



1-1-1969

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Anthony C. Bennetti

Roger J. Marzulla

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## Recommended Citation

Anthony C. Bennetti and Roger J. Marzulla, Comment, *Professional Responsibility in Client Representation - A Re-Evaluation*, 10 SANTA CLARA LAWYER 112 (1969).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol10/iss1/7>

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# PROFESSIONAL RESPONSIBILITY IN CLIENT REPRESENTATION— A RE-EVALUATION

The American Bar Association has recently adopted a new Code of Professional Responsibility, a statement of the ethical responsibilities for the practicing attorney.<sup>1</sup> Within the near future, the California Legislature or the State Bar Association can adopt or endorse all or part of the new ABA Code. Such action would have a substantial effect on the California legal profession because this would determine whether the ABA Code will have binding legal effect or will be merely an advisory standard. To date the ABA's Canons of Professional Ethics, which the Code replaces, have been merely an advisory standard in California.

The American Bar Association adopted the Canons of Professional Ethics in 1908.<sup>2</sup> The ABA Canons discussed a lawyer's duties to his client, the courts, his fellow attorneys and the public at large. Over the years, the ABA amended the Canons several times, but some lawyers still found them inadequate as a useful guide for defining their responsibilities.

In the meantime, California codified the State Bar Act of 1927<sup>3</sup> to regulate the practice of law in California. This act includes three provisions intended to define a lawyer's responsibilities: first, a list of his duties to the profession and his clients,<sup>4</sup> second, an oath to carry out his duties to the best of his knowledge and abilities<sup>5</sup> and third, an authorization for the State Bar's Board of Governors to formulate Rules of Professional Conduct subject to approval by the state supreme court.<sup>6</sup> In the later formulation of these Rules of Professional Conduct, the California State Bar Board of Governors "commended" the ABA's Canons of Ethics to the members of the State Bar.<sup>7</sup> Thus the ABA Canons have had no legal effect in California beyond "commendation."

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<sup>1</sup> ABA, CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter referred to and cited as ABA CODE].

<sup>2</sup> ABA, CANONS OF PROFESSIONAL ETHICS (1908).

<sup>3</sup> Cal. Stats. 1927, ch. 34, at 38 (1927), as amended CAL. BUS. & PROF. CODE §§ 6000-6154 (West 1962).

<sup>4</sup> CAL. BUS. & PROF. CODE § 6068 (West 1962).

<sup>5</sup> *Id.* § 6067.

<sup>6</sup> *Id.* § 6076.

<sup>7</sup> "Rule 1 . . . . The specification in these rules of certain conduct as unprofessional is not to be interpreted as an approval of conduct not specifically mentioned. In that connection the Canons of Ethics of the American Bar Association are commended to the members of the State Bar." *Id.*

In 1969 the American Bar Association voted to replace its Canons of Ethics. The new Code of Professional Responsibility is the result of five year's work by the Association's Special Committee on Evaluation of Ethical Standards, whose purpose was to examine the Canons and recommend changes. The Committee found that the Canons needed revision in four ways: first, they either omitted or only partially covered important aspects of professional conduct, second, many Canons, though substantially sound, needed editorial revision, third, most of the Canons did not lend themselves to practical sanctions for violation, fourth, some of the Canons were obsolete due to changing conditions in the profession.<sup>8</sup> After exhaustive study, the Committee concluded that further amendment of the present Canons was unsatisfactory. Modern conditions demanded a modern Code of Professional Responsibility.

The ABA is now seeking adoption of the entire new Code by appropriate state agencies. In California, the ABA's Code of Responsibility could be incorporated into the Business and Professions Code by the Legislature, formulated as Rules of Professional Conduct by the State Bar Board of Governors and the Supreme Court of California, or merely commended to the members of the California Bar as the present Canons of Ethics are now commended.<sup>9</sup>

Before either the legislature or the State Bar takes action on the Code, its provisions should be carefully evaluated. The ABA Code includes nine Canons which are broad statements of principles governing all aspects of the legal profession. Each Canon is accompanied by several objectives to which every lawyer should aspire. These objectives are the Ethical Considerations. Each Canon also includes a set of minimum standards of conduct which are to effect the aims of the Canon. These standards are the Disciplinary Rules. The ABA anticipates that the regulatory bodies of each State Bar will apply these standards of conduct to disciplinary actions undertaken in their jurisdictions.

This comment seeks to establish a method of evaluating the ABA Code's Disciplinary Rules in light of the already existing California provisions, violation of which can result in suspension, disbarment or reproof of attorneys. Although California gave no legal effect to the old ABA Canons, the new ABA Code may contain worthwhile additions to or modifications of California's substantive law concerning attorneys.

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<sup>8</sup> ABA CODE, at v.

<sup>9</sup> The essential choice in California is between giving the ABA Code the force of a substantive rule of discipline (legislative enactments and enactments by the State Bar Board of Governors are enforced in the same manner) and giving the Code the status of an advisory standard.

Disciplinary proceedings against attorneys are presently within the jurisdiction of the California State Bar Board of Governors and the state supreme court. The supreme court, by statutory procedure, may suspend or disbar an attorney for any of the following causes:<sup>10</sup> conviction of a felony or misdemeanor involving moral turpitude,<sup>11</sup> disobedience of an order of the court,<sup>12</sup> violation of his oath or statutory duties,<sup>13</sup> wilfully appearing without authority as attorney for a party to an action,<sup>14</sup> lending his name as attorney to a non-attorney<sup>15</sup> or commission of any act involving mortal turpitude, dishonesty or corruption.<sup>16</sup>

As an alternative procedure, the California State Bar Board of Governors may hold a hearing on any of the above causes or establish disciplinary boards to hold such hearings subject to review by the supreme court of the state.<sup>17</sup> In addition, the Board of Governors or its disciplinary boards may recommend to the state supreme court that an attorney be suspended from practice for any wilful breach of the Rules of Professional Conduct.<sup>18</sup> They may also discipline members of the State Bar by public or private reproof.<sup>19</sup>

The new ABA Code makes no recommendations as to disciplinary procedures; instead, its proposals are aimed at the substantive reasons for which an attorney may be disciplined. The Code's Rules, found in Canon 7, which deal with the lawyer's rights and obligations during the course of representation have been chosen for an evaluation based on a comparison with present California law. Canon 7 has been selected because in the course of representation the lawyer must attain the legitimate aims of his client through legally acceptable procedures, procedures which are sometimes mystifying to the client. Witness one judge's opinion:

The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are the cabalistic rituals of the lawyers and judges. . . . The layman knows nothing of their tactical significance. . . . He does know this much: that several

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<sup>10</sup> CAL. BUS. & PROF. CODE § 6100 (West 1962).

<sup>11</sup> *Id.* § 6101.

<sup>12</sup> *Id.* § 6103.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 6104.

<sup>15</sup> *Id.* § 6105.

<sup>16</sup> *Id.* § 6106.

<sup>17</sup> "Method as alternative and cumulative. In their relation to the provisions . . . concerning the disciplinary authority of the courts, the provisions of this article [concerning the disciplinary authority of the State Bar's Board of Governors] provide a complete alternative and cumulative method of hearing and determining accusations against members of the State Bar." *Id.* § 6075.

<sup>18</sup> *Id.* § 6078.

<sup>19</sup> *Id.* § 6077.

years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel.<sup>20</sup>

In order to inspire the trust and confidence of clients, the profession must insure through its disciplinary measures that each client may expect an attorney to fulfill his professional obligations. The ten Disciplinary Rules of Canon 7 are designed to facilitate that aim.

As pointed out above, this comment seeks to evaluate the Disciplinary Rules of Canon 7 as possible additions to or modifications of California law. The method employed here is an analytical comparison between the Rules and the present California law. All of the Rules for ABA Canon 7 are not susceptible to this method of evaluation. For example, California has not decided whether disciplinary action would be proper against an attorney who is wholly or partially responsible for the release of prejudicial publicity in a criminal case. Yet Disciplinary Rule 7-107 of the new ABA Code sets forth a ten point set of rules concerning an attorney's relations with the news media. In this area, then, comparison would be a poor form of evaluation because California has had no experience with the substantive procedures laid out in the Rule; this comment does no more than point out the scope of the problem.

Similarly, comparison is a poor form of evaluation when two rules are nearly identical. With only slight additions, the ABA Committee which drafted the Code of Professional Responsibility patterned the Rules governing a lawyer's contact with witnesses and judicial officers after two California Bar Rules of Professional Conduct. These Disciplinary Rules are not considered.

This comment examines the first six Disciplinary Rules of ABA Canon 7, and makes recommendations for official action in three alternative forms: First, the ABA Rule is so much better a statement of the principle under discussion that the Legislature should amend the Business and Professions Code to include the ABA provision. Second, the ABA Rule adds an important dimension which should be adopted by the State Bar Board of Governors as a Rule of Professional Conduct for approval by the state supreme court. Third, the ABA Disciplinary Rule should merely be commended to the members of the California Bar as an advisory standard, as are the present ABA Canons. These recommendations are the result of the following analytic comparison.

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<sup>20</sup> Daley v. County of Butte, 227 Cal. App. 2d 380, 392, 38 Cal. Rptr. 693, 700 (1964).

***“Canon 7 A Lawyer Should Represent a Client Zealously  
within the Bounds of the Law”***

**DISCIPLINARY RULES**

**DR 7-101 Representing a Client Zealously.**

**(A) A lawyer should not intentionally:**

- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.**
- (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110,<sup>21</sup> DR 5-102,<sup>22</sup> and DR 5-105.<sup>23</sup>**

<sup>21</sup> ABA CODE, DR 2-110, at 28. Withdrawal from Employment.

