Rule 5.6 Restrictions on a Lawyer's Right to Practice
(Proposed Rule Adopted by the Board on March 9, 2017)

(a) Unless authorized by law, a lawyer shall not participate in offering or making:

(1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that concerns benefits upon retirement, or

(2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise.

(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.

(c) This rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

Comment

[1] Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons* in connection with settling a claim on behalf of a client.

[3] This rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to rule 1.17.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.6
(Current Rule 1-500)
Restrictions on a Lawyer's Right to Practice

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 1-500 (Agreements Restricting a Member's Practice) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 5.6 (Restrictions On Right To Practice). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 5.6 (Restrictions on a Lawyer's Right to Practice).

Rule As Issued For 90-day Public Comment

The main issue considered was whether to add an express exception that would permit a restrictive partnership, or similar, agreement which is "authorized by law" in order to address the wide range of restrictive arrangements that a law firm might employ which do not constitute a violation of the current rule (see *Howard v. Babcock* (1993) 6 Cal.4th 409, 425). The Commission voted to recommend adoption of this exception. Furthermore, the Commission recommends adoption of the rule structure of Model Rule 5.6 to eliminate unnecessary differences with the national standard of Model Rule 5.6 and to facilitate compliance in the case of partnership agreements among multijurisdictional law firms.

Paragraph (a) restricts a lawyer from participating in offering or making: (1) a restrictive law firm partnership, or similar, agreement; and (2) a restrictive agreement as part of a settlement of a client's case or matter. Paragraph (a) continues the concept of the existing exception for agreements that concern benefits upon retirement (current rule 1-500(A)(1)). The paragraph also adds the exception described above that permits agreements authorized by law.

Paragraph (b) continues the existing prohibition against a lawyer participating in, offering or making an agreement which precludes the reporting of a violation of the rules. Although this concept is not in Model Rule 5.6, the Commission recommends that it be carried forward because it provides important public protection.

Paragraph (c) provides that the rule does not prohibit agreements that impose restrictions on practice as part of disciplinary proceedings. This continues paragraph (A)(3) of current rule 1-500.

Comment [1] cites to Business and Professions Code § 16602 and *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80] concerning the application of the wide range of restrictive arrangements that law firms might employ.

Comment [2] explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement cannot require that a lawyer refrain from representing other clients. This continues the guidance in the first Discussion paragraph in rule 1-500.

Comment [3] clarifies that the rule does not prohibit restrictions of the sale of a law practice, where agreements to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission did not revise the proposed rule.

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

After public comment, the Commission's proposed rule was considered by the Board of Trustees at its meeting on November 17, 2016. To continue the broad scope of current rule 1-500, the Board revised the proposed rule to provide that a lawyer shall not participate in offering or making an agreement that imposes a restriction on a lawyer's right to practice even if that agreement is not a partnership, shareholders, operating, employment, or other similar type of agreement and even if the agreement is not connected with a settlement of a client controversy.

The Board also revised the rule to make the prohibition on restrictive agreements subject to a general "authorized by law" exception. With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

The redline strikeout text below shows the changes made by the Board:

(a) ~~A~~Unless authorized by law, a lawyer shall not participate in offering or making:

(1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that~~: (i)~~ concerns benefits upon retirement, or ~~(ii) is authorized by law; or~~

(2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise~~in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy~~.

* * * * *

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

No comments were received in response to the additional 45-day public comment. The Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 5.6 at its March 9, 2017 meeting.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.6 [1-500]

Commission Drafting Team Information

Lead Drafter: Mark Tuft
Co-Drafters: Jeffrey Bleich, James Ham, Lee Harris

I. CURRENT CALIFORNIA RULE

Rule 1-500 Agreements Restricting a Member's practice

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or

(2) Requires payments to a member upon the member's retirement from the practice of law; or

(3) Is authorized by Business and professions Code sections 6092.5 subdivision (i), or 6093.

(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.

Discussion

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.

