are gaining acceptance abroad. The first steps toward approving MDPs have been taken in Great Britain; legislation has been passed in Australia to allow law firms to incorporate and share profits with non-lawyers; and the International Practice Law Committee of the Canadian Bar Association has recommended that lawyers be permitted to enter into partnerships and share fees with non-lawyers. See *id.*

55. See *infra* Part V.

signs of relaxing the standards governing dual practitioners who share fees with non-lawyers.⁵⁶ In Formal Opinion 1999-154, the Committee considered the extent to which a lawyer may advertise his or her legal skills to market non-legal services and concluded that the rules of professional conduct apply, notwithstanding the non-legal nature of the business.⁵⁷ The Committee also decided that while receiving a commission for referring clients to an investment manager was not an impermissible fee sharing, it did create a financial interest to constitute a business transaction with a client.⁵⁸

1. *Facts*

Attorney A wished to create a business that offered investment advisory services.⁵⁹ As part of her business A would identify the investment needs and objectives of her clients, refer clients to a portfolio manager and in some cases directly manage the portfolio herself.⁶⁰ If A referred a client's portfolio to an investment manager, she would receive a fee from the manager based on a percentage of the value of the portfolio.⁶¹

A anticipated that she might give "incidental legal advice" to her clients relating to the investment process, but would not charge an additional fee for this advice.⁶² When clients needed help preparing legal documents A would refer them to another attorney. However, A would review the documents and advise the clients about them.⁶³

A would market herself solely as an investment advisor, but she intended to emphasize her legal experience by listing "Esq." and her L.L.M in taxation on her business cards.⁶⁴ In addition, she planned to describe her former tax practice in various solicitations.⁶⁵

56. A dual practitioner is a lawyer who delivers both legal and non-legal services to clients. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999).

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

61. See *id.*

62. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999).

63. See *id.*

64. See *id.*

65. See *id.*

2. Discussion

The first issue is whether or not the rules of professional conduct apply to attorney A's investment services practice. The general rule is, "when a lawyer is providing both legal and non-legal services to a client, all of the services are considered to be legal services for the purposes of determining whether a lawyer must comply with the rules."⁶⁶ To determine whether A is providing legal services, the Committee considered whether her services "would constitute the practice of law if performed by a non-lawyer."⁶⁷

Under the fact presented, A would be performing traditional legal services such as reviewing legal documents and offering legal advice.⁶⁸ It does not matter that the primary focus of her business would be non-legal investment advice, she would still be bound by the rules of professional conduct.⁶⁹

Concluding that the rules of professional conduct apply to A's practice, the Committee next considered whether "A's communication of her professional designation as a lawyer and her legal credentials" constitute communication regarding legal services subject to Rule 1-400.⁷⁰ Reasoning that the

66. *Id.* See *Kelly v. State Bar*, 789 P.2d 1026 (Cal. 1991); *Layton v. State Bar*, 808 P.2d 808 (Cal. 1990).

67. State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999); see also State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1995-141 (1995).

68. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999).

69. See *id.* This fact raises serious implications for A's non-legal practice. For example, the Committee points out that A has a duty of confidentiality with respect to *all* of the client's information. See *id.* "A cannot reasonably segregate the information she acquires in the provisions of legal services and that which she acquires in the provision of non-legal services; all information concerning the client should be regarded as within the scope of Business and Professions Code section 6068(e)." *Id.* A also owes her clients a duty of loyalty that will require her to refrain from representing adverse interests. See *id.*

70. *Id.* Rule 1-400 defines a communication as "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client." CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(A) (1999). The rule prohibits communications that:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

definition of a communication is broad, including the use of any "firm name, trade name, fictitious name, or other *professional designation of such member* or law firm,"⁷¹ the Committee decided that:

[W]here A lists her qualifications or experience as a lawyer in a communication for law-related professional services such as investment advice, such use of legal credentials is a "communication" within the meaning of rule 1-400 if a recipient of such materials could reasonably believe that A is offering legal services or investment advice that involves legal judgment or considerations.⁷²

The Committee did not decide whether the use of legal credentials is actually a communication, because such a decision would be highly fact specific. However, the potential that the use of credentials will constitute a communication does exist:

[A] is a dual practitioner whose non-legal profession is nevertheless law-related. When she seeks to attract clients by reference to her legal training and expertise, prospective clients could reasonably be led to believe that they will receive legal as well as non-legal services, or at a minimum, advice based upon legal considerations.⁷³

Because A's use of her legal credentials may constitute a communication, A's promotional activities may also constitute solicitations subject to Rule 1-400 and increased regulation.⁷⁴

The Committee last considered whether the fee paid to A by a portfolio manager would be an impermissible division of fees with a non-lawyer under Rule 1-320.⁷⁵ The Committee

(4) Fail to indicate clearly, expressly, or by context, that is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(6) State that member is a "certified specialist" unless the member hold a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and state the complete name of the entity which granted certification.

CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(D) (1999).

71. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(A) (1999) (emphasis added).

72. State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999).

73. *Id.*

74. *See id.*

75. *See id.* Rule 1-320 provides that "neither a member or a law firm shall

characterized the percentage fee paid to A as "a commission-like fee for introducing her clients to the primary investment manager,"⁷⁶ yet this was not "sharing a legal fee."⁷⁷ The fee paid to A was not in compensation for legal services or advice and therefore, not prohibited.⁷⁸ The fee arrangement did "create in the lawyer a financial interest in the subject matter of the representation"⁷⁹ constituting a business transaction with a client.⁸⁰ Therefore, A must:

(1) make full disclosure in writing of all relevant circumstances surrounding the insurance referral arrangement and all actual and reasonably foreseeable consequences to the client from that arrangement . . . (2) comply with all requirements of rule 3-300, including obtaining the client's written consent to the arrangement; and (3) ensure that the attorney is able to completely advise the client under the circumstances.⁸¹

3. Conclusion

The bottom line is that it is very difficult for lawyers to work as "dual practitioners." To the extent attorneys offer legal advice they are bound by the rules of professional conduct, including the duties of loyalty and confidentiality. To the extent they advertise by highlighting their legal credentials, Rule 1-400 may apply. Finally, the rules against fee division make it nearly impossible to form partnerships with non-

directly or indirectly share legal fees with a person who is not a lawyer." CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-320(A). The rule also gives a list of exceptions that the Committee does not find relevant. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999).

76. State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999).

77. *Id.*

78. See *id.* Two situations that would constitute an impermissible division of fees are: (1) where A is paid a fee by a client for professional services including legal advice and then shares that fee with a non-lawyer investment manager; and (2) if A and the investment manager are partners in a single practice that offers both legal and non-legal services. See *id.*

79. *Id.* See CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310(B)(4) (1999).

80. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999); see also CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-300 (1999).

81. State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1999-154 (1999) (citing State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1995-140 (1995)).

lawyers.

C. *Regulation of Attorney Web Sites: Interim Opinion 96-0014*⁸²

The discussion of attorney advertising in Formal Opinion 1999-154 is related to another prominent issue: the use of attorney web sites. The emerging technology of the Internet provides a new medium of communication and new possibilities for lawyers to reach out to potential clients.⁸³ Both the ABA and state ethics committees have struggled to figure out just what an attorney's web site is, how to classify it, and how to regulate it if at all.⁸⁴

California has joined the states that have considered the issue and has taken the first step toward making a decision that the rules of professional conduct govern attorney web sites.⁸⁵ In Interim Opinion 96-0014, the Committee suggests that a web site providing information to the public about the attorney's availability for professional employment is a communication governed by the rules of professional conduct, but is not a solicitation.⁸⁶

1. *Facts*

Attorney A was a part of a law firm in private practice

82. State Bar of California Standing Comm. on Professional Responsibility and Conduct, *Interim Opinion 96-0014* (1999) (visited Jan. 31, 2000) <<http://www.calbar.org/2bar/3com/3cp9903a.htm>>.

83. See *id.*

84. See ABA Comm'n on Advertising, *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies: A White Paper Presented for the Purposes of Discussion* (visited Jan. 31, 2000) <<http://www.abanet.org/legalserv/advertising.html>>. The range of questions at issue with attorney web sites is mind-boggling. As the ABA's *White Paper* discusses, decision makers must consider constitutional restrictions on regulation of commercial speech (which means that a regulating body must first decide whether a web site is commercial speech); the construction of the Internet (domain names, "meta tags," HTML language, etc.); false and misleading information; direct communication with clients; and a myriad other issues. See *id.*

85. See *id.* According to the ABA's *White Paper*, as of 1998 20 states had considered the scope of applicability of ethics rules to the Internet. See *id.* In fact, "there have been no opinions indicating the rules are inapplicable, so it may be assumed that a lawyer's use of the Internet invokes a requirement to comply with all ethics rules governing advertising and solicitation." *Id.*

86. See State Bar of California Comm. on Professional Responsibility and Conduct, *Interim Op. 96-0014* (1999).

that maintained a web site.⁸⁷ The site described of the firm, the education and professional background of the attorneys in the firm, contained law related images, and allowed e-mail access to any lawyer in the firm.⁸⁸ The web site did not include any live video, bulletin boards, links to law-related sites, or newsgroup functions.⁸⁹

2. Discussion

The Committee first resolved that A's Internet web site is a communication within the definition of Rule 1-400.⁹⁰ According to the Committee, "The web site fits within the scope of Rule 1-400(A) because it concerns the firm's availability for professional employment; the web site is directed to the general public."⁹¹ Because the web site fits into the definition of a communication it must comply with the rules governing attorney communications.⁹²

According to 1-400(D), a communication may not contain any false or misleading information.⁹³ The Committee did not elaborate on what would constitute false or misleading information but the ABA's white paper⁹⁴ extensively considered

87. *See id.*

88. *See id.*

89. *See id.*

90. *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 stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or 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 unsolicited correspondence from a member of law firm directed to any person or entity.

CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(A) (1999).

91. State Bar of California Comm. on Professional Responsibility and Conduct, Interim Op. 96-0014 (1999).

92. *See* CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(D)-(F) (1999).

93. *See* CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(D) (1999).

94. The ABA's Commission on Advertising prepared the *White Paper* for the purpose of discussing the effect emerging technologies have on the Model Rules of Professional Conduct. *See* ABA Comm'n on Advertising, *supra* note 84. Although it does express ABA policy, it also highlights areas that need further

several aspects of web sites that may cause problems. Under the ABA's Model Rules of Professional Conduct a lawyer may not use terms that "create an unjustified expectation about results the lawyer can achieve."⁹⁵ Thus, attorneys are precluded from using words such as "full service" or "complete legal services."⁹⁶ Further, attorneys are not allowed to make comparisons to other attorneys' services unless the comparison can be factually substantiated.⁹⁷ Thus, web sites could not contain the words "best lawyers," "highly qualified," or "expert."⁹⁸

The concerns about attorney web sites extend beyond the text on that site. For example, pictures may be considered to be false and misleading.⁹⁹ Domain names, URLs and e-mail addresses may also cause problems.¹⁰⁰ For example, an e-mail address such as "never_lost_a_case@abc.com" or "big_money_4_U@xyz.com" could violate rules of professional conduct.¹⁰¹ Further, the way a web site is constructed may cause problems.¹⁰² A web site is generally registered with a search engine, and site creators have methods that can ensure priority placement with those search engines ("and as with yellow pages, a lawyer with a home page that appears at the beginning of the list from a search engine's search has a competitive advantage.")¹⁰³ Search engines work by identifying the words "that appear in the html language used to code the contents of the site."¹⁰⁴ If a web site repeatedly uses certain words and phrases it is more likely that site will be listed

consideration. *See id.*

95. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1(b) (1983).

96. *See* ABA Comm'n on Advertising, *supra* note 84.

97. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1(d) (1983).

98. *See* ABA Comm'n on Advertising, *supra* note 84.

99. For example, an illustration may display a map or a globe that would be appropriate for a firm practicing international law but not for other practice areas, or a web site may have a picture with an attorney in a courtroom, which might not be appropriate for an attorney without courtroom experience. *See id.*; *see also* CAL. BUS. & PROF. CODE § 6158 (West 1998) (noting that the message of electronic media "means the effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message").

100. *See* ABA Comm'n on Advertising, *supra* note 84; Arthur Garwin, *Commentary on Domain Names*, A.B.A. J., Feb. 2000, at 64.

101. *See* ABA Comm'n on Advertising, *supra* note 84.

102. *See id.*

103. *Id.*

104. *Id.*

near the top of any resulting search.¹⁰⁵

Beyond being concerned about the content of their own web sites, attorneys must also be careful of the links they provide to other web sites.¹⁰⁶ Links allow an attorney to direct a client to other web sites of interest. The question remains open as to whether the attorney is responsible for the content of those linked sites. On the one hand, "[i]f a lawyer is responsible for the content of the links, the burden of review becomes enormous, which in turn limits the lawyer's ability to link to other sites."¹⁰⁷ On the other hand, "[i]f a lawyer is not responsible for the content of links, lawyers would be able to provide their potential clients with information, through the links, that would be impermissible for them to do directly."¹⁰⁸

Although the Committee found that attorney web sites are communications, calling into question the above scenarios, it was not convinced that web sites are solicitations under Rule 1-400.¹⁰⁹ A solicitation can either be (1) delivered in person or by telephone, or (2) "directed by any means to a person

105. *See id.* These words and phrases can appear in the HTML language in several ways. First, the text of the site may itself contain words and phrases. *See id.* Second, the words and phrases can be embedded into "meta tags," which are inserted to the coded HTML language and are not visible on the web page. *See id.* Third, words and phrases can be placed on a site in the same color as the background making them invisible. *See id.* No matter where these words and phrases are placed, if they are out of context with the lawyer's practice but instead designed to ensure priority placement with a search engine, the web site may be considered false and misleading. *See id.*

106. The Committee did not reach this question in its proposed opinion. *See* State Bar of California Comm. on Professional Responsibility and Conduct, Interim Op. 96-0014 (1999).

