

LEAGUE OF CALIFORNIA CITIES FALL 2018 CONFERENCE ETHICS UPDATE

Presented by:

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FLASHY



Rules of Professional Conduct:
Almost 70 New Ways to be
More Ethical!

CUTE



JADED



THEATRICAL



SINCERE



LOT OF STUFF TO REVIEW



PITHY, WITH A SIDE OF SNARKY

- ▶ WELCOME TO TRAFFIC SCHOOL



OVERVIEW

- ▶ BACKGROUND (AUTHORITY/PROCESS)
- ▶ NEW RULES (FOCUS ON GOVT AND NEW NEW)
- ▶ TIME PERMITTING—THE BALANCE
- ▶ FINISH WITH A BANG

STATUTORY AUTHORITY

- ▶ California State Bar Act (B&P 6000-6243)
- ▶ B&P 6076 and 6077
 - ▶ State Bar, with CASC approval, can adopt Rules of Professional Conduct and subject members to discipline for violation of same

HISTORY OF RULES

- ▶ Originally adopted 1928
- ▶ Updated 3 times in last 40 years
 - ▶ (1975, 1989, 1992)
- ▶ Latest revisions process began 17 years ago
 - ▶ Commission for the Revision of the Rules of Professional Conduct (“Rules Commission”)
- ▶ 17 rules submitted for approval in 2010

A NEW HOPE

- ▶ Rather than approve the Rules Commission's 17 rules...
 - ▶ CASC and State Bar work together to take a different approach
 - ▶ Second Commission for the Revision of the Rules of Professional Conduct ("Rules Commission 2")
 - ▶ OR ("R2C2")
- ▶ R2C2 submits 70 rules to State Bar Governing Board and CASC for approval in 2017

R2C2 CHARTER

- ▶ Confidence in profession
- ▶ Protection of the public
- ▶ Clear and enforceable
 - ▶ As opposed to aspirational
- ▶ Conform to ABA Model Rules where possible
- ▶ Substance in rule
 - ▶ “Elucidate” don’t “Expand upon” in comments

EXTRA CREDIT READING

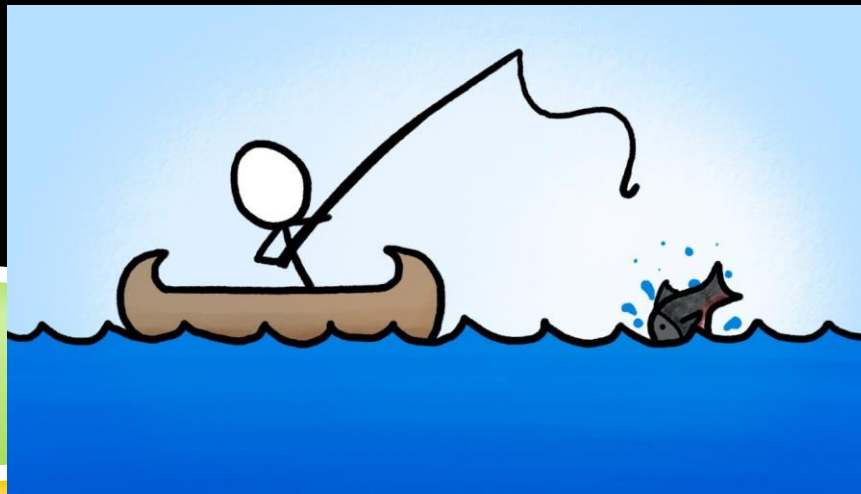
- ▶ EACH PROPOSED NEW RULE INCLUDES A REPORT
 - ▶ EXISTING RULES
 - ▶ PROPOSED NEW RULE
 - ▶ TABLES X-REF OLD TO NEW AND NEW TO ABA
 - ▶ REDLINES
 - ▶ HISTORY
 - ▶ OCTC COMMENTS
 - ▶ PUBLIC COMMENTS
 - ▶ RELATED LAWS
 - ▶ CONCEPTS ACCEPTED/REJECTED
 - ▶ DISSENT
- ▶ ALL AVAILABLE ON STATE BAR WEBSITE