I.A. CURRENT ABA MODEL RULE

Rule 5.6 Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017
Action: Recommend Board Adoption of Proposed Rule 5.6 [1-500]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 5.6 [1-500]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 5.6 [1-500] Restrictions on a Lawyer's Right to Practice

(a) Unless authorized by law, a lawyer shall not participate in offering or making:

(1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of

the relationship, except an agreement that: concerns benefits upon retirement, or

(2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise.

(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.

(c) This rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

Comment

[1] Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons* in connection with settling a claim on behalf of a client.

[3] This rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to rule 1.17.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-500)

Rule 1-500 ~~Agreements Restricting a Member's~~[5.6] Restrictions on a Lawyer's Right to Practice

(a) Unless authorized by law, a lawyer shall not participate in offering or making:

(~~A~~1) ~~A~~a ~~member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement~~partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a ~~member~~lawyer to practice ~~law~~after termination of the relationship, except ~~that this rule shall not prohibit such~~ an agreement ~~which:~~that concerns benefits upon retirement, or

~~(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or~~

(2) ~~Requires payments to a member upon the member's retirement from the practice of law; or~~an agreement that imposes a restriction on the lawyer's right to practice is part of the settlement of a client controversy, or otherwise.

~~(3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.~~

(~~B~~b) A ~~member~~lawyer shall not ~~be a party to or~~ participate in offering or making an agreement which precludes the reporting of a violation of these rules.

(c) This rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

~~Discussion~~Comment

~~Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.~~

~~Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law.~~

[1] Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons* in connection with settling a claim on behalf of a client.

[3] This rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to rule 1.17.

IV.A. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT ABA MODEL RULE 5.6)

Rule 5.6 [1-500] Restrictions on ~~Rights~~a Lawyer's Right to Practice

~~A~~(a) Unless authorized by law, a lawyer shall not participate in offering or making:

(~~a~~1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement ~~concerning~~that: concerns benefits upon retirement~~;~~, or

(~~b~~2) an agreement ~~in which~~that imposes a restriction on ~~the~~a lawyer's right to practice ~~is part of the~~in connection with a settlement of a client controversy, or otherwise.

(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.

(c) This rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

Comment

[1] ~~An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.~~ Concerning the application of paragraph (a)(1), see Business and Professions Code § 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (~~b~~a)(2) prohibits a lawyer from offering or agreeing not to represent other persons* in connection with settling a claim on behalf of a client.

[3] This rule does not ~~apply to~~ prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to rule 1.17..

V. RULE HISTORY

Rule 2-109 was adopted in 1975 following the 1972 State Bar of California Special Committee's Study of the ABA Code of Professional Responsibility. Rule 2-109 largely followed the provisions of ABA Code DR 2-108. Rule 2-109 was intended to deter situations called to the Committee's attention in which lawyers had "agreed" to restrict their practice (i.e., geographically) upon termination of employment with a law firm. It was believed such agreements violated state antitrust laws. See Business and Professions Code § 16600, et. seq. In addition, rule 2-109 also prohibited a lawyer from agreeing, as part of a settlement, to restrict the lawyer's practice, for example, a lawyer who agrees not to represent another plaintiff in a lawsuit against a manufacturer that is based on the same defect in the manufacturer's product as was alleged in the settled matter.

In 1989, as part of a comprehensive revision and reordering of the Rules of Professional Conduct, rule 2-109 was renumbered rule 1-500. Proposed rule 1-500(A) carried forward the prohibition of agreements restricting the right of a lawyer to practice law in rule 2-109(A).

Rule 2-109(B), which provided exceptions to paragraph (A)'s general prohibition, was also carried forward. Paragraph (B)(1) was expanded to clarify that a restrictive employment agreement would not survive the termination of the relationship created or contemplated by the agreement, and that the rule was applicable to an agreement between shareholders of a law corporation.

Paragraph (C), similar to Business and Professions Code § 6090.5, was added to expressly prohibit a lawyer from requiring, as a condition of settling a civil action for

professional misconduct brought against the attorney, that the client agree not to file a complaint with the State Bar concerning the conduct. Paragraph (C) was intended to be broader than the statute because it was not limited to circumstances involving attorney malpractice.