107. ABA Comm'n on Advertising, *supra* note 84.

108. *Id.* For example, an attorney may provide a link to a client's web page where the client wrote "we've worked with lots of law firms, but none have demonstrated the quality of Smith & Doe." *Id.* Had the attorney provided this statement on its own web site, it would violate Model Rule 7.1. *See id.*

109. *See* State Bar of California Comm. on Professional Responsibility and Conduct, Interim Op. 96-0014 (1999). Rule 1-400(B) defines a solicitation as follows:

For purposes of this rule, a "solicitation" means 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.

CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(B) (1999).

known to the sender to be represented by counsel in a matter that is a subject of the communication.”¹¹⁰ Web sites do not meet either of these requirements.¹¹¹ Although e-mail is transmitted through telephone wires, the Committee “do[es] not believe that e-mail creates the risk of undue influence against which [Rule 1-400(B)(2)(a)] is designed to guard.”¹¹² Further, web sites are not directed to any one in particular and the attorney does not initiate the communication.¹¹³

The last issue the Committee addressed was interstate communication. The rules of professional conduct and the above concerns apply equally to foreign attorneys in their communications made in California concerning their availability to perform legal services in California.¹¹⁴ The Committee also warned that California attorneys advertising in other jurisdictions must comply with the rules of those jurisdictions.¹¹⁵ In fact, an attorney “must recognize the possibility that the advertising rules of other jurisdictions may apply to her Internet web site even if she is licensed only by California and intends to practice only in California.”¹¹⁶ Although attorneys may attempt to avoid regulation in other states,¹¹⁷ such

110. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(B)(2) (1999).

111. See State Bar of California Comm. on Professional Responsibility and Conduct, Interim Op. 96-0014 (1999).

112. *Id.* E-mail allows a potential for the recipient to read and reflect on the message. See *id.*

113. See *id.* In order to be considered a solicitation, the attorney must initiate the communication. See *id.*

114. See *id.* Rule 1-100(D)(2) states:

As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-100(D)(2) (1999).

115. See State Bar of California Comm. on Professional Responsibility and Conduct, Interim Op. 96-0014 (1999). For example, in Pennsylvania an ethics opinion was issued that “a lawyer may not advertise that he or she is ‘competent,’ ‘sympathetic,’ or ‘caring.’” ABA Comm’n on Advertising, *supra* note 84.

116. State Bar of California Comm. on Professional Responsibility and Conduct, Interim Op. 96-0014 (1999).

117. See *id.* The Committee recommends that attorneys add to their web site,

an explanation of where the attorney is licensed to practice law; a description of where the attorney maintains law offices and actually practices law; an explanation of any limitation on the courts in which the attorney is willing to appear; a statement that the attorney does

efforts may not always be enough.¹¹⁸

3. Conclusion

The full extent to which various aspects of attorney web sites implicate the rules of professional conduct remains undecided. However, it is clear that the Committee has extended the rules to encompass attorney web sites and new technologies. Further, attorneys with web sites must not only ensure compliance with California rules but also with the rules of any other jurisdictions that may apply to that web site.

IV. CALIFORNIA STATE COURT DECISIONS

In addition to the Committee's ethics decisions, state courts sometimes issue decisions that govern attorney conduct. This year the California courts have vindicated several aspects of the State Bar's regulation of attorneys and have extended the disqualification rules.

A. *The Conflict of Interest of an "Of Counsel"*

The rule in California is clear that "when a conflict of interest requires an attorney's disqualification from a matter, the disqualification extends vicariously to the attorney's entire law firm."¹¹⁹ In *People v. Speedee Oil Change Systems, Inc.*¹²⁰ the California Supreme Court had occasion to consider whether the same rule applies to an attorney who is "of counsel" to the law firm. The court concluded that the per se rule of disqualification of an entire law firm when one attorney has a conflict of interest applies with equal force when that attorney is "of counsel."¹²¹

1. Facts

The California Attorney General sued Speedee Oil on behalf of the Department of Corporations alleging violations of

not seek to represent anyone based solely on a visit to the attorney's web site.

Id.

118. *See id.*

119. *People v. Speedee Oil Change Sys., Inc.*, 980 P.2d 371, 374 (Cal. 1999).