THE VERDICT

- ▶ CASC issues Administrative Order 2018-05-09 on May 10, 2018
- ▶ Approves 69 of the 70 submitted rules
- ▶ Become effective November 1, 2018
- ▶ Some modifications to the submitted rules
 - ▶ Identified at beginning of Order
 - ▶ Discussed in my paper

THE ONE THAT GOT AWAY

- ▶ RULE 1.14 CLIENT WITH DIMINISHED CAPACITY
 - ▶ No explanation from CASC
 - ▶ Perhaps unnecessary because duty to client does not change based upon client's capacity
 - ▶ Perhaps redundant because all clients have diminished capacity



SOME BASIC CHANGES

- ▶ Format
 - ▶ RULE-DISCUSSION becomes RULE-COMMENT
- ▶ Numbering
 - ▶ Matches ABA Model Rules
- ▶ Apply to “LAWYERS” rather than “MEMBERS”
 - ▶ Includes those appearing pro hac vice

NEW ORGANIZATION

- ▶ CLIENT-LAWYER RELATIONSHIP (RULES 1.0-1.18)
- ▶ COUNSELOR (RULES 2.1 – 2.4.1)
- ▶ ADVOCATE (RULES 3.1-3.10)
- ▶ TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS (RULES 4.1-4.4)
- ▶ LAW FIRMS AND ASSOCIATIONS (RULES 5.1-5.6)
- ▶ PUBLIC SERVICE (RULES 6.1-6.5)
- ▶ INFORMATION ABOUT LEGAL SERVICES (RULES 7.1-7.5)
- ▶ MAINTAINING THE INTEGRITY OF THE PROFESSION (RULES 8.1-8.5)

WHAT COMES NEXT

- ▶ Not going to read the rule
- ▶ Try to highlight major differences
- ▶ Focus on work for public entities
- ▶ Paper includes what I will cover and more



RULE 1.0 PURPOSE AND FUNCTION OF THE RULES OF PROFESSIONAL CONDUCT

- ▶ AKA You need to find more hours in the day.



- ▶ COMMENT 5
- ▶ Comments are guidance for interpreting and practicing



RULE 1.0.1 TERMINOLOGY

- ▶ AKA It's still fraud, even if no one was fooled
- ▶ Definitions section for rules
- ▶ “Person” includes organizations
- ▶ “Firm” includes in house legal department
- ▶ “Fraud” definition regulates conduct, not consequences
- ▶ “Screened” definition—because screens
- ▶ * Not a missing footnote

RULE 1.1 COMPETENCE

- ▶ AKA It's OK to be simply negligent—just don't be gross about it.
- ▶ Broke up competence, diligence and supervision
- ▶ ABA includes simple
- ▶ Implied competence with technology

"I am, as I've said, merely competent.
But in an age of incompetence, that
makes me extraordinary."
- Billy Joel

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY

- ▶ AKA Better get it in writing.
- ▶ New to CA
- ▶ Representation does not equal endorsement of political views.
- ▶ Limited representation should be in writing (although that didn't make it into the rule).

RULE 1.2.1 ASSISTING, SOLICITING, OR INDUCING VIOLATIONS

- ▶ AKA Almost clears up the cannabis haze
- ▶ “Pause” and Restate 1-120
- ▶ Awaiting C3PO update to deal with advising cannabis businesses
- ▶ Rules violation versus Federal Prosecution



RULE 1.3 DILIGENCE

- ▶ AKA Slow and steady may still win the race.
- ▶ R2C2 specifically rejected inclusion of “promptness,” which is found in the ABA Model Rule



RULE 1.4 COMMUNICATION WITH CLIENTS

- ▶ AKA Good news and bad news...only later.
- ▶ Supplements B&P sections 6068(m) and (n)
- ▶ Expands prior rule with more specificity
- ▶ Can delay bad news when client would react in a way that may cause imminent harm to client or others

RULE 1.4.1 COMMUNICATION OF SETTLEMENT OFFERS

- ▶ AKA Sometimes our rules are just better than the ABA's.
- ▶ ABA Model Rules don't have separate settlement offer rule.
- ▶ Written offers and "significant" oral offers



RULE 1.4.2 DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE

- ▶ AKA For those who dare to go bare.
- ▶ State law requires professional liability insurance in certain circumstances.
- ▶ Rule requires disclosure of lack of insurance in certain circumstances
- ▶ In house lawyers exempt...