**(A) In general.**

- (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.**
- (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all matter and property to which the client is entitled, and complying with applicable laws and rules.**
- (3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.**

**(B) Mandatory withdrawal.**

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

- (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.**
- (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.**
- (3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.**
- (4) He is discharged by his client.**

**(C) Permissive withdrawal.**

If DR 2-110 (B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) His client:
  - (a) Insists upon prosecuting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification or reversal of existing law.
  - (b) Personally seeks to pursue an illegal course of conduct.
  - (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.
  - (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.
  - (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.
  - (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.
- (2) His continued employment is likely to result in a violation of a Disciplinary Rule.
- (3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
- (4) His mental or physical condition renders it difficult for him to carry out the employment effectively.
- (5) His client knowingly and freely assents to termination of his employment.
- (6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

<sup>22</sup> *Id.*, DR 5-102, at 64. Withdrawal as Counsel When the Lawyer Becomes a Witness.

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

<sup>23</sup> *Id.*, DR 5-105, at 65. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105 (C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105 (C).
- (C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102 (B).

This affirmative duty of the lawyer to seek all lawful remedies for his client

derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.<sup>24</sup>

Not only does everyone have a right to representation, but he has a right to *effective* representation. This right is based on both the contract between the attorney and client, and on the attorney's role as an officer of the courts which exist to administer the laws governing every citizen.

These obligations of contract and of role, as enumerated in DR 7-101 (A) (1-3), are broad and, at first glance, quite burdensome. But a closer inspection shows that these are the functions performed by the attorney in an average case. The emphasis in section (1) is on "reasonably available *means*" for seeking the remedy for which the lawyer is employed; this is an obligation of his position as lawyer. Section (2) forbids breaching the contract of employment as lawyer. Section (3) commands that a lawyer not sabotage his client's case. Taken as a whole, this Disciplinary Rule merely says that a lawyer shall perform his duty as attorney when he contracts to do so. This is what the lawyer *usually* does.

The importance of this Disciplinary Rule is that it is *disciplinary*; usually obeying a commandment is not enough. Each time a lawyer fails to seek his client's legal rights through legally available means, he not only breaches the contract but breaks the rules governing his professional life. This Disciplinary Rule makes the lawyer's duty to his client a duty also to the Bar; failure to live up to this duty is reason for sanction by the Bar.

In contrast, California imposes no statutory duty upon its attorneys comparable to that outlined in the Code. Certainly California provides disciplinary action for violation of the attorney's oath<sup>25</sup> and for gross negligence, which qualifies as moral turpitude.<sup>26</sup> But

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<sup>24</sup> *Id.*, EC 7-1, at 76.

<sup>25</sup> CAL. BUS. & PROF. CODE § 6067 (West 1962).

<sup>26</sup> *Id.* § 6106. California courts ordinarily hold that gross negligence is moral turpitude within the meaning of this statute.



rather than a matter for discipline, California sees inattention to clients' affairs as grounds for a civil suit based on breach of contract. For example, in the famous case of *Lucas v. Hamm*,<sup>27</sup> plaintiffs sued as third party beneficiaries of a will prepared by defendant for the deceased. A provision of the will establishing a trust for plaintiffs was invalid as a violation of the rule against perpetuities and an illegal restraint on alienation. The court held that plaintiffs did have a right to sue an attorney for negligence in performing his contract with the client, but that the principles involved in the invalid trust were so complex that the defendant was not liable for negligence in writing the will.

Had the conduct of Hamm been negligent, Lucas would have been able to recover the value of the trust. Hamm would have incurred liability for his breach of contractual duty to Lucas. But in all probability this breach of contract would *not* have resulted in any disciplinary action by the State Bar, since there is no provision in California statutes comparable to DR 7-101 (A) (2). The Disciplinary Rule makes a lawyer liable to his client, as does the California case law; but unless the lawyer's breach of duty be either gross negligence or a breach of his oath, he breaches no duty to the Bar. This is the primary difference between DR 7-101 (A) and California law. The Disciplinary Rule adds a punitive dimension to what California sees as only a contractual problem.

In addition to giving the client this civil remedy against the lawyer, the courts are willing to do what they can to remedy the attorney's failure to carry out his contract. In a singular case in 1933,<sup>28</sup> the California Supreme Court considered the merits of an appeal, though the attorney for the respondent failed to appear in the proceedings and did not file a brief. While reproaching the attorney for being remiss, the court took upon itself the duty of combing the trial record for error and surprisingly enough (or perhaps not so surprisingly) found in favor of respondent. The attorney for respondent, it seems, never was called upon to account for his actions in a civil or disciplinary action.

In an even more blatant case of dereliction,<sup>29</sup> plaintiff's attorney failed to serve adverse parties in a wrongful death action, or to take any other steps until the statute of limitations had run. Despite repeated phone calls from the client (which the lawyer never returned) and notice that plaintiff had retained a new attorney to whom he should send the files, the attorney did nothing at all, and

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<sup>27</sup> 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

<sup>28</sup> *Larimer v. Smith*, 130 Cal. App. 98, 19 P.2d 825 (1933).

<sup>29</sup> *Daley v. County of Butte*, 227 Cal. App. 2d 380, 38 Cal. Rptr. 693 (1964).

the case was dismissed. The appellate court held that a client, as principal, is responsible for the actions of his attorney, as agent; but the client as layman is bewildered by the rituals of the court, and must rely upon his lawyer to act for him. Plaintiff should therefore not be penalized for the incompetence of his attorney, and the order dismissing the suit was reversed. Again it appears that the State Bar took no disciplinary action, and that the client brought no action in damages against the attorney. Mere inaction—even breach of contract—is not grounds for sanction by the State Bar, although the client here could probably have recovered actual damages caused by the lawyer's inaction.

Although inaction is not usually grounds for discipline in California, the State Bar will discipline an attorney who takes affirmative steps which prejudice his client's case. Thus in the case of *Hinds v. State Bar*,<sup>30</sup> the California Supreme Court approved the suspension of an attorney who acted in a manner which tended to injure his client. As attorney for the wife in a divorce action, Hinds prepared a quit claim deed of property from the husband to the wife. Either to secure his own fee or to prevent the wife from defrauding her husband in the property settlement, Hinds added the name of his niece as a grantee on this deed. Whether this act was to insure his own position or to protect the husband, the court found such an act injurious to the client's case and a breach of Hind's duty as her legal representative. The California rule, then, seems completely in accord with DR 7-101 (A) (3).

Both DR 7-101 (A) and California law recognize that a lawyer must represent his client zealously, seeking lawful remedies through "reasonably available means." Both see this as a contractual duty, giving the client an action for breach of contract in case of failure to perform. But the ABA Disciplinary Rule goes further in making breach of contract grounds for *disciplinary action*. Such discipline for neglect of client is practically unknown in California.

Although California recognizes the extent and importance of the problem, its solutions are relatively weak. The Board of Governors may take action for failure to live up to the attorney's oath "faithfully to discharge the duties of an attorney at law to the best of his knowledge and ability;"<sup>31</sup> the supreme court may take action for "any act involving moral turpitude."<sup>32</sup> But the fact is that mere failure to do something which the lawyer should have done in the course of representation seldom qualifies as violation of the oath,

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<sup>30</sup> 19 Cal. 2d 87, 119 P.2d 134 (1941).

<sup>31</sup> CAL. BUS. & PROF. CODE § 6067 (West 1962).

<sup>32</sup> *Id.* § 6106.

and still more seldom qualifies as moral turpitude. The State Bar simply has no authority in the majority of cases involving the attorney's breach of his contract of employment.

**RECOMMENDATION:** The legislature should adopt DR 7-101 (A) as part of the California Business and Professions Code. Perhaps the Rule will impose a new responsibility on California attorneys, but it will have a number of beneficial effects.

First, this Disciplinary Rule will inspire greater confidence in the legal profession. A client who is being represented knows that the Bar Association guarantees the quality of his lawyer's work. The lawyer will use reasonable diligence in seeking the client's remedies, or he will have to explain his failure to do so to the rest of the profession. If well enforced, this Disciplinary Rule could go far to reduce the incidence, both real and supposed, of inadequate representation.

Second, the legal profession should police its own activities to see that clients are getting proper representation. Lawyers have a monopoly on the practice of law, and implicit in any monopoly is the possibility of shoddy craftsmanship and lack of perseverance in performing the work that must be done. This tendency is overcome to a large degree by the basic integrity of most attorneys and the importance of a personal reputation for competence and energy. But the few instances in which a client may have a case which his counsel considers "too small" to warrant full exploitation is reason enough for the State Bar to insure that *every* contract of employment will be carried out completely and competently.

Third, this Disciplinary Rule will strengthen the advocate system. The system operates best when both sides are fully prepared and genuinely interested in seeking their clients' remedies. When counsel for one party fails to appear, to make an important motion, to file a brief or a complaint or to take any other measure necessary to obtain his client's rights, the court is required to compensate for the lawyer's negligence. Unequipped to prepare the case for one side or the other, the court is in a difficult and unaccustomed position which, despite its best efforts, may yield an unjust judgment for the client who is inadequately represented.

Finally, DR 7-101 (A) adds no duty which the lawyer does not already realize that he has, that is, the duty to fulfill the contract with his client. It does add accountability to the State Bar for breach of this contract; but the lawyer is already under a contractual duty to adequately represent the client. Hence this Disciplinary Rule, like any good rule of conduct, will have no effect

on the vast majority of conscientious practitioners. Only those few who knowingly fail to carry out their contracts of employment incur an accountability to the State Bar for dereliction; this accountability would certainly be beneficial to the profession. The Board of Governors of the State Bar, composed as it is of eminent California lawyers, is particularly well-equipped to administer this Disciplinary Rule. The decision of a court or jury in a civil suit for breach of contract should not be binding on the Board, which ought to make its own inquiries and findings to determine whether discipline is warranted. By enforcing this standard, the Board should see that no lawyer is unjustly held liable for failure to adequately represent his client; at the same time enforcement will enhance the reputation of the profession in general and move California closer to the goal of true justice through protection of the legal rights of every person in the state.

