Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif.'s New Rules For Lawyers Move Closer To ABA Model

By **Mark Loeterman** (September 17, 2018, 2:27 PM EDT)

Mark Loeterman

The first comprehensive overhaul of California's Rules of Professional Conduct in nearly 30 years becomes operational on Nov. 1, 2018. Until now, California has been the only state that does not base its rules on the American Bar Association's Model Rules of Professional Conduct.

That changes in November, when 69 rules approved by the California Supreme Court will replace the 46 rules that currently govern attorney conduct. Some of the new rules mirror the language used by the ABA, but many continue to reflect California's unique approach to certain ethical questions.

The State Bar of California's commission responsible for drafting the rule revisions has adopted the same numbering scheme applicable to the ABA rules, which will make it easier to compare California's rules to those of other jurisdictions. To assist readers, the number for the current versions of the rules discussed below appear in parentheses.

Safekeeping Client Funds — Rule 1.15 (4-100)

Generally, the new rule states that all funds received or held by an attorney for the benefit of a client must be deposited in a trust account. Rule 1.15(a) specifically requires that fees paid in advance be held in trust similar to the current rule's requirement on advances for costs and expenses.

When a draft of the rule was circulated for public comment, the Los Angeles County Bar Association took exception to the addition of the word "fees," which is not part of the current Rule 4-100, fearing "this simple change could potentially have a dramatic impact on the day-to-day practices of many attorneys throughout the state." The commission did not agree.

By using the phrase "funds received or held," the rule applies retroactively to funds collected before the Nov. 1 effective date, which may necessitate moving some funds presently in a general account to a trust account. LACBA urged delaying the implementation of this rule so that attorneys were "given fair and adequate advance warning," but the commission rejected this suggestion as well.

There are limited exceptions: A true retainer, meaning funds paid to ensure an attorney's availability during a specified period or on a specified matter (as distinct from compensation for legal services), may be deposited in a general account, because it is deemed earned upon inception of the engagement.

Similarly, in Rule 1.15(b), a flat fee paid in advance may be deposited in a general account, provided the lawyer discloses in writing (i) that the client has a right to require the fee be placed in a trust account until earned, and (ii) that the client is entitled to a refund of any unearned amounts if the representation is terminated or the services are not completed. Here, the commission wanted to assure that unearned fees would be available for refund to the client, while respecting the freedom of a lawyer and client to set the terms of the fee arrangement.

Conflicts of Interest: Current Clients — Rule 1.7 (3-310)

In recommending the adoption of Rule 1.7, the commission opted for the ABA Model Rules framework of clearly-stated general conflict principles, while providing specific examples in the comments section. This approach increases client protection, because application of the rule is no longer limited by the discrete "checklist" of situations contained in the current version 3-310(B).

Rule 1.7 describes two kinds of conflict situations relating to current clients: (1) those where the representation is directly adverse to another client in the same or a separate matter, and (2) those involving a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action will be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's personal interests.

In either circumstance, the rule preserves California's more client-protective requirement that an attorney obtain "informed written consent" to the representation, which includes a written disclosure of the adverse consequences of the conflicted representation. By contrast, the ABA Model Rules follow a less strict formulation of "informed consent, confirmed in writing." By that standard, according to the commission, a lawyer could confirm by email or even text message that the client has consented to a conflict.

Comment [4] to Rule 1.7 states, "The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of each client."

On the other hand, Comment [1] makes clear that simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing businesses in unrelated litigation, does not ordinarily constitute a conflict of interest.

Reporting Up the Corporate Ladder — Rule 1.13 (3-600)

Both Rule 1.13 and the current version make clear that in representing an organization, it is the organization itself that is the client, acting through its duly authorized officers, directors, employees or other "constituents."

The key change is that Rule 1.13 will require "reporting up the corporate ladder" in specified circumstances. The duty to report up is triggered when (1) the lawyer knows that a constituent is acting, has acted or intends to act in a way (2) that the lawyer knows or reasonably should know is (i) a violation of a legal duty to the organization or a violation of law, and (ii) likely to result in substantial injury to the organization. Currently, reporting up is voluntary rather than mandatory.

Two separate scienter standards are applicable: (1) a subjective standard that requires actual knowledge that a constituent is acting, has acted or plans to act and; (2) an objective standard that asks whether a reasonable lawyer would conclude that the constituent's course of action is a violation of law or a legal duty and likely to result in substantial injury to the organization. A lawyer's "reporting up" requirement is triggered only when both parts of the test have been satisfied.

A lawyer must notify the highest authority in the organization if the lawyer has been discharged or forced to withdraw because of his or her "reporting up" requirements. Finally, the rule has been clarified to apply to both in-house and outside lawyers.

Imputation of Conflicts of Interest — Rule 1.10 (No Existing California Rule Counterpart)

Rule 1.10 incorporates from California case law concepts relating to imputed conflicts of interest; i.e., the circumstances where an entire law firm is barred from representing a client because one or more of its lawyers is disqualified based on a conflict of interest. This issue typically comes into play when lawyers make a lateral move from one private firm to another, and can be especially acute in large firms that maintain offices in different cities and even different countries.

Paragraph (a) of Rule 1.10 states that any prohibition on legal representation under Rules 1.7 (current client conflicts) or 1.9 (former client conflicts) will be imputed to all lawyers in the firm. Unlike the ABA Model Rule, however, which broadly permits an ethical screen to be placed around a prohibited lawyer, the new California version permits screening only in limited situations.

Specifically, a prohibited lawyer's conflict will not be imputed to other lawyers in the firm so long as the prohibited lawyer did "not substantially participate" in the contested matter and is timely screened, and written notice is provided to any affected former client.

In permitting this narrow exception, the commission reasoned that it "will provide flexibility for lawyers to move laterally without creating a significant risk that a lawyer who has acquired sensitive confidential information about the former clients is now in the opposing party's law firm." The adoption of a limited screening provision is consistent with the holding of Kirk v. First American Title Ins. Co.

Sexual Relations With Clients — Rule 1.8.10 (3-120)

Rule 1.8.10 adopts the standard of Model Rule 1.8(g), which prohibits sexual relations between an attorney and a current client unless such relations existed when the attorney-client relationship commenced, or the client is the attorney's spouse or domestic partner. LACBA opposed the concept of an absolute prohibition, preferring California's current restriction on lawyer-client sexual relations that are based on coercion, undue influence or intimidation.

Prohibited Discrimination, Harassment and Retaliation — Rule 8.4.1 (2-400(C))

Currently, a civil court or administrative tribunal must first adjudicate a discrimination complaint and make a finding of unlawful conduct before an attorney disciplinary proceeding can be initiated. This means the finding of discrimination must be final, the appeals process exhausted or the time for appeal expired.

Rule 8.4.1 eliminates the precondition of a "prior adjudication" which has, in effect, rendered the current version of the rule virtually unenforceable, and denied the public access to the disciplinary

system. Interestingly, Rule 2-400 stands alone among the existing Rules of Professional Conduct in imposing such a requirement. When LACBA weighed in on the rule revision, it noted that handling discrimination claims is well within the competence and jurisdiction of the State Bar Court, and that there is no evidence the disciplinary system would be overwhelmed with meritless claims. Rule 8.4.1 should better protect the public from unlawful discrimination by lawyers.

The new Rules of Professional Conduct are likely to impact how lawyers approach many routine situations that arise in their practice. While this article describes some of the most important changes, attorneys should take a closer look at the full substance of these rules and related comments before the implementation date of Nov. 1, 2018.

Mark Loeterman is an attorney and mediator with Signature Resolution LLC.