RULE 1.5 FEES FOR LEGAL SERVICES

- ▶ AKA Unreasonable fees are still OK.
- ▶ ABA Model rule prohibits unreasonable fees
- ▶ CA prohibits “unconscionable” fees
- ▶ “Retainer” versus “flat fee” issue



RULE 1.5.1 FEE DIVISIONS AMONG LAWYERS

- ▶ AKA I can't do it—but I knows a guy.
- ▶ CA, not ABA, rule for fee splitting
 - ▶ ABA requires joint responsibility
 - ▶ CA allows for a pure referral
- ▶ Meant to encourage referrals when a lawyer is not competent to handle a matter.

RULE 1.6 CONFIDENTIAL INFORMATION OF A CLIENT

- ▶ AKA Why Government lawyers can't whistle
- ▶ Tracks existing CA rule, based upon 6068(e)
- ▶ Bulk of rule is comments to help interpret
- ▶ R2C2 rejects exception for a government lawyer whistle blower



RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

- ▶ AKA Conflicts, more or less.
- ▶ Replaces 3-310
- ▶ ABA Model Rule is 1.7, 1.8(f), 1.8(g) and 1.9
- ▶ ABA Model Rule has 35 comments
- ▶ Rule 1.7 has 11 comments

RULE 1.8.I BUSINESS TRANSACTIONS WITH A CLIENT AND PECUNIARY INTEREST ADVERSE TO A CLIENT

- ▶ AKA Hollywood here I come.
- ▶ Substantively similar to existing rule
- ▶ R2C2 rejects ABA Model Rule provisions on
 - ▶ Negotiation for media and print rights to client's story during representation.
 - ▶ champerty

RULE 1.8.2 USE OF CURRENT CLIENT'S INFORMATION

- ▶ AKA Don't stab your client in the back without their consent
- ▶ Dovetails with B&P 6068(e)
 - ▶ Not just non-disclosure, prohibition on use to disadvantage of client
- ▶ Can use to disadvantage of client with client consent(?)

RULE 1.8.3 GIFTS FROM CLIENT

- ▶ AKA “For me? You shouldn’t have. Does it come with a certificate of independent review?”
- ▶ Tracks prior CA rule 4-400
- ▶ Can accept gift, but now have to get a certificate of independent review before receiving a substantial gift from a client.



RULE 1.8.5 PAYMENT OF PERSONAL OR BUSINESS EXPENSES INCURRED BY OR FOR A CLIENT

- ▶ AKA I got ya covered.
- ▶ Intended to restrict lawyers from inducing a potential client into representation by promising financial assistance



RULE 1.8.6 COMPENSATION FROM ONE OTHER THAN CLIENT

- ▶ AKA Put it on Mr. Underhill's tab.
- ▶ Doesn't apply to lawyer rendering service on behalf of a public agency that provides legal services to other public agencies or the public



RULE 1.8.7 AGGREGATE SETTLEMENTS

- ▶ AKA You get a car, and you get a car, and you also get a car!
- ▶ Informed written consent required