**DR 7-101 (B) In his representation of a client, a lawyer may:**

- (1) **Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.**

This Disciplinary Rule is explained as follows: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client. . . ."<sup>33</sup>

Clearly an attorney must have the freedom to make or fail to make objections, to frame the pleadings, to make motions and to develop a theory of the case. This exercise of discretion is a part of the representation, for the only effective representation is that in which the lawyer can choose the *most* effective method of achieving his client's remedy, waiving the procedural alternatives which would be less effective. Such waiver of ineffective or impractical procedures is not a violation of DR 7-101 (A), for the less effective means are not "reasonable" if their waiver in favor of more effective means is possible.<sup>34</sup>

California recognizes this need for exercise of discretion in its case law. In the California Supreme Court case of *People v. Mattson*,<sup>35</sup> the defendant asserted his constitutional rights to appointed

<sup>33</sup> ABA CODE, EC 7-7, at 77.

<sup>34</sup> Note that ABA CODE, DR 7-101 (A) (1), at 86, requires the lawyer to use "all reasonable means," which does not include "all means." The Disciplinary Rule thus recognizes the need for the exercise of discretion by the lawyer.

<sup>35</sup> 51 Cal. 2d 777, 336 P.2d 937 (1959).

counsel and to represent himself at the same time. He wanted to appear *in propria persona*, with an attorney to take care of "legal matters" while he handled the case himself. The court denied Mattson the use of an attorney as law clerk, holding that he had the right to appointed counsel, but that an attorney must be free to manage the case. To the extent that an attorney acts at the direction of the layman in discretionary matters, he is not performing his function as attorney.

Another attorney's discretion was called into question in an earlier criminal case in which defendant was convicted of robbery.<sup>36</sup> On appeal he claimed that his defense attorney erred in asking him on the witness stand whether defendant was paying the lawyer any fee. Since counsel was court-appointed, the defendant answered that he was not paying the attorney anything (the attorney explained to the appellate court that he just didn't want the jury to think that he was getting any of "the loot"). The court upheld the conviction saying that an attorney may try the case any way he wishes so long as he gives an adequate defense. Although it may disapprove of the method in which counsel presents the case, the court should leave this to his discretion and refrain from interfering in the presentation unless absolutely necessary.

In a well-written opinion, *People v. Blye*,<sup>37</sup> the court of appeals drew a sharp distinction between basic rights and procedural rights, holding that the attorney has discretionary control over the procedure only. Blye was convicted of burglary when the public defender, in chambers and outside the presence of his client, withdrew the plea of not guilty, saying that he felt the defendant was guilty. The attorney also refused to let Blye testify because he believed his client would lie on the stand. In reversing the conviction, the court said that basic rights such as the plea and the right to testify may be exercised only by the client. When the attorney disagrees regarding the client's exercise of these basic rights, it is his duty to withdraw from the case. Only the client may waive a basic right.

Both DR 7-101 (B) and California case law are substantially the same, for they recognize the necessity that an attorney be free to waive certain rights of the client in the course of representation. But without interpretation the Disciplinary Rule says little—only that rights of the client may be waived "where permissible." California has no comparable rule in statutory form, and a study of the case law is necessary to determine that any attorney has wide

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<sup>36</sup> *People v. Wheeler*, 113 Cal. App. 2d 881, 249 P.2d 299 (1952).

<sup>37</sup> 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965).

discretion in presenting the case, but may not exercise independent control over basic and substantial rights.

**RECOMMENDATION:** The Board of Governors of the State Bar should adopt the following as a Rule of Professional Conduct: "In his representation of a client, a lawyer may exercise his professional judgment to waive or fail to assert a right or position of his client which does not affect the merits of the case or substantially prejudice the basic rights of the client." This proposed rule is a synthesis of California law and the ABA Disciplinary Rule, intended to bring sharply into focus this significant aspect of the attorney's representation.

First, it clarifies the position of the State Bar, affirming the lawyer's broad discretion in presenting the case. The rule also limits this discretion to matters properly within the discretion of counsel, denying to him those decisions which are so important that only the client can make them. Such matters as entering a plea or settling out of court are so basic that they fall outside the sole discretion of counsel, who is reminded by this rule of the necessity that he consult with his client before taking such actions.

Second, the imposition of discipline on attorneys who usurp their position as the representative of the client protects the client by making such misconduct less frequent. Withdrawing a plea of not guilty, or settling the claim without the client's consent, are serious matters. No lawyer should feel that he can abuse his position by taking such steps; no lawyer worthy of the name would do so. The action of waiving a client's basic rights without his consent is unprofessional and reprehensible. The proposed rule attempts to prevent such a waiver and to punish the lawyer who wastes his client's legal rights in that way.

Finally, this recommendation complements DR 7-101 (A) by further defining the process of seeking the client's legal objectives through reasonably available means. In effect the recommended rule permits a lawyer to disregard those means which are not reasonable—an essential consideration. However, this consideration does not belong in the Business and Professions Code (which states affirmative duties), since the Rule does not assert an affirmative duty directly. The proposed rule serves instead to *define* the affirmative duty to fulfill the contract of employment. It protects against a misinterpretation of DR 7-101 (A) and of the case law which makes a lawyer liable to his client for negligence, since it makes clear that a proper waiver of the client's prerogatives is not negligence or breach of contract.

As a rule of Professional Conduct, this rule must be construed broadly to give the lawyer wide discretion. If any question exists as to whether the waiver was proper, the doubt should be resolved in favor of the lawyer; otherwise the rule could prove so restrictive that it might restrain a lawyer from making full use of his position to the detriment of the client. The Board of Governors of the State Bar is well-suited to administer such a rule, protecting both the attorney and his client against a possible distortion of their relationship.

**DR 7-101 (B) [In his representation of a client, a lawyer may:]**

- (2) **Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.**

The meaning and purpose of this rule are clear. The most basic of legal axioms is that the attorney, whose job it is to uphold the law, must not participate in activity which is against the law. This Disciplinary Rule, in conjunction with the mandate of DR 7-102 (A) (8), sets out the principle that a lawyer may not participate in illegal activity whether in his representation of a client or not. Such a restriction is the major qualification on how far a lawyer may go in his representation of a client, that is, "*zealously within the bounds of the law.*" In representing a client, the lawyer may neither be forced by his client to break the law, nor do so on his own initiative. Refusing to break the law, says DR 7-101 (B) (2), is not inadequate representation; therefore a lawyer may (and under DR 7-102 (A) (8) must) refuse to take part in illegal actions. The bounds of the law are essential restrictions on the zeal which a lawyer must use in representing his client.

As one might expect, California law yields essentially the same rule. The attorney has a duty "to counsel or maintain such actions, proceedings or defenses only as appear to him legal or just . . ."<sup>38</sup> The California rule is an affirmative statement of the same principle laid out in the ABA Code—that a lawyer shall not take steps which are against the law, and his client can't make him do it. In one case,<sup>39</sup> after a client finished giving him the fourth different version of how an auto accident occurred, an attorney was entitled to withdraw from the case. Convinced that he cannot urge a case based on untruthful allegations of his client, a lawyer must decline to present the case. Any other course would be the perpetration of a fraud on the judicial system, which is illegal and therefore unethical.

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<sup>38</sup> CAL. BUS. & PROF. CODE § 6068(c) (West 1962).

<sup>39</sup> Home Indemnity Co. v. Standard Acc. Ins. Co., 167 F.2d 919 (9th Cir. 1948).

Essentially the same opinion appears in the case of *Hinds v. State Bar*.<sup>40</sup> The court there said that if Hinds' allegation were true, and his client intended to defraud her husband by receiving a deed to property from him and then denying that she had any separate property, his duty was to refuse to participate in that transaction. A lawyer may maintain only such actions as appear to him legal. Fraud is not legal.

The imperative that a lawyer not participate in illegal conduct, then, is recognized in essentially the same way by both the ABA Code and California law. The only apparent difference is that the ABA Code explicitly states that a lawyer may refuse to participate in unlawful conduct, "even though there is some support for an argument that the conduct is legal." California implicitly recognizes this enhancement of the rule, but does not come out with it in so many words.

This refinement of the rule against unlawful conduct is important, for it makes practical a principle which would otherwise be unworkable. An attorney cannot be expected to walk a narrow path between conduct in fact unlawful on the one hand, and conduct not unlawful but which he in good faith believed to be unlawful on the other, incurring injury if he falls either way.

Realistically, if an attorney is expected not to do unlawful acts, he must be given the discretion to refuse to do acts which he believes are unlawful, even though some might argue that they are legal. When faced with an alternative he thinks is probably unlawful, the attorney must be able to disregard it without feeling that such a good faith judgment can leave him liable for breach of contract. The lawyer's objectivity in deciding such questions should never be clouded by fear of reprisal for an honest mistake.

**RECOMMENDATION:** This provision should be adopted as it stands by the Board of Governors in the same Rule of Professional Conduct as DR 7-101 (B) (1), above.

First, it completes the provision of California Business and Professions Code section 6068, that a lawyer shall maintain only such actions "as appear to him legal." By adding the explicit statement that a lawyer may refuse to participate in unlawful conduct despite arguments his actions are legal, the attorney is encouraged in his refusal to press claims or use methods which are questionable. This encouragement improves the quality of representation given by California attorneys, since it prohibits "shady" and "sharp" prac-

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<sup>40</sup> *Hinds v. State Bar*, 19 Cal. 2d 87, 119 P.2d 134 (1941).



tices. Improved observance of higher standards of practice is, after all, the goal of all provisions for professional standards. Adoption of this rule will tend to improve observance of and hence raise professional standards regarding the avoidance of unlawful actions.