120. *Id.*

121. *See id.*

the California Franchise Investment Act.¹²² Speedee franchisees, including the respondent, intervened in the action and brought in Mobil Oil Corporation as a defendant in intervention.¹²³ Attorney Geordan Goebel had represented the respondent franchise many times but because of the complex nature of the action he associated the law firm of Shapiro, Rosenfeld & Close as attorneys of record.¹²⁴ Attorney Eliot Disner was "of counsel" to the Shapiro firm and was listed on its letterhead.¹²⁵

The law firm of Cohon and Gardner represented Mobil in the action.¹²⁶ After conducting an initial check for conflicts and verifying that Disner knew nothing about the case, attorney Jeffrey Cohon called Disner and, "in a conversation Cohon believed was confidential, he and Disner discussed the case's substantive allegations, its procedural status and Mobil's theories."¹²⁷ The two attorneys then met and further discussed the case.¹²⁸ At this meeting Disner gave Cohon a copy of his resume and business card that both "prominently featured the Shapiro firm's name and address."¹²⁹ At the end of this meeting, Disner agreed to do some legal research and then conveyed the results to Cohon.¹³⁰

When Gardner received notice of the Shapiro firm's association, he notified Disner his services were not needed and then notified Shapiro that he objected to its participation in the case on behalf of the franchise.¹³¹ Mobil filed a motion to disqualify the Shapiro firm arguing that Disner, and thus the Shapiro firm, had acquired confidential information concerning the case. In opposition, both Disner and Shapiro filed declarations swearing they had not discussed the case with each other, nor did either know of the other's participation in the case.¹³² The trial court denied the motion and the court of

122. *See id.*

123. *See id.*

124. *See id.*

125. *See Speedee Oil Change Sys.*, 980 P.2d at 374.

126. *See id.* at 375.

127. *Id.* When Cohon called Disner, "the receptionist answered the telephone, 'Shapiro, Rosenfeld and Close.'" *Id.*

128. *See id.* At the meeting, they discussed the background of the case, Mobil's theories and discovery strategy, as well as specific factual issues. *See id.*

129. *Id.* at 375.

130. *See id.*

131. *See Speedee Oil Change Sys.*, 980 P.2d at 375.

132. *See id.* at 376.

appeal affirmed.¹³³

2. Discussion

The heart of the California Supreme Court's decision lay in its characterization of the relationship between Disner, an attorney "of counsel," and the Shapiro law firm. The right of a court to disqualify an attorney is based on "the paramount concern . . . to preserve the public trust in the scrupulous administration of justice and integrity of the bar."¹³⁴ The court easily concluded that for the purposes of conflict of interest, Disner represented Mobil.¹³⁵ The true question is whether the relationship between a law firm and its "of counsel" attorney is close enough to require the entire firm's disqualification.

In order to be considered "of counsel," the firm must have a relationship with an attorney that is "close, personal, continuous, and regular."¹³⁶ In fact, "the essence of the relationship between a firm and an attorney of counsel to the firm 'is the closeness of the 'counsel' they share on client matters.'"¹³⁷ As long as the relationship between Disner and the Shapiro firm was close enough for Disner to be held out as "of counsel," then "the principal and 'of counsel' relationship must be considered a single, de facto firm for the purposes of Rule 3-310."¹³⁸

133. See *id.* The appellate court based its decision on the fact that "the trial court implicitly concluded Mr. Disner practiced law separate and apart from [the Shapiro firm] except on those few annual occasions when Mr. Disner or [the Shapiro firm] associated the other on a particular case." *Id.*

134. *Id.* at 378. The court added, "Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." *Id.*

135. See *id.* at 383. The court found that Disner represented Mobil for conflict purposes because he knowingly obtained confidential information and acted on that information to provide Cohon with legal research. See *id.* at 382.

136. *Id.* at 383 n.6; CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400(E) (1999).

137. *Speedee Oil Change Sys.*, 980 P.2d at 383 (citing State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1993-129 (1993)).

138. *Id.* at 384 (citing State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1993-129 (1993)). The ABA takes the same position. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-357(1997).

3. Conclusion

In determining that the disqualification of an attorney "of counsel" extends to the attorney's firm, the court left open the question of whether effective screening procedures can avoid disqualification.¹³⁹ Justice Mosk addressed this issue in his concurrence and concluded that since the disqualification is automatic, "ethical screens" should make no difference.¹⁴⁰ This case confirms the trend towards increased scrutiny of attorneys' actions demonstrates California courts' commitment to high ethical standards.