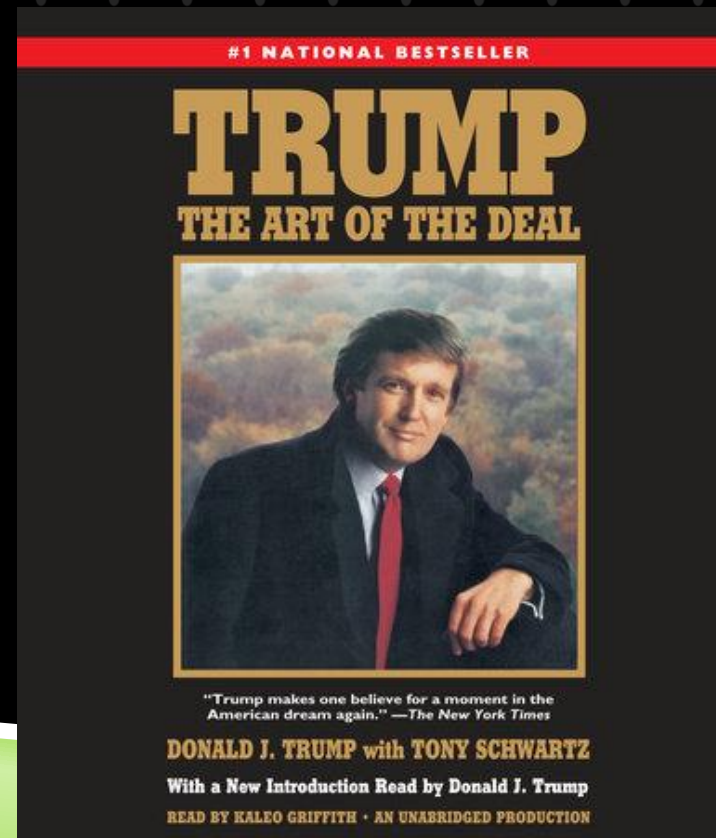
RULE 1.8.8 LIMITING LIABILITY TO CLIENT

- ▶ AKA Can't we keep this just between us?
- ▶ Different rule vis a vis the timing of the...f-up.



RULE 1.8.9 PURCHASING PROPERTY AT A FORECLOSURE OR A SALE SUBJECT TO JUDICIAL REVIEW

- ▶ AKA The art of the (self) deal.



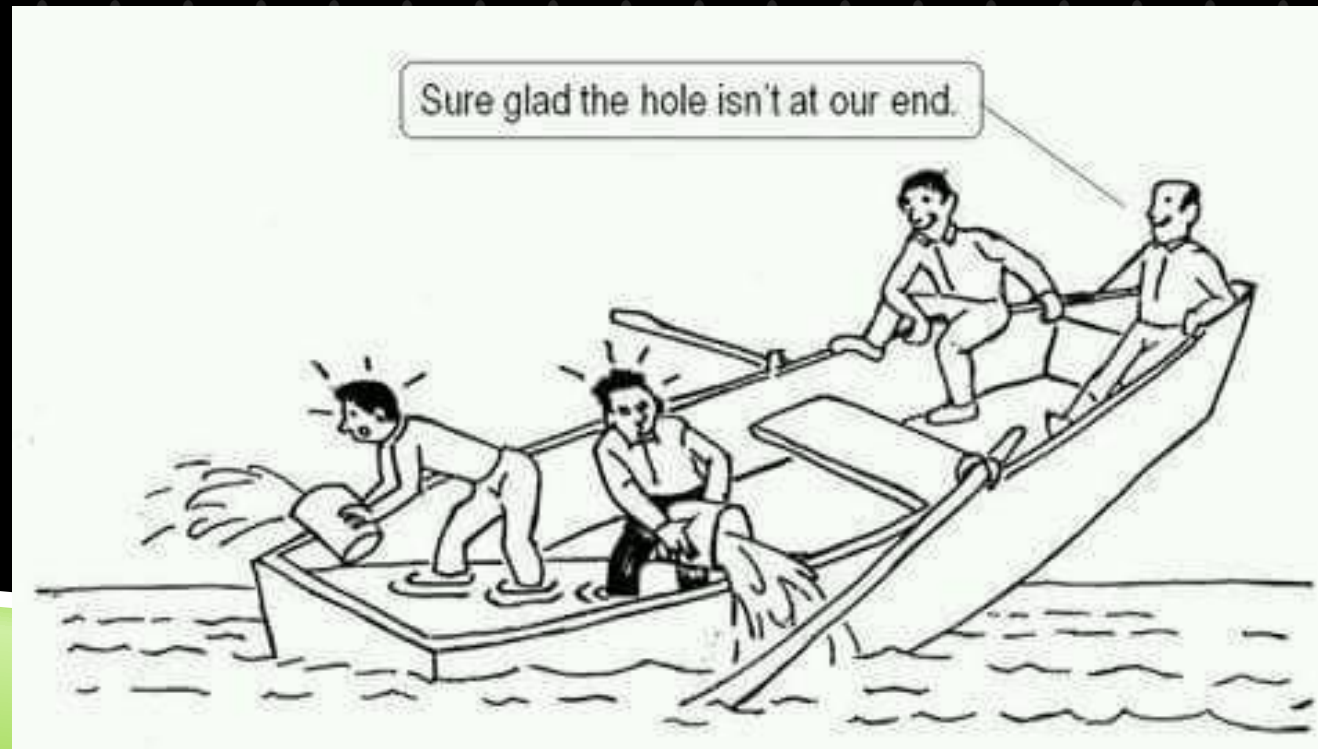
RULE 1.8.10 SEXUAL RELATIONS WITH CURRENT CLIENT