Second, it will modify and define the rules regarding representation of a client. When an attorney refuses to employ a means of attaining his client's legal objectives, he runs the risk of a suit for breach of contract (and discipline under DR 7-101 (A) (1)) unless he is excused by law from employing such means. Unlawfulness of the act is grounds for such a refusal under California law. Under the Disciplinary Rule, a *belief* that the method is unlawful is sufficient justification for not using it. And so it should be; otherwise, the threat of suit for failure to pursue the client's remedy looms over him each time a lawyer decides whether an act is lawful. Removing this cloud encourages a decision against questionable methods, improving professional conduct.

Finally, the rule lets a client know that his attorney has true discretion in determining whether the course advocated by the client is lawful. The lawyer need do no more than point to the rule, saying, "I think this conduct is unlawful, and I need not do it no matter what you say." Convincing a client that his way is the wrong way, in the absence of such reinforcement, may require extensive legal explanations that he may not understand anyway. The client's confidence in the attorney's judgment as to methods to be used is increased by the knowledge that the law trusts his lawyer's judgment as to the lawfulness of the act.

Good faith must be involved in every such judgment. Otherwise, the lawyer may arbitrarily toss aside any proposal as "unlawful," justifying his decision with "because I think so." Interpreted properly, this Disciplinary Rule can be of great value in defining and limiting the attorney's duty to represent his client, by keeping it within the bounds of the law.

#### **DR 7-102 Representing a Client Within the Bounds of the Law.**

**(A) In his representation of a client, a lawyer shall not:**

- (1) File a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of his client when he knows or it is obvious that such action would serve merely to harass or maliciously injure another.**

California law presently imposes a duty upon an attorney to "counsel or maintain such actions, proceedings or defenses only as

appear to him legal or just, . . . ."<sup>41</sup> The attorney also has the duty "to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice [of his cause]."<sup>42</sup> The California Supreme Court applied this latter section to the conduct of an attorney in the case of *In re Sadicoff*.<sup>43</sup>

Sadicoff and others appeared for the plaintiff in a breach of contract action. They prepared an affidavit charging a well-known actress with allegedly immoral and perhaps fictitious matters which were prejudicial to her reputation and character. The trial court ordered the affidavit sealed, but Sadicoff withheld it from filing for five days in order to force a settlement or otherwise cause harm by threat of publication of the statements. The contents of the affidavit were communicated to a newsman during that time. Citing the statutory duty of attorneys to refrain from advancing facts prejudicial to the reputation of a party, and finding that Sadicoff's cause did not require the delay, the supreme court ordered that he be suspended from the practice of law for six months. The court recognized by this decision that California prohibits action on behalf of a client which serves merely to harass or injure another. The ABA Code's Disciplinary Rule prohibits similar conduct on the part of an attorney.

The California State Bar Board of Governors has supplemented the statutory duties of an attorney, to maintain only legal or just actions and to refrain from prejudicing the character of a witness or party, with a Rule of Professional Conduct which requires that:

A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another; nor shall he take or prosecute an appeal merely for delay, or for any other reason, except in good faith.<sup>44</sup>

This California Rule prohibits even the acceptance of employment in a case which is designed to harass or delay, and the state supreme court has pointed out that disciplinary action would be proper against an attorney who takes an appeal which has no proper appellate objective.<sup>45</sup>

**RECOMMENDATION:** No member of the legal profession should be allowed to use legal procedures to harass or injure another. This is the substance of Disciplinary Rule 7-102 (A) (1). By judicial

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<sup>41</sup> CAL. BUS. & PROF. CODE § 6068(c) (West 1962).

<sup>42</sup> *Id.* § 6068(f).

<sup>43</sup> 208 Cal. 555, 282 P. 952 (1929).

<sup>44</sup> CAL. BUS. & PROF. CODE § 6076 (Rule 13) (West 1962).

<sup>45</sup> *People v. Mattson*, 51 Cal. 2d 777, 336 P.2d 937 (1959).

interpretation of the statutory duties of an attorney as in *Sadico*, and by application of the Rules of Professional Conduct of the California State Bar, California law is adequately equipped to achieve the same end. Both the ABA Rule and California law protect the innocent attorney who might prejudice the reputation of a party or witness when it is required by his client's legitimate interests. Under the ABA Disciplinary Rule, an attorney is punished when he knows or it is obvious that legal action will serve *merely* to harass or injure another. In California, *wilful* conduct in contravention of a statutory duty or a Rule of Conduct is required.<sup>46</sup>

Because DR 7-102 (A) (1) is consistent with present California law, there is no reason to enact the section as an amendment to the duties of an attorney or to adopt it as a Rule of Professional Conduct. The Rule ought merely to be commended to the members of the State Bar under Rule 1 of the Rules of Professional Conduct.

**DR 7-102 (A) [In his representation of a client, a lawyer shall not:]**

- (2) **Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such a claim or defense if it can be supported by a good faith argument for an extension, modification, or reversal of existing law.**

Some indication that the Disciplinary Rule in this area is already judicial law in California can be found in such a case as *Sullivan v. State Bar*,<sup>47</sup> construing the code section requiring an attorney to "counsel or maintain such actions . . . only as appear to him legal or just . . ."<sup>48</sup> In a rather complicated factual situation; Sullivan had procured, through an execution sale, certain real property by a deed in his nephew's name. Although the sheriff's sale in satisfaction of his client's lien had been recalled, Sullivan maintained before the Disciplinary Board of the State Bar that his client's lien may have been transferred to the nephew and that a subsequent suit for foreclosure of the lien was then entirely proper. The Board ruled that the foreclosure suit was instituted merely to harass and delay one of the parties who had had the sale set aside. The state supreme court reversed, holding that there was no evidence that the attorney did not honestly believe that his actions had a legal basis or that he maintained the action in bad faith. No evidence showed that his motive in transferring the property to his nephew

<sup>46</sup> CAL. BUS. & PROF. CODE §§ 6077, 6103 (West 1962).

<sup>47</sup> 28 Cal. 2d 488, 170 P.2d 888 (1946).

<sup>48</sup> CAL. BUS. & PROF. CODE § 6068(c) (West 1962).

was unethical, and neither ignorance nor incompetence, without more, is grounds for discipline.<sup>49</sup> In effect, and expressed in terms of the Disciplinary Rule, the court ruled that Sullivan's prosecution of the foreclosure suit was supported by a good faith argument for extension of existing law to his situation. On the other hand, had the evidence shown a lack of good faith on Sullivan's part, as the State Bar Disciplinary Board alleged, the court would have affirmed the recommended disciplinary action.

**RECOMMENDATION:** Both the California courts and the new ABA Disciplinary Rule require that an attorney *knowingly* take action unfounded in existing law or unsupported by a good faith argument before the attorney is subject to discipline. The *Sullivan* case indicates that the California requirement that an action "appear" just or legal to an attorney is equivalent to the ABA provision that an action be supported by a good faith argument before an attorney can defend himself against a charge of reprehensible conduct. Since the two rules are compatible, the ABA Rule does not require enactment as a code section or a Rule of Conduct but should be commended to the members of the State Bar as are the ABA Canons of Ethics.

**DR 7-102 (A)** [In his representation of a client, a lawyer shall not:]

- (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
- (4) Knowingly use perjured testimony or false evidence.
- (5) Knowingly make a false statement of law or fact.
- (6) Participate in the creation or preservation of false evidence when he knows or it is obvious that the evidence is false.

These four subdivisions of the Rule, when taken together, prohibit an attorney from using the privileges of his office to perpetrate a fraud. Any fraudulent conduct on his part is likely to fall within any one or more of the four subdivisions. For example, in *McMahon v. State Bar*,<sup>50</sup> the attorney filed a petition for special letters of administration alleging on information and belief that the deceased had died intestate. The supreme court, however, held that the evidence showed this allegation to be false, and the court ruled that McMahon had sufficient knowledge of the existence of a will to

<sup>49</sup> *Sullivan v. State Bar*, 28 Cal. 2d 488, 495, 170 P.2d 888, 893 (1946).

<sup>50</sup> 39 Cal. 2d 367, 246 P.2d 931 (1952).

justify his suspension from practice for sixty days. Under California law, the court ruled that he had violated his oath,<sup>51</sup> used means inconsistent with the truth<sup>52</sup> and engaged in conduct involving moral turpitude.<sup>53</sup>

Expressed in terms of the Disciplinary Rule of the ABA Code, McMahon knowingly failed to disclose the existence of a will, used and participated in the creation of false evidence and by such participation, made a false statement of fact. The attorney, by virtue of his position, owes a fiduciary duty to the courts; and the ABA Disciplinary Rule does nothing more than prohibit an attorney from perpetrating a fraud on the court by act or omission. California accomplishes the same end by the simple formulation that attorneys shall use means consistent with the truth in maintaining the causes confided to them.

**RECOMMENDATION:** While the ABA Disciplinary Rule enumerates four prohibitions, any fraudulent conduct on the part of attorneys is likely to fall within all four categories. The California rules applied in *McMahon* demonstrate that California is amply equipped to handle a fraud perpetrated by any attorney. To enact the Disciplinary Rule in this area as a new code section or to enact it as a Rule of Professional Conduct would be to needlessly repeat what is already covered by California law. Since the Rule is stated in a different and perhaps more explicit fashion than California law on this subject, the Rule should be commended to the members of the State Bar under the Rules of Professional Conduct as an advisory standard.