B. *The Constitutionality of Continuing Education Requirements*

While in *Speedee Oil* the California Supreme Court discussed how the rules of professional conduct protect the interests of justice, in *Warden v. State Bar of California*¹⁴¹ it emphasized the rules' function as a consumer protection measure. In this case the court rejected a constitutional challenge to the mandatory continuing legal education ("MCLE") program and found that it did not violate equal protection principles.¹⁴²

1. Facts

Attorney Lew Warden is member of the State Bar of California.¹⁴³ Warden did not comply with the MCLE requirements so the State Bar sent him a letter warning that he had sixty days to comply or it would enroll him as an inactive member of the Bar.¹⁴⁴ When Warden took no action, the State Bar advised him that it would submit his name to the Board of Governors with a recommendation that he be enrolled as an inactive member.¹⁴⁵ Warden sent a letter to the State Bar asserting that the MCLE program is unconstitutional and that he could not be prohibited from practicing law for refusing to comply with its requirements.¹⁴⁶ Warden was enrolled

139. See *Speedee Oil Change Sys.*, 980 P.2d at 382.

140. See *id.* at 386.

141. *Warden v. State Bar*, 982 P.2d 154 (Cal. 1999).

142. See *id.* at 156.

143. See *id.* at 159.

144. See *id.*

145. See *id.*

146. See *id.*

as an inactive member and brought suit alleging that by exempting certain categories of attorneys from the MCLE requirements the program violated his constitutional rights.¹⁴⁷ The trial court granted a summary adjudication in favor of the Bar on all issues.¹⁴⁸ The appellate court reversed, concluding that three of the exemptions could not be sustained under the rational relationship equal protection standard, but it could not agree on a remedy.¹⁴⁹

2. Discussion

The MCLE program required attorneys to complete thirty-six hours of legal education within a thirty-six month period.¹⁵⁰ Certain categories of attorneys are exempted from this requirement, including retired judges, officers and elected officials of the State of California, and full-time professors at accredited law schools.¹⁵¹

Using a rational relationship standard,¹⁵² the court held that, "although it may be that the wisdom of some or all of

147. See *Warden*, 982 P.2d at 160.

148. See *id.* at 160–61.

149. See *id.* Two justices argued that the appropriate remedy is to invalidate the whole program, while the one remaining justice argued that only the unconstitutional exemptions need be invalidated. See *id.*

150. See *id.*; see also CAL. BUS. & PROF. CODE § 6070 (West 1998). Four of those MCLE hours must be in legal ethics. See *id.*

151. See *Warden*, 982 P.2d at 156. The State Bar is currently considering an amendment to this rule to reduce the number of hours required and eliminate the categorical exemption for retired judges. See State Bar of California, *Home Page* (visited Mar. 10, 2000) <<http://www.calbar.org/2cer/mclerev.htm>>.

152. Warden argued that the right to "engage in any of the common occupations of life" is a fundamental right. *Warden*, 982 P.2d at 162; see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Conway v. State Bar*, 767 P.2d 657 (Cal. 1989); *Yakov v. Board of Med. Examiners*, 435 P.2d 553 (Cal. 1968). However, the court rejected this argument relying on *Bible v. Committee of Bar Examiners*, which held that the rational relationship is applied in cases involving occupational licensing. See *Warden*, 982 P.2d at 163.

Justice Kennard dissented, arguing that the rational basis standard of review is not properly applied when the equal protection challenge is to a court rule. See *id.* at 170 (Kennard, J., dissenting). The rational relationship standard is used to allow deference to a co-equal branch of government, but in this case the MCLE program was established pursuant to a court rule and the court owes itself "no particular deference." *Id.*

Justice Brown also dissented, noting that California follows a different set of standards than the federal government. See *id.* at 175 (Brown, J., dissenting). Justice Brown felt the court should undertake a "genuine judicial inquiry into the correspondence between the classification and the legislative goals," by "asking whether the legislative classifications substantially advance the legislative purposes without being 'grossly overinclusive' or 'underinclusive.'" *Id.*

these exemptions is debatable as a matter of policy," there are plausible reasons that rationally support the exemptions.¹⁵³ The rationale for these exemptions could be that the above categories of attorneys are less likely to represent clients on a full-time basis and that by virtue of their jobs they are more likely to be familiar with recent legal developments.¹⁵⁴

It is of little surprise that the court upheld the MCLE requirement, given the court's emphasis on the program's consumer protection purpose:

The aim of continuing legal education is to provide continuing assurance to the public that all California attorneys, no matter how many years may have passed since their law school graduation and State Bar admission, have the knowledge and the skills to provide their clients with high quality legal services.¹⁵⁵

Under the court's rationale, just because the program is imperfect is no reason to invalidate a "consumer protection measure 'intended to enhance the competency of attorneys practicing law in this state.'"¹⁵⁶

3. Conclusion

Currently forty states, including California, have adopted MCLE requirements.¹⁵⁷ Although the ABA recommends against any exemptions,¹⁵⁸ the California Legislature, State Bar and Supreme Court have seen fit to excuse certain classes of attorneys from the MCLE program. This case reaffirms the steps California's governing bodies have taken to ensure ethical and competent representation by attorneys.