- ▶ AKA Abstinence is the best form of protection.
- ▶ Flat out prohibition
- ▶ Includes “constituents” of organization



RULE 1.8.11 IMPUTATION OF PROHIBITIONS UNDER RULES 1.8.1 TO 1.8.9

- ▶ AKA Guilt by association
- ▶ Firm-wide prohibition



RULE 1.9 DUTIES TO FORMER CLIENTS

- ▶ AKA Don't forget to check the rearview mirror
- ▶ Companion to rule 1.7 for current clients
- ▶ Expansion of prior rule with 3 concepts:
 - ▶ Not adverse in same or related matter
 - ▶ Not adverse to client from prior firm
 - ▶ Use or reveal confidential info



RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

- ▶ AKA A screen you can't see through.
- ▶ Imputes 1.7 and 1.9 to firm
- ▶ Allows use of ethical screen with written notice
- ▶ Only applies to coming and going
- ▶ Can't have significant participation or knowledge
- ▶ Doesn't apply to government lawyers (1.11)

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICIALS AND EMPLOYEES

- ▶ AKA Government to private, government to government, but not private to government.
- ▶ Broad screening allowed
- ▶ Last scenario governed by caselaw

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

- ▶ AKA Leave that resume in your back pocket
- ▶ Screening procedures for neutral moving into private practice
- ▶ Limits on solicitation of employment while a neutral

RULE 1.13 ORGANIZATION AS CLIENT

- ▶ AKA I'm going to tell on you
- ▶ Report "up" but not "outside" obligation
 - ▶ Constituent violating law and
 - ▶ Action likely to substantially injure organization
- ▶ If no action, may have to resign

RULE 1.15 SAFEKEEPING FUNDS AND PROPERTY OF CLIENTS AND OTHER PERSONS

- ▶ AKA Trust me.
- ▶ Deposit for operations in writing
- ▶ Caselaw re duty to 3rd parties (lienholders)



RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

- ▶ AKA Wait...you're firing me?



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RULE 1.17 SALE OF A LAW PRACTICE

- ▶ AKA Original owner, new tires, purrs like a kitten
- ▶ Limitations on selling off portions of a practice



RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

- ▶ AKA Yet another screen
- ▶ Cannot divulge confidential information
- ▶ Entire firm has conflict unless screen impacted lawyer
- ▶ Once again, “unconsented” screening, with ability to challenge scope of screen
- ▶ Compensation implication

RULE 2.1 ADVISOR

- ▶ AKA How do you think I should vote on this agenda item?
- ▶ New Rule
- ▶ Independent professional judgment
- ▶ Can consider moral, economic, social and political factors

RULE 2.4 LAWYER AS THIRD PARTY NEUTRAL

- ▶ AKA Are you my Momma?
- ▶ New Rule
- ▶ Must advise and explain role to parties when a neutral.



RULE 2.4.1 LAWYER AS TEMPORARY JUDGE, REFEREE, OR COURT-APPOINTED ARBITRATOR

- ▶ AKA The bootstrap
- ▶ Imports rules of Code of Judicial Ethics so bar can discipline pro tems



RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

- ▶ AKA I knew this was a bad idea.
- ▶ First of 9 rules in this series to track ABA
- ▶ Eliminates “knowledge” from Rule 3-200
- ▶ Prohibits
 - ▶ Certain actions
 - ▶ Certain claims or defenses

RULE 3.2 DELAY OF LITIGATION

- ▶ AKA The four corner stall.
- ▶ New to CA
- ▶ Modeled on NY rule, rather than aspirational ABA
- ▶ Not sure about a sea change in litigation tactics.