**DR 7-102 (A) [In his representation of a client, a lawyer shall not:]**

**(7) Counsel or assist his client in conduct the lawyer knows to be illegal or fraudulent.**

In California, a lawyer may not "advise the violation of any law [though he may advise in good faith that a law is invalid]."<sup>54</sup> Advising the violation of law subjects an attorney to disciplinary action. Application of this rule resulted in three months' suspension for an attorney who advised that the name of a bank be erased from the face of a will even though the court was not misled thereby.<sup>55</sup> Likewise, disciplinary action was affirmed against another attorney

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<sup>51</sup> CAL. BUS. & PROF. CODE § 6067 (West 1962).

<sup>52</sup> *Id.* § 6068(d).

<sup>53</sup> *Id.* § 6106.

<sup>54</sup> *Id.* § 6076 (Rule 11).

<sup>55</sup> Bar Ass'n v. De Vall, 59 Cal. App. 230, 210 P. 279 (1922).

who advised his client to testify falsely regarding a robbery; the court ruled that no attorney could counsel a client to take illegal action.<sup>56</sup>

**RECOMMENDATION:** Since this subdivision of the Disciplinary Rule is so straightforward and has its counterpart in existing California law, there is no need for official action by way of adoption. The Rule can be commended with the rest of the ABA provisions under Rule 1 of the Rules of Professional Conduct.

**DR 7-102 (A)** [In his representation of a client, a lawyer shall not:]

**(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.**

This section is a general prohibition designed to include reprehensible conduct not clearly defined by the other sections. California uses the violation of the attorney's oath<sup>57</sup> and the sections dealing with the commission of a crime<sup>58</sup> or act involving mortal turpitude<sup>59</sup> to accomplish the same end. Ordinarily ignorance of the law is not grounds for discipline; but conduct amounting to gross negligence or habitual neglect of clients' affairs will be punished in California as a breach of the attorney's oath to discharge his duties to the best of his knowledge and ability.<sup>60</sup> In the ABA Code, the Disciplinary Rules covering competence of an attorney are included in Canon 6.<sup>61</sup>

In California, "conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension."<sup>62</sup> Furthermore:

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.<sup>63</sup>

**RECOMMENDATION:** Since in California commission of any act involving moral turpitude, dishonesty or corruption is grounds for severe disciplinary action, the proposed ABA Rule fails to add any significant factor. If California should adopt any of the other Rules, the already existing provisions, which provide that a breach of enacted rules is cause for disciplinary action, would govern, not sub-

<sup>56</sup> *In re Jones*, 208 Cal. 240, 280 P. 964 (1929).

<sup>57</sup> CAL. BUS. & PROF. CODE § 6103 (West 1962).

<sup>58</sup> *Id.* § 6101.

<sup>59</sup> *Id.* § 6106.

<sup>60</sup> *Id.* § 6067.

<sup>61</sup> ABA CODE, DR 6-101, at 74.

<sup>62</sup> CAL. BUS. & PROF. CODE § 6101 (West 1962).

<sup>63</sup> *Id.* § 6106.

division (8)'s prohibition of "conduct contrary to a Disciplinary Rule." As an integral part of the Code itself, a provision such as this would be necessary, but in terms of California's potential enactment or even commendation of the Code, it is superfluous.

**DR 7-102 (B) A lawyer who receives information clearly establishing that:**

- (1) **His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.**

According to this rule, an attorney must offer his client an opportunity to rectify any fraud before revealing it to the defrauded party or tribunal. The Supreme Court of California took a slightly different view in *Hinds v. State Bar*.<sup>64</sup> In a divorce action, the attorney's client claimed in an affidavit that she had no separate property and had made no arrangements for attorney's fees. In fact, she had made arrangements for fees and she allegedly had separate property. When the State Bar disciplinary board later held a hearing on the alteration of a deed involved in the property settlement, the attorney claimed that his actions were taken to protect the defrauded husband. The board found the attorney guilty of misconduct. On review, the supreme court held in rather broad language that if the attorney had in good faith been convinced that the affidavit was fraudulent, he had a duty to reveal it to the court. Nowhere does the court mention a duty to call upon his client to rectify the fraud before going to the court.

**RECOMMENDATION:** Since the attorney in *Hinds* was not disciplined for his failure to reveal the fraud (but rather for altering the deed), the dictum in that case should be disregarded in favor of the ABA Disciplinary Rule. The Rule encompasses the probability that the attorney's knowledge of a fraud would come from a confidential communication with his client. By giving the client the opportunity to rectify the fraud before revealing it, the Rule allows an attorney to fulfill his fiduciary obligation. The statutory duties of an attorney presently require him "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."<sup>65</sup> The Legislature could amend that duty to include the ABA Disciplinary Rule. If the Legislature does not act, the State

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<sup>64</sup> 19 Cal. 2d 87, 119 P.2d 134 (1941).

<sup>65</sup> CAL. BUS. & PROF. CODE § 6068(e) (West 1962).

Bar Board of Governors can adopt the provision as a Rule of Professional Conduct.

The Rule actually provides important protection for the attorney. If his client has perpetrated a fraud on the court, and the attorney knows this by virtue of a privileged communication, he can always request that he be allowed to withdraw from the case. If a judge should demand to know the reason for the request, the attorney is faced with a dilemma. A passing remark by the Court in the *Hinds* case seems to indicate that he should reveal the fraud. Yet he is under a statutory duty to maintain the confidences and secrets of a client. Adoption of the ABA Disciplinary Rule would establish an explicit procedure for the attorney to follow. He would tell the client to rectify the fraud; if the client refused, he would have authorization under this rule to point out to the court that it had been defrauded by his client.

**DR 7-102 (B) [A lawyer who receives information clearly establishing that:]**

- (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.**

No California cases on this point have been found, but the rule is logically inferrable from the *Hinds* decision.<sup>66</sup> If the court could find a duty on the part of the attorney to reveal his *client's* fraud upon the tribunal, in spite of the attorney-client privilege, then it could easily find a duty to reveal the fraud of some third party to whom the attorney owes no fiduciary duty. In a highly complicated and technical patent decision the United States Supreme Court reached the same result.<sup>67</sup>

**RECOMMENDATION:** This Rule should be adopted by the State Bar as a Rule of Professional Conduct along with DR 7-102 (B) (1). Regarding the fraud of third parties, California has no rule other than its moral turpitude provision which need not be stretched to cover a duty of an attorney to reveal a fraud to a tribunal. The "moral" element is not clear, for example, in the case of an attorney who is merely minding his own business. And yet a judicial body ought not to be defrauded. Perhaps the best solution is to amend the rule, adding that the fraud should be "in relation to matters about which the lawyer is appearing as counsel." A limiting clause such as this would carry out the intent of the provision and yet

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<sup>66</sup> 19 Cal. 2d 87, 119 P.2d 134 (1941).

<sup>67</sup> Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945).



reduce the class to which its broad language might apply. As amended, the Rule forms a suitable counterpart to the previous rule about the fraudulent conduct of clients and should be adopted by the State Bar Board of Governors.

**DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.**

- (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

This section is foreign to California law regulating the legal profession. In civil practice, a public prosecutor and other "quasi-judicial" officers are absolutely immune from suit for malicious prosecution, a rule set down in *Pearson v. Reed*.<sup>68</sup> The appellate court found that although the evidence could support the jury's verdict that the city prosecutor maliciously maintained a petty theft action without probable cause, he was not civilly liable in damages to the defendant. In another case, the court of appeal extended the immunity to a prosecutor who *initiated* a suit without probable cause.<sup>69</sup> Other authorities mention no alternative relief against such official action, other than criminal prosecution of the attorney or ouster from office.<sup>70</sup> While the strong public policy protecting the government attorney from suit for malicious prosecution every time he fails to obtain a conviction may be necessary, the legal profession as such should have the power to discipline an attorney who prosecutes a case when he knows, or it is obvious, that the charges are not supported by probable cause. The prosecution of any case is solely within the discretion of the district attorney.<sup>71</sup> Besides, the rule would not require the district attorney to investigate the probable cause supporting charges which he does not *know* to be without merit.

**RECOMMENDATION:** In principle, the Disciplinary Rule is designed to give assurance to the public that the broad discretionary powers of the public prosecutor will be exercised without abuse. To this extent the Rule would be valuable as a California Bar Rule of Professional Conduct. Disciplinary Rules which prohibit a *private* attorney from using the legal process merely to harass or injure

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<sup>68</sup> 6 Cal. App. 2d 277, 44 P.2d 592 (1935).

<sup>69</sup> *Norton v. Hoffmann*, 34 Cal. App. 2d 189, 93 P.2d 250 (1939).

<sup>70</sup> *See, e.g., Prentice v. Bertken*, 50 Cal. App. 2d 344, 123 P.2d 96 (1942); *White v. Brinkman*, 23 Cal. App. 2d 307, 73 P.2d 254 (1937).

<sup>71</sup> *Taliaferro v. San Pablo*, 187 Cal. App. 2d 153, 9 Cal. Rptr. 445 (1960).

another have already been discussed.<sup>72</sup> The legal profession has just as large a stake in seeing that legal processes are not abused in the name of the *public*. But if every defendant who was not convicted could have disciplinary proceedings instituted against the prosecutor in his case, then the public policy preventing civil suits would be thwarted. If this Disciplinary Rule is made a California Rule of Professional Conduct, the State Bar disciplinary boards would be charged with the serious duty of protecting prosecutors from harassment. This protection would be afforded through exhaustive preliminary investigations.

**DR 7-103 (B)** The public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

This provision of DR 7-103 is also without precedent in California law. The defense in a criminal action presently has the right of discovery, but there is no duty on the part of the prosecutor to disclose evidence not requested by defense counsel. The courts have held that the state has no interest in keeping beneficial evidence from the defense.<sup>73</sup> Nonetheless, the defense must make the motion for discovery, both specifying the matter to be discovered and stating a plausible justification.<sup>74</sup> If the defense does not request discovery, the prosecution need not volunteer the evidence as would be required by this ABA Disciplinary Rule.