153. *Warden*, 982 P.2d at 165.

154. *See id.* Justice Kennard rejected these contentions in his dissent. He noted that those who represent clients on a part-time basis are *more* likely to need continuing education and *less* likely to be abreast of legal developments. *See id.* at 172. At the same time, clients of part-time practitioners are just as vulnerable to the damage caused by malpractice as those represented by full-time attorneys. *See id.* Justice Kennard also rejected the majority's second rationale. *See id.* at 173.

155. *Id.* at 171.

156. *Id.* at 157.

157. *See id.* at 157 n.1.

158. *See id.* at 165 n.10.

C. *The First Amendment and the State Bar's Political Activities*

In the short opinion of *Morrow v. State Bar of California*,¹⁵⁹ the Ninth Circuit Court of Appeals held that compulsory membership in the State Bar does not violate attorneys' First Amendment rights.

1. *Facts*

Bill Morrow, representative of California's 73rd assembly district; Barry Keene, former state senator; and J. Bruce Henderson, former member of the San Diego County Council, sued to enjoin the State Bar from engaging in political activities that are not germane to its regulatory functions.¹⁶⁰ Because the plaintiffs were not complaining of the way the State Bar spends their mandatory dues, the District Court dismissed the complaint for failure to state a claim.¹⁶¹

2. *Discussion*

The heart of the plaintiffs' claim was that "by virtue of their mandatory State Bar membership, [the plaintiffs] are associated in the public eye with viewpoints they do not in fact hold," which violates their First Amendment rights of free association.¹⁶² The California Supreme Court had previously held that the State Bar could not spend an attorney's mandatory dues on activities that were ideological in nature and not related to regulating the legal profession.¹⁶³ However, the court held that membership alone does not violate the plaintiffs' rights since they are not forced to espouse any particular view nor are they prohibited from expressing their own views.¹⁶⁴

3. *Conclusion*

The State may compel lawyers to join the State Bar and pay dues as long as members can receive refunds of the portion of their dues spent on political activities unrelated to the

159. *Morrow v. State Bar*, 188 F.3d 1174 (9th Cir. 1999).

160. *See id.* at 1175.

161. *See id.*

162. *Id.*

163. *See Keller v. State Bar*, 496 U.S. 1 (1990); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

164. *See Morrow*, 188 F.3d at 1177.

Bar's regulatory function.

V. THE ACTIVITY OF THE AMERICAN BAR ASSOCIATION

While California regulators have been expanding the reach of the rules of professional conduct, this year has been a year of change for the ABA. In 1999 the ABA addressed new technologies,¹⁶⁵ confronted new ways to deliver legal services¹⁶⁶ and considered a revision of the Model Rules of Professional Conduct.¹⁶⁷

A. *Ethics 2000*

"Ethics 2000" is the thirteen-member Commission on the Evaluation of Rules of Professional Conduct ("Commission").¹⁶⁸ The Model Rules have not been revised since 1983 and despite the fact that they "have proven to reflect, in the main, an effective approach to the resolution of many ethical issues that could serve the profession well into the next century," they would "benefit . . . from a comprehensive study and review at this time."¹⁶⁹ The Commission is considering a wide variety of issues including:

variations in the Rules as they have been adopted by the states; areas of inconsistency or dissonance from Rule to Rule or Rule to Comment; the American Law Institute's *Restatement of the Law Governing Lawyers*; new forms of technology; public perceptions; multi-city law firms; and the growth of specialized practice areas.¹⁷⁰

In many ways, Ethics 2000 is easing restrictions on lawyers. Several small examples illustrate the point. Ethics

165. See *infra* Part V.B.1.

166. See *supra* Part III.B.

167. See *infra* Part V.A.

168. See ABA Comm'n on the Evaluation of the Rules of Professional Conduct, *Ethics 2000 Home Page* (visited Apr. 11, 1999) <<http://www.abanet.org/cpr/ethics2k.html>>. The Commission is charged with:

(1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; (2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions; (3) conducting original research, surveys and hearings; and (4) formulating recommendations for action.

Id.

169. *Id.*

170. Ethics 2000 Advisory Council, *Ethics 2000 Advisory Council Information* (visited Jan. 27, 2000) <<http://www.abanet.org/cpr/advisory.html>>.