RULE 3.3 CANDOR TOWARD THE TRIBUNAL

- ▶ AKA Don't hide the ball—unless you have to.
- ▶ Prior rule prohibited misleading the court through false statement of fact or law
- ▶ Now affirmative duty to correct, unless breach client confidentiality
- ▶ Duty may extend beyond the representation

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

- ▶ AKA Play nice in the sandbox.
- ▶ Combines 3 existing rules re evidence, witnesses, discovery, and trial conduct



RULE 3.5 CONTACT WITH JUDGES, OFFICIALS, EMPLOYEES AND JURORS

- ▶ AKA There's no party like an ex parte.
- ▶ Prohibits ex parte contacts with judges (and admin bodies acting as judges) absent a rule allowing same
- ▶ Colantuono/SeLegue memo



RULE 3.6 TRIAL PUBLICITY

- ▶ AKA Meet the press.
- ▶ Limitation on public statements about litigation or investigation
- ▶ Standard of care changed
 - ▶ Formerly reasonable person
 - ▶ Lawyer “knows or reasonably should know” has substantial likelihood of prejudicing

RULE 3.7 LAWYER AS WITNESS

- ▶ AKA How to cross-examine yourself.
- ▶ Now includes bench trial, ALJ and arbitrator
- ▶ Rules re lawyers from same firm
- ▶ Rule for government lawyers



RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

- ▶ AKA How to be a minister of justice.
- ▶ Expands former, former rule 5-110
- ▶ Expedited update December 2017, renumbered
- ▶ Includes sharing of evidence, advising accused of rights, cure obligations for wrongly accused
- ▶ Can be disciplined for poor supervision of others

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

- ▶ AKA Please fill out a speaker card.
- ▶ New rule, modeled on NY
- ▶ Must disclose if representing self or others
 - ▶ Unless just seeking public info
 - ▶ Don't have to ID client
- ▶ Report cites Monty Python



RULE 3.10 THREATENING CRIMINAL, ADMINISTRATIVE, OR DISCIPLINARY CHARGES

- ▶ AKA Extortion's still bad.
- ▶ No ABA counterpart, but comments elaborate on CA rule
- ▶ Release-dismissal agreements OK
- ▶ "All available legal remedies" OK

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

- ▶ AKA I cannot tell a lie—I mean a “material” lie.
- ▶ Cannot make false statement of material fact or law to third person
- ▶ Cannot fail to disclose same if non-disclosure would assist in crime or fraud by client



RULE 4.2 COMMUNICATION WITH A REPRESENTED PERSON

- ▶ AKA Leave my date alone.
- ▶ No contact with represented party without lawyer's consent
- ▶ Organizations and government different rules
- ▶ OK to communicate with “public officials”

RULE 4.3 COMMUNICATING WITH AN UNREPRESENTED PERSON

- ▶ AKA Help me, help you.
- ▶ Limits interactions with unrepresented person on behalf of a client
 - ▶ Implying disinterest
 - ▶ Correcting misconceptions
 - ▶ Providing legal advice
 - ▶ Obtaining privileged information

RULE 5.1 RESPONSIBILITIES OF MANAGERIAL AND SUPERVISORY LAWYERS

- ▶ AKA Have I got your attention, City Attorney?
- ▶ One sentence in 3-110 now 3 rules (5.1-5.3)
- ▶ Managerial authority =
duty to takes steps to ensure
compliance with rules by
subordinates
- ▶ Includes a duty to cure
potential violations



RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

- ▶ AKA The anti-Nuremberg rule.
- ▶ Duty to comply with rules, notwithstanding direction from a supervisor
- ▶ Includes caveat for arguable question
 - ▶ But doesn't extend to supervisor

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

- ▶ AKA The buck still stops here.
- ▶ May be responsible for actions of secretaries, investigators, law clerks and paraprofessionals
- ▶ No caveat concerning arguable questions



RULE 5.3.1 EMPLOYMENT OF DISBARRED, SUSPENDED, RESIGNED, OR INVOLUNTARILY INACTIVE LAWYER

- ▶ AKA The Slytherin Rule
- ▶ No ABA equivalent
- ▶ Allows “ineligible persons” certain types of work, with written consent of client and notification to the state bar.
- ▶ Intended to be vocational rehab opportunity



RULE 5.4 FINANCIAL AND SIMILAR ARRANGEMENTS WITH NONLAWYERS

- ▶ AKA No peanut butter in your chocolate.
- ▶ Combines 3 prior rules
 - ▶ Forming a partnership with a non-lawyer (I-310)
 - ▶ Financial Arrangements with non-lawyers (I-320)
 - ▶ Legal Service Programs (I-600)
- ▶ Intended to protect the lawyer's independent professional judgment