Ordinarily, discovery cannot be used to acquire investigatory evidence unless the defendant can show some better cause for inspection than a mere desire to benefit from the information gathered by the people.<sup>75</sup> Pretrial discovery in criminal cases is based on the *rules* of discovery, not on Constitutional due process.<sup>76</sup> This last principle seems inconsistent with the proposition that a prosecuting attorney's duty is to seek justice, not convictions—a proposition set down in *People v. Hail*.<sup>77</sup> The court of appeal, in admonishing the prosecutor for an improper remark to the jury, said the public

<sup>72</sup> See text accompanying notes 41-46, *supra*.

<sup>73</sup> *People v. Riser*, 47 Cal. 2d 566, 305 P.2d 1 (1956); *Norton v. Superior Ct.*, 173 Cal. App. 2d 133, 343 P.2d 139 (1959).

<sup>74</sup> *Ballard v. Superior Ct.*, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

<sup>75</sup> *People v. Cooper*, 53 Cal. 2d 755, 349 P.2d 964, 3 Cal. Rptr. 148 (1960).

<sup>76</sup> *Jones v. Superior Ct.*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

<sup>77</sup> 25 Cal. App. 342, 143 P. 803 (1914).

prosecutor represents the people of whom the accused is a member. He also represents the law which condemns rather than commands conviction for an offense upon insufficient evidence. Yet despite these grand principles, the courts consistently hold that *discovery* is not a matter of Constitutional right. To understand this is to understand that the whole theory of the adversary system rejects the notion that one side may sit back while the prosecution gathers all the information in relation to a case.

Nonetheless, the American Bar Association's Code Committee found that the prosecutor's duty to seek justice was paramount to the procedures of discovery. That duty to seek justice exists because of the following: The discretionary power of the prosecutor as representative of the sovereign, the role of the prosecutor as advocate of the public interest and the presumed innocence of the accused.<sup>78</sup>

**RECOMMENDATION:** This Disciplinary Rule does not require that a prosecuting attorney reveal his entire case to the defense, or even that he reveal all his information. It requires only that the prosecutor reveal to the defense *known* evidence which properly belongs to the defense—that which tends to negate guilt, mitigate the degree or reduce punishment. Considering the broad discretionary powers of the prosecuting attorney, and his public duty to seek justice, this Disciplinary Rule should be adopted as a California Rule of Professional Conduct. As the legal profession experiments with such a rule, it will become aware of what burdens are imposed upon public prosecutors and will be able to evaluate measures that may be applied in case of breach of the Rule. The essence of this Rule, and its counterpart DR 7-103 (A), should be taken up for extensive debate among members of the State Bar in order to gauge the possible effects. Members of the Bar must consider that thorough investigation of criminal matters might well be discouraged by such a rule. Prosecutors may hesitate to try cases which ought to be tried for fear of disciplinary action if their discretion is adjudged to be in error.

The success of such a rule depends on the wisdom displayed in its enforcement. Only the clearest cases of abuse of public office ought to be tried. If all doubts are resolved in favor of the prosecutor, then the Rule can achieve the purpose for which it was designed—professional integrity, in the public as well as private sphere.

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<sup>78</sup> ABA CODE, EC 7-13, at 79.

**DR 7-104 Communicating with One of Adverse Interest.**

(A) During the course of his representation of a client, a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

This rule is important because our advocate system "functions best when persons in need of legal advice or assistance are represented by their own counsel."<sup>79</sup> The nature of advocacy is having counsel for each party representing only the interests of that party; but this must be done in such a manner that the efforts of the advocate for an adverse party are not undone. If a lawyer were permitted to communicate with an adverse party without the permission of his counsel, he would be tempted to undercut the efforts of that counsel. This would weaken the structure of the advocate system.

The layman seeks a lawyer to represent him because he is unable to cope with his own legal problems. The lawyer, both as advisor and as advocate, protects the legal interests of his client, for an attorney is the only person able to do so. Therefore it is counsel for the adverse party, and not the party himself with whom all matters should usually be discussed.

The whole principle of legal *representation* is based on the concept of a lawyer *representing* his client. The legal issues, beyond the ability of the layman to handle competently, are resolved by having counsel for each side exert their best efforts and utilize their most effective legal skills. When a lawyer communicates directly with an adverse party in the absence of the party's attorney, he denies to the adverse party the right of every person to have his position protected by a lawyer.

California also recognizes the unfairness of direct communication between a lawyer and an adverse party by making this requirement a part of its Rules of Professional Conduct.

A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.<sup>80</sup>

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<sup>79</sup> ABA CODE, EC 7-18, at 81.

<sup>80</sup> CAL. BUS. & PROF. CODE § 6076 (Rule 12) (West 1962).

This rule finds application in many cases. For instance, a young Dutch woman, while visiting her family in California, accompanied her sister to a lumber yard to procure a load of plywood. Placing the slabs of wood on the luggage rack atop her mini-bus, the American sister discovered to her chagrin that she possessed no lashings with which to secure the load. Her obliging sibling clambered to the roof of the vehicle and lay flat upon the timber, clutching the luggage rack. Proceeding homeward immersed in strains of the car radio, squeals of her children and barking of her dog, the driver had no inkling that mishap was imminent until she heard a loud thud on the road behind her, as both the girl and the plywood slid from their perch. Mitten, the attorney for the injured Dutch sister, obtained a judgment against the American sister, who was represented by her insurance company's lawyer. The judgment exceeded the limits of defendant's insurance policy. While a motion for retrial was pending, Mitten told defendant that the next verdict would probably be substantially higher, and persuaded her to sign a declaration, saying in part that she had been negligent, that she had later attempted the stunt herself and found that she had to "hang on for dear life," that she did not desire a new trial and that she was inadequately represented at the original trial. For communicating with this adverse party, the State Bar sought to discipline Mitten.

In *Mitten v. State Bar*,<sup>81</sup> the court found the attorney's acts were grounds for discipline under Rule 12 of the Rules of Professional Conduct (communicating with adverse parties), and upheld a three months' suspension. The lawyer retained by the insurance company, as representative of the defendant's sister, was unable to carry out his obligations as her attorney because of the unethical acts of Mitten.

Both the California Rule of Professional Conduct and the ABA Code have as their object the strengthening of the legal process by prohibiting one lawyer from interfering with the proper performance of adverse counsel's duties. Such conduct is outside the bounds of the law, and therefore subject to discipline.

**RECOMMENDATION:** Since California already has a rule nearly identical to DR 7-104 (A) (1), it need not adopt the Disciplinary Rule. A general commendation of the ABA Code is sufficient.

Both the ABA's Disciplinary Rule and Rule 12 of California's Rules of Professional Conduct express the same thought in very similar terms, that is, an attorney may not communicate with an

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<sup>81</sup> 71 A.C. 545, 455 P.2d 753, 78 Cal. Rptr. 649 (1969).

adverse party who is represented by counsel, on the subject of the controversy, without either having adverse counsel present or getting his permission to do so. In this respect both rules are in complete agreement.

The only possible distinction between the ABA's Disciplinary Rule and the California Rule of Professional Conduct is that the ABA Rule includes the provision that the attorney shall not cause another to communicate with the adverse party under circumstances in which he could not himself do so. Although this provision makes the thought logically complete, it really adds nothing to the legal effect. It is a basic law of agency that a principal cannot do through an agent what the principal could not legitimately do for himself. Without question any California lawyer who sent a henchman to interrogate an adverse party in the absence of adverse counsel would be just as liable as if he had done it himself.

Since California long ago recognized and applied this rule against an attorney's communication with an adverse party in the absence and without the permission of his counsel, DR 7-104 (A) (1) need not be adopted in this state. It should be commended in a general endorsement of the ABA Code.

**DR 7-104 (A) [During the course of his representation of a client, a lawyer shall not:]**

- (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being in conflict with the interests of his client.

The law does not require that a party to a dispute retain counsel. "If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance a lawyer shall not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer."<sup>82</sup> The lawyer here is in a delicate position.

Special rules apply when a layman assumes the role of his own advocate. The most obvious conflict of interest would exist where an attorney representing one party tried to advise an adverse party, for one attorney cannot serve two clients. Since the layman does not possess the skills of an attorney, he is not able to deal with an

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<sup>82</sup> ABA CODE, EC 7-18, at 81.

attorney on equal terms. Yet the advocate system assumes that counsel on both sides possess basic legal skills. Having such an unfair advantage, the lawyer cannot be permitted to deal with the adverse party as an equal, yet he cannot give him advice as a client either, if the lawyer is to maintain fidelity to the interests he represents. Therefore, the lawyer must have as little to do with the layman as possible—he really can say little of value to the layman who chooses to represent himself, except that the layman ought to seek counsel.

In practical terms, of course, the lawyer must have some dealings with this layman. This is the only way the case can be settled. But these dealings must not be in terms of legal advice, but more in terms of offers for settlement which the layman must evaluate and decide upon as best he can. The lawyer cannot, in good faith to his client or the profession, do much more for the adverse party.

A good example of how such difficulties may arise appears in *Silver v. Shemanski*.<sup>83</sup> An attorney representing the executor of an estate sought to work out a compromise with decedent's widow, who was not represented by counsel. The attorney acted as mediator while the negotiations were in progress, but when the talks broke down he advised the widow to obtain her own lawyer. She failed to do so, and lost the case. On appeal the widow claimed that "her attorney" (the compromiser) had failed properly to represent her. The court ruled that at all times—even while attempting a settlement—the attorney was acting in behalf of the executor, and the wife had no claim to his services. The attorney apparently did an admirable job of handling this delicate situation.