2000 is considering allowing attorneys to use the phrases "best practice" or "excellence in practice" as aspirational statements in advertising.¹⁷¹ It is also considering revising the Rules to allow lawyers to accept reasonable directions from third-party payers, i.e., those who pay for another's representation.¹⁷² It is considering eliminating automatic imputation of personal interest conflicts.¹⁷³ Although many of the proposed changes to some extent relax the regulation of attorneys, lawyers should be aware that there are many proposals that would strengthen those regulations.¹⁷⁴ The Committees full report is expected this year, but an overview of which rules it might change is available at <http://www.abanet.org/cpr/wkpliss.html>.¹⁷⁵

B. *Decisions of the ABA's Standing Committee on Ethics and Professional Responsibility*

The ABA's Standing Committee on Ethics and Professional Responsibility issued three formal opinions in 1999. The Committee interprets the ABA's Model Rules of Professional Conduct, which govern attorneys. Although these opinions are not binding, they indicate how the rules may affect attorneys and their activities.

1. *Protecting the Confidentiality of Unencrypted E-Mail: Formal Opinion 99-413*¹⁷⁶

Transmitting information relating to the representation of a client by unencrypted e-mail over the Internet does not violate Model Rule 1.6.¹⁷⁷ Internet e-mail "affords a reasonable expectation of privacy from a technological and legal

171. See *id.* Such statements would normally be seen as false and misleading. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

172. See Ethics 2000, *Proposed Work Plan* (visited Jan. 27, 2000) <<http://www.abanet.org/cpr/wkpliss.html>>; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1983).

173. See Ethics 2000, *Proposed Work Plan* (visited Jan. 27, 2000) <<http://www.abanet.org/cpr/wkpliss.html>>; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(i) (1983).

174. See Ethics 2000, *Proposed Work Plan* (visited Jan. 27, 2000) <<http://www.abanet.org/cpr/wkpliss.html>>.

175. See *id.*

176. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-413 (1999).

177. See *id.* The full text of this opinion is available at <<http://www.abanet.org/cpr/fo99-413.html>>.

standpoint.”¹⁷⁸ However, an attorney should discuss the issue with her clients and follow the client’s instructions on how to transmit sensitive information.¹⁷⁹

2. *Ethical Obligations When a Lawyer Changes Firms: Formal Opinion 99-414*¹⁸⁰

When a lawyer leaves one firm to join another, both she and the “responsible members of the firm who remain” must take reasonable measures to assure that the withdrawal does not cause any material adverse effects to the interests of clients with whom the lawyer is currently working.¹⁸¹ Further, those attorneys have an ethical obligation to notify the clients and protect the clients’ files, information and property.¹⁸² Finally, the departing lawyer is ethically prohibited from making in-person contact with any client with whom she has no family or attorney-client relationship prior to her departure.¹⁸³ Once the attorney leaves the firm, she may contact any client in writing.¹⁸⁴

3. *Representation Adverse to an Organization by a Former In-House Counsel: Formal Opinion 99-415*¹⁸⁵

Neither a former in-house lawyer nor his new firm may represent an interest adverse to the lawyer’s former employer in the same or a substantially related matter without the former employer’s consent when the lawyer has personally represented his former employer.¹⁸⁶ Further, if the former in-house lawyer gained protected information concerning the matter he will be disqualified and the disqualification will be imputed to the whole firm.¹⁸⁷

178. *Id.*

179. *See id.*

180. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-414 (1999).

181. *Id.*

182. *See id.*

183. *See id.*

184. *See id.*

185. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-415 (1999).

186. *See id.*

187. *See id.*

C. *New Ethics Rule on Political Contributions*

Just in time for the 2000 election the ABA has voted to adopt a new model rule by a vote of 266 to 157.¹⁸⁸ The new rule reads: "A lawyer or law firm shall not accept a government legal engagement or appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment."¹⁸⁹

This rule, which was rejected last August, was endorsed by the Securities and Exchange Commission Chairman Arthur Levitt who urged House of Delegates members, "Lend the integrity of your profession and the power of your prestige to end pay for play."¹⁹⁰ State legislators will now consider whether to adopt this new rule.¹⁹¹

VI. CONCLUSION

The opinions and decisions issued this year by the California State Bar, California State courts and the ABA Standing Committee on Ethics and Professional Responsibility are not radical. However, the opinions highlight the problems that state and national regulators deal with when confronting new technologies and new ideas on how to practice law. Society is substantially different today from when the above rules were drafted, and the different bar associations and courts are trying to meet society's emerging needs with the same old rules. While the ABA is analyzing and revising its Model Rules, the opinions of the California State Bar and state courts seem to indicate that the trend in California is to stretch the current ethical theories to cover more and different aspects of an attorney's practice. While the above sources are not exhaustive of the regulations affecting lawyers in California, they nonetheless highlight the importance of paying attention to new developments in the area of professional responsibility.

188. See *ABA Adopts Ethics Rule on Political Contributions*, WALL ST. J., Feb. 15, 2000, at B15.

189. *Id.*

190. *Id.*

191. See *id.*