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

- ▶ AKA Not without a Golden Ticket.
- ▶ Can't aid in unauthorized practice
- ▶ Can't practice without admission in another state
- ▶ Can't have CA office without membership



RULE 5.6 RESTRICTIONS ON A LAWYER'S RIGHT TO PRACTICE

- ▶ AKA You can't always get what you want.
- ▶ In partnership and settlement agreements can't:
 - ▶ Restrict practice of law after leaving partnership
 - ▶ Prohibit report of violation of the rules
 - ▶ Restrict from representing another client concerning the same or similar claims
- ▶ Can have financial consequences concerning same

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS

- ▶ AKA A good deed goes unpunished.
- ▶ New rule to CA
- ▶ Can serve in a legal services organization, even if it serves persons with interests adverse to a client.
- ▶ Addresses specific level of participation.
- ▶ Meant to encourage participation.

RULE 6.5 LIMITED LEGAL SERVICES PROGRAMS

- ▶ AKA Rules for speed dating.
- ▶ Such as pro bono clinic
- ▶ Only conflict if lawyer actually knows
- ▶ Limits how conflict is imputed to other lawyers at the firm
- ▶ Still have duty of confidentiality

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

- ▶ AKA Se Habla Espanol.
- ▶ Former rule 1-400 is now 5 rules (7.1-7.5)
- ▶ Cannot make false or misleading statements about services
- ▶ State Bar Board can develop standards re what presumptively violates rules

RULE 7.2 ADVERTISING

- ▶ AKA Mad Men (or Women)
- ▶ Restrictions on advertising
- ▶ No longer required to retain ads for 2 years



RULE 7.3 SOLICITATION OF CLIENTS

- ▶ AKA Would you like to buy a Girl Scout Cookie
- ▶ Real time solicitation prohibition



RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

- ▶ AKA Certifiable.
- ▶ Can't advertise specialty unless State Bar certified
- ▶ Can communicate “specialize in” a particular field of law



RULE 7.5 FIRM NAMES AND TRADE NAMES

- ▶ AKA Well you can call me Ray...
- ▶ Can't use a firm name that violates 7.1 (misleading communication about services)
- ▶ Can't use a firm name that implies a relationship with a government agency



RULE 8.1 FALSE STATEMENT REGARDING APPLICATION FOR ADMISSION TO PRACTICE LAW

- ▶ AKA The wrong type of bar for lies.
- ▶ Applicant can't make false statement or with "reckless disregard as to truth of falsity"
- ▶ For recommendations—can't make a statement you know to be false

RULE 8.1.1 COMPLIANCE WITH CONDITIONS OF DISCIPLINE AND AGREEMENTS IN LIEU OF DISCIPLINE

- ▶ AKA Fool me once...
- ▶ Discipline for violating terms of discipline.



RULE 8.2 JUDICIAL OFFICIALS

- ▶ AKA Bootstrap for the other boot.
- ▶ Imports judicial canons for those seeking judicial office to allow State Bar enforcement
- ▶ Comments on judicial candidate
 - ▶ No false or reckless statements of fact concerning judge or judicial candidate
 - ▶ Criticism based on reasonable factual basis is fine

RULE 8.4 MISCONDUCT

- ▶ AKA The 6 Commandments
- ▶ Sets out six basic prohibitions that summarize the duties of a lawyer
- ▶ Addresses honesty, trustworthiness and fitness to practice



RULE 8.4.1 PROHIBITED DISCRIMINATION, HARASSMENT AND RETALIATION

- ▶ AKA The State Bar FEHA Policy.
- ▶ Updates existing 2-400 from 1994
- ▶ Eliminates prior threshold that a court determine the alleged conduct occurred
 - ▶ Original JDX with Bar now
 - ▶ Duty to report
 - ▶ Bar can defer

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

- ▶ AKA Home Field Advantage
- ▶ Admitted in CA, subject to discipline in CA regardless of where conduct occurs
- ▶ Admitted outside of CA, subject to discipline in CA for legal services performed in CA
- ▶ Doesn't preclude multi-jdx discipline

BE GOOD



bang

THANK YOU.

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