An example of the abuses and injustices inherent in such a situation occurred in a case considered by the California Supreme Court in 1950.<sup>84</sup> Turner had acted as attorney for the plaintiff at the trial level, but the case had been taken over by another lawyer on appeal. While the appeal was pending, Turner contacted both parties and worked out a compromise, without the knowledge or consent of counsel for either party. However laudable his motives, the court held that Turner should have remained aloof from the controversy, and should not have communicated with either party or given legal advice to parties who were not his clients.

Although California case law seems to recognize the rule that a lawyer shall not advise an adverse party who is not represented by counsel, no statutory provision exists comparable to DR 7-104

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<sup>83</sup> 89 Cal. App. 2d 520, 201 P.2d 418 (1949).

<sup>84</sup> *Turner v. State Bar*, 36 Cal. 2d 155, 222 P.2d 857 (1950).

(A) (2). Yet this rule is essential to the protection of a layman's rights when he chooses to represent himself. As long as the layman may act as his own attorney, the legal system must take care to protect his rights; otherwise the ideal of equal rights for all is hollow. However imprudent it may be not to secure an attorney, the choice of whether to retain counsel is left to the layman. His rights nevertheless should be protected against the unfair advantage which some attorneys might take of the layman's vulnerable position.

**RECOMMENDATION:** DR 7-104 (A) (2) should be adopted by the Board of Governors of the State Bar as part of Rule 12 of the Rules of Professional Conduct.

First, the layman needs this protection. His legal rights do not disappear as soon as he decides to act as his own counsel, although he is probably hurting his chances of securing them by such a choice. The legal arena is competitive and demanding beyond the skills of the layman, but he has a right to be there. Since the judicial system exists to administer justice, rather than to provide an arena for competition among attorneys, the layman must be given a special break. This break consists in his not having to fight out a settlement on a one-to-one basis with the attorney outside of court. The rules of advocacy do not strictly apply to the layman; the court does not hold the layman to the strict standards it sets for attorneys; and the attorneys must make special provisions, too, for dealing with this layman who represents himself.

Second, the lawyer owes a duty to his client not to advise an adverse party. Although most lawyers are probably capable of considering most situations objectively and giving the arguments for each side, when an attorney assumes the representation of a client he cannot act also as advisor to the adverse party. Each situation is different, but probably the furthest extent to which a lawyer may go in dealing with a layman as adverse party is to offer terms of settlement to him. Anything more than this would be advising one whose interests are in direct conflict with those of a client. This is a breach of the lawyer's fiduciary duty.

Finally, the lawyer himself should have the backing of such a statute such as DR 7-104 (A) (2) to make clear to any adverse party who asks for advice that he cannot give it. Some laymen, not understanding the advocate system, look to the attorney as an impartial advisor, capable of dispensing dissertations on the law whenever asked to do so. To protect his position as advocate, the lawyer must decline to give any such notice to the adverse party. His position is made that much stronger if he can decline by saying



that there is a law against his giving such advice. Sometimes this is the only type of explanation which a layman can understand.

#### **DR 7-105 Threatening Criminal Prosecution:**

- (A) A lawyer shall not present, participate in presenting or threaten to present criminal proceedings or threaten to present criminal charges solely to obtain an advantage in a civil matter.**

Civil actions decide disputes as to whether a personal wrong has been done to the plaintiff. Criminal actions involve the determination of whether punishment is merited by the defendant as a deterrent to protect society. Any action at law should be decided through the legal processes of fact-gathering and impartial decision (although some types of inducement and compromise, without coercion, are proper tools for arriving at just decisions).

Threat of criminal prosecution is not a proper tool for winning a civil suit. Such abuse of process is not an inducement, but blackmail; it does not bring about a settlement, but only submission. The threat of criminal prosecution is an abuse of both the criminal and civil processes and is impermissible for anyone—most especially an officer of the court.

The lawyer who is in a position to commence or threaten criminal actions is in a position of public trust. Properly handled, the system of criminal law is society's bulwark against disorder and violence. But if misused, the process can become a means of intimidation for personal gain. No system of criminal justice can permit itself to be used for the personal ends of its administrators.

Likewise the civil system sets up a forum and rules of law to prevent the powerful from imposing their wills on others. Since the threat of criminal prosecution is a powerful weapon, its application to civil suits places the threatened party in a position where he must either give up his legal rights or submit to criminal prosecution and possible imprisonment. This intimidation is not rule of law, but rule of force; it must be resisted and repudiated by the entire legal profession.

Certainly the institution of criminal proceedings is discretionary with the district attorney, and his integrity should not be questioned unless clear abuse presents itself. Use of the criminal process *solely* for gaining advantage in a civil suit would be such an abuse. Any attorney who files a complaint as a means of obtaining advantage in a civil action should be severely punished, whether he be a government lawyer or not. The prohibition imposed by this Disciplinary Rule applies to all members of the legal profession.

California has no statute comparable to DR 7-105(A), although there are many provisions under which such misconduct can be disciplined:

It is the duty of an attorney:

. . . .

(c) To counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just . . .

(d) To employ for the purpose of maintaining the cases confided to him such means only as are consistent with truth . . .

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.<sup>85</sup>

The commission of any act involving moral turpitude, dishonesty or corruption . . . whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.<sup>86</sup>

Although these statutes cover the field, they do it more by patchwork than by deliberate design. Commencing a criminal action solely to gain advantage in a civil suit would be a violation of all of them. Cases involving prosecution for personal motives are usually disciplined as "an act involving moral turpitude," although the other provisions above quoted would probably do just as well. The reason California has never adopted a statute comparable to DR 7-105 is probably that it is so clearly an act of moral turpitude that no special prohibition of such abuse of process was thought necessary.

**RECOMMENDATION:** California should commend DR 7-105(A) but need not adopt it as a statutory provision.

First, there is no question that the principle set out in this Disciplinary Rule is important. The evils and injustice which would result from threatening prosecution on criminal charges solely to gain advantage in a civil suit are manifest. This abuse of process would make a mockery of both the civil and criminal processes, destroying rule of law and substituting for it the reign of intimidation and threat. Every lawyer must realize this. There is no argument in favor of the propriety, legality or value of permitting such abuse. Anyone who threatens or institutes such criminal proceedings should be subject to immediate and severe discipline.

Second, because this act is, however, so clearly a breach of the lawyer's official duties, it qualifies as a clear case of moral turpitude. California has used the provision for discipline of acts involving

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<sup>85</sup> CAL. BUS. & PROF. CODE § 6068 (West 1962).

<sup>86</sup> *Id.* § 6106.

moral turpitude to punish those attorneys who have begun criminal prosecutions out of personal motives. This has worked well; so no need exists to adopt the Disciplinary Rule as a separate provision. DR 7-105(A) speaks to the lawyers, telling them something they already know; it provides discipline for something already covered in California. Hence, adoption of the Disciplinary Rule as a statutory provision would serve no worthwhile purpose.

Finally, because DR 7-105(A) is in agreement with California law, it should be commended to California attorneys as a part of the general commendation of the ABA Code. This commendation will give the Disciplinary Rule no legal force, but legal force is not needed. Commending DR 7-105(A) will serve as a reminder—if any lawyer needs a reminder—that instituting or threatening criminal proceedings for gain in a civil matter is reprehensible and will not be tolerated by the profession.

#### **DR 7-106 Trial Conduct.**

- (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such ruling.**

Courts usually confront this rule in contempt proceedings, making reference to the attorney's statutory duty to maintain the respect due courts and judicial officers.<sup>87</sup> In *Gallagher v. Municipal Court*,<sup>88</sup> the California Supreme Court reversed a contempt order against an attorney who asserted in open court that his client's right to counsel included the right to cross-examine witnesses in a judicial investigation of allegations against his client. Those allegations were that during recess of another trial someone had observed Gallagher's client conversing with one of the jurors. The presiding judge ordered an investigation during which Gallagher was repeatedly denied the opportunity to cross-examine the jurors who were interrogated. At the close of the questioning, the judge ordered that Gallagher's client be taken into custody and sent to the district attorney's office. When counsel inquired if his client was under arrest and on what charge, the judge found him in contempt. The supreme court, in Gallagher's appeal from the order, held that the judge had acted properly in denying cross-examination, but that the attorney could reasonably have believed that his client's rights were in jeopardy. He was thus privileged to urge his point upon the court without being held in contempt. When his client was ordered to the district

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<sup>87</sup> *Id.* § 6068(b).

<sup>88</sup> 31 Cal. 2d 784, 192 P.2d 905 (1948).

attorney's office, he had a *duty* to inquire whether she was under arrest, and his inquiry was not a violation of the judge's previous order to stay out of the proceedings. In terms of the Disciplinary Rule, the court held that the attorney was taking appropriate steps in good faith to contest the rulings of the judge.

**RECOMMENDATION:** This Disciplinary Rule should be commended to the members of the State Bar as an explicit formulation of the respect due courts and judicial officers. But the Rule does not add anything to the general rule that attorneys should be respectful. The State Bar may apply that rule should disciplinary action against an attorney become necessary. Members of the legal profession know that they can test the validity of a judge's rulings by proper procedures. Lawyers also know that they face contempt proceedings for any blatant disregard of a judge's ruling. Any further addition to California's substantive law in this matter is unnecessary.

**DR 7-106 (B)** In presenting a matter to a tribunal, a lawyer shall disclose:

- (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

The Supreme Court of California decided in *Shaeffer v. State Bar*,<sup>89</sup> that unless an attorney evidenced an intent to mislead a judge, he was not subject to disciplinary action when he failed to disclose a prior case in which he appeared as counsel and in which the holding was adverse to his position in a subsequent case. The supreme court held that there was no evidence of the attorney's intent to mislead, and opposing counsel *did*, after all, cite the adverse authority. The court seemed to indicate that in all fairness Shaeffer, intimately familiar with the case in question, should have revealed the case.<sup>90</sup> Nevertheless, he could rely on opposing counsel to bring it up as long as he did not intend to mislead the trial court. It did not matter that Shaeffer intended to distinguish the case.

California reaches the intended effect of the ABA Disciplinary Rule by construing the statutory duty of an attorney "[N]ever to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."<sup>91</sup> No attorney can seek to mislead the court, even by omission. It is the duty of every attorney, civil or criminal, to deal with the law as it actually is. He can then make

<sup>89</sup> 26 Cal. 2d 739, 160 P.2d 825 (1945).

<sup>90</sup> *Id.* at 748, 160 P.2d at 829.

<sup>91</sup> CAL. BUS. & PROF. CODE § 6068(d) (West 1962).

arguments for change or he can distinguish the authorities which go against him.

**RECOMMENDATION:** Though California's case law seems to prohibit misrepresentation of the law by omission, its Rules of Professional Conduct deal only with active misrepresentation. One Rule prohibits an attorney from intentionally misquoting to the jury any statements, arguments or the contents of documents; it also prohibits the attorney from knowingly citing any overruled decision or a statute which has been repealed or declared unconstitutional.<sup>92</sup> Nor may the attorney intentionally misquote to any judge or judicial officer the language of a book, statute or decision.<sup>93</sup> Disciplinary Rule 7-106 (B) (1), dealing with the failure to disclose authorities known to counsel, is the perfect complement to the California Rule. DR 7-106 (B) (1) should be adopted as an amendment to Rule of Professional Conduct 17.

**DR 7-106 (B)** [In presenting a matter to a tribunal, a lawyer shall disclose:]

- (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

There is little or no authority in California on the subject under consideration. An 1869 decision of the supreme court placed California among those jurisdictions which do not consider the identity of the client a matter of privilege.<sup>94</sup> In that case, the court held that there was no error in admitting an attorney's testimony as to the identity of his client. The court did not hold that any duty arose by virtue of the attorney's status, but rather that he was under the same obligations as other witnesses—to testify truthfully.

In appearances before public officers or bodies, a California Rule of Professional Conduct requires that an attorney disclose that he is indeed an attorney, but he need not reveal the identities of the parties he represents.<sup>95</sup>

**RECOMMENDATION:** In cases where California does not view the identity of a client or employer as privileged, a judge may order an attorney to reveal them. Beyond that, there is no apparent reason to impose the threat of disciplinary action by the State Bar or the state supreme court. Even the mild sanction of private admonish-

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<sup>92</sup> *Id.* § 6076 (Rule 17).

<sup>93</sup> *Id.*

<sup>94</sup> *Satterlee v. Bliss*, 36 Cal. 489 (1869).

<sup>95</sup> CAL. BUS. & PROF. CODE § 6076 (Rule 14) (West 1962).

ment seems improper in a case where an attorney merely fails to voluntarily disclose the identities of his clients and employers. If the ABA Rule were in effect, it should be presumed that the identity of the client is privileged or irrelevant until shown to be otherwise.

**DR 7-106 (C) [In appearing in his professional capacity before a tribunal, a lawyer shall not:]**

- (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.**
- (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.**
- (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.**
- (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of the accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters herein.**
- (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.**
- (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.**
- (7) Intentionally or habitually violate any established rule of procedure or of evidence.**

California has not decided every issue presented by the various subdivisions of DR 7-106 (C). Taken as a whole this section, in the words of the Ethical Considerations which interpret Canon 7, is a compilation of "certain concepts of proper professional conduct which have become rules of law applicable to the adversary adjudicative process."<sup>96</sup> These rules are designed to give the force of law to long standing customs which have been developed to insure the impartial and speedy administration of justice. They are designed to set out the exact framework in which lawyers are free to operate in pursuit of their clients' objectives.

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<sup>96</sup> ABA CODE, EC 7-20, at 81.

The thrust of these rules is again to insure that the lawyer clearly understands that he must use established procedures to attain his clients' objectives. Any allusion or opinion on his part must be foreseeably supported by evidence which he will introduce. Such opinions are properly withheld until the trier of fact has seen and heard that evidence. The prohibited activities within the scope of this section are practices which tend to subvert the adversary system, and as such they tend to degrade the entire legal profession.

**RECOMMENDATION:** The purpose of this section in proscribing activities which tend to undermine the adversary system is effected in California through the broad provisions by which it enforces the attorney's oath, his duty to maintain only those actions which appear to him just, his duty to refrain from offensive personality and his duty to maintain the respect due courts and judicial officers. California disciplinary authorities can also punish any act involving moral turpitude, dishonesty or corruption. With these provisions, California is able to enforce the long-standing customs of practice which the ABA Disciplinary Rule is designed to effect. Nevertheless, the State Bar should adopt this section of the Code because it provides a clear expression of the expected trial conduct of the responsible professional. The legal process can protect the rights of all parties only if all officers of the court are determined to observe the formalities of evidence and procedure.

#### **DR 7-107 Trial Publicity.<sup>97</sup>**

DR 7-107 sets out a detailed list of disciplinary provisions prescribing those matters which a lawyer may disclose and those he may not disclose at various stages of the trial, when there is a reasonable possibility that such information will be disseminated through the public communications media. These provisions are so detailed and extensive that space will not even permit them to be printed here. The importance and sensitivity of the area of trial publicity are so great that it cannot be adequately treated in this Comment.

Without question a major problem exists where any occurrence—especially a spectacular trial—may be instantaneously transmitted, amplified, received and interpreted by the public without reference to the surroundings (and therefore in a sense the truth) of the report. This problem is the responsibility not only of the profession, but of the government authorities, the writers and broadcasters, and every person who is a potential juror. The magnitude of the difficulty and the inadequacy of present solutions—even within the profession—are manifest.<sup>98</sup>

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<sup>97</sup> ABA CODE at 88-91.

<sup>98</sup> *Estes v. Texas*, 381 U.S. 532 (1965).

At least some members of the California Bar recognize the need for reform in this area.<sup>99</sup> The difficulty of defining for the lawyer his responsibility with respect to trial publicity is only a small part of the dilemma, but a significant one. Because of the intricacy of the problem, few universal rules can be set down ahead of time. Just what may an attorney say about the case before or during trial? To whom may he say it? And what kind of discipline should be imposed if he fails to obey these rules?

These and other related problems have been the subject of study by various groups of lawyers around the country.<sup>100</sup> The solution posed by the ABA Code is to permit the lawyers to report only matters of official record, and the procedural steps taken so far in the trial. By excluding all comment on the merits and speculation on the future of the trial, the Code attempts to establish a standard which will insure maximum protection to the accused. It leaves relatively little discretion to the attorney, strictly limiting those things which he may report.

California law on the matter is somewhat nebulous and in a state of change. Again, a detailed study of state rules relating to trial publicity is impossible in the context of the present study. Suffice it to say that California comes nowhere near the detail, organization and stringency of the ABA rules. Some improvement in the California law on trial publicity is definitely indicated. Whether DR 7-107 of the ABA Code provides the model for this reform cannot be properly evaluated in this Comment.

As with other Disciplinary Rules not covered here, DR 7-107 should be studied in detail and its provisions evaluated. Possibly it could serve as a foundation for revision of California law relating to trial publicity.

#### CONCLUSION

This Comment has considered the Disciplinary Rules of Canon 7, which defines the duties of a lawyer in his capacity as representative of his client. The Disciplinary Rules have been evaluated, compared with the ethical standards now applied in California and a recommendation made as to the use California should make of each Rule. Although perhaps the most significant, Canon 7 is only one of nine Canons in the ABA Code, each with its own Disciplinary Rules and Ethical Considerations.

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<sup>99</sup> See, e.g., *Maine v. Superior Ct.*, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968); 5 SANTA CLARA LAW. 107 (1965).

<sup>100</sup> See ABA, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1966).



Each of the Canons deserves exhaustive study and analysis. The ABA Code is the result of five years of work by a very distinguished Committee of American lawyers; it is the most original, complete and contemporary study of the lawyer's responsibilities available. The Code should serve as the foundation for further law review comments, articles for legal journals, papers, discussions and action by bar associations across the country. These inquiries should be the catalyst in a process of re-evaluating and modernizing the frequently unwieldy and incomplete provisions of statutes and rules governing the conduct of attorneys. Unlike the Canons of Professional Ethics, this new Code lends itself to practical application in the form of Disciplinary Rules capable of enforcement by the governing body of any bar association.

Whether imposed by statute, bar association rules or less formal means, ethical standards serve an important function in the legal profession. The lawyer's position of trust demands a high degree of responsibility and a strong intrinsic moral sense. Promulgation of high professional standards is of prime importance if the legal profession is to maintain a position of respect. Every member of the profession has a duty to develop his own moral standards; study and adoption of rules and recommendations for professional standards go far to help the attorney to increase and structure his own understanding of his professional obligations.

Certainly California should "commend" the new ABA Code to members of the State Bar, as it did the old Canons of Professional Ethics. But beyond this, the legislature and State Bar Association should consider the Code in detail to determine what improvements could be made in California's professional standards. The Code is such a valuable source of thought on professional responsibility that failure to study it closely would be a great waste. Individual lawyers should also be encouraged to evaluate the Code on their own, and come to their own conclusions about the value of its provisions.

On January 1, 1970, the new Code will "go into effect." But precisely what effect it will have on California's legal profession depends on the use California decides to make of it. Properly used, the ABA Code of Professional Responsibility can be a significant tool in the continual re-shaping of the profession to resemble more closely the ideal of an "honorable, and deservedly honored" part of the judicial system.

*Anthony C. Bennetti*  
*Roger J. Marzulla*