In 1992, Paragraphs (A) and (B) were consolidated for greater clarity. No substantive change was intended. Proposed subparagraph (A)(3) was new. It added a new exception to rule 1-500 where a member enters into an agreement in connection with State Bar discipline that restricts the member's practice pursuant to Business and Professions Code §§ 6092(i) (agreements in lieu of discipline), and 6093 (conditions of probation).

A proposed amendment to the second paragraph of the Discussion section conformed it to the relettering of the paragraphs of the text. No substantive change was intended.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule and Comments [1] and [3].

     Commission Response: No response required.

  2. OCTC is concerned that Comment [2] is unnecessary and merely repeats the rule.

     Commission Response: The Commission did not delete Comment [2] because it explains how paragraph (a)(2) is applied, emphasizing that the terms of a settlement agreement may not require that a lawyer refrain from representing other clients. This explanation is being carried forward from the first Discussion paragraph found in current rule 1-500 and deleting it might cause confusion as to whether this explanation remains true for the proposed rule.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, two public comments were received. Both comments agreed with the proposed Rule. During the 45-day public comment period, no comments were received. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. The California Supreme Court's Opinion in *Howard v. Babcock*

In *Howard v. Babcock* (1993) 6 Cal.4th 409 [25 Cal.Rptr.2d 80], the enforceability of a partnership agreement was challenged as inconsistent with the policy reflected in the prohibition of rule 1-500. In part, the challenged partnership agreement provided for forfeiture of all withdrawal benefits, other than the right to a return of capital, if a partner withdrew from the firm before the age of 65 and within one year thereafter engaged in the practice of law in the same defined geographic area in which the partnership conducted business.

In rejecting the challenge and finding that the agreement was enforceable, the Court observed that there is no reason to distinguish the legal profession from other professions, which may provide in a partnership agreement against competition by withdrawing partners in a limited geographical area. The court observed that a non-competition provision is essentially an agreement for liquidated damages. Specifically, the Court stated: "We hold that an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area is not inconsistent with rule 1-500 and is not void on its face as against public policy." (*Howard v. Babcock, supra,* at p. 425.)

Justice Kennard dissented, taking a different view of the legal profession:

> "If the practice of law is to remain a profession and retain public confidence and respect, it must be guided by something better than the objective of accumulating wealth. Here, in refusing to enforce a rule of ethics that prohibits attorneys from entering into agreements that restrict their right to practice law after leaving a firm, the majority diminishes the rights of clients in favor of the financial interest of law firms based on its one-sided view of the realities and equities of the practice of law." (*Howard v. Babcock, supra,* at p. 433.)

2. Business & Professions Code §§ 16600, et seq.

Subject to certain exceptions, an agreement that prevents a person from engaging the person's profession, trade or business is considered void as against public policy. Business and Professions Code § 16600 provides: "Every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." This statutory prohibition also is regarded as a well-settled public policy in California that promotes competition and mobility. In addition, an agreement that violates this law is likely to also constitute a unlawful business practice in violation of California's Unfair Practices Act (California Business and Professions §§ 17200 et seq.).

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 5.6: Restrictions on Right to Practice," revised September 15, 2016, is available at::

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_6.authcheckdam.pdf [Last visited 2/7/17]

- Twenty-seven states have adopted Model Rule 5.6 verbatim.[1] Twenty-three jurisdictions have adopted a rule that is substantially similar to Model Rule 5.6.[2] California has adopted a rule substantially different in format and structure from Model Rule 5.6. However, the substance of rule 1-500 is substantially similar to the Model Rule.

- Eight states have adopted a rule that provides for an exception for practice restrictions in connection with a sale of a law firm.[3]

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend that the structure of current rule 1-500 be replaced with the rule structure used in jurisdictions that have adopted the Model Rule structure, i.e., state the general prohibitory language in the introductory clause ("shall not participate in offering or making") of paragraph (a), add a clause stating an "authorized by law" proviso, and then state the two specific prohibited agreements: (1) partnership/shareholders/operating/employment agreements ("partnership agreements") that restrict right to practice; and (2) agreements to restrict practice made as part of a settlement.[4]

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[1] The twenty-seven jurisdictions are: Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

[2] The twenty-three jurisdictions are: Alabama, Alaska, Arizona, Arkansas, District of Columbia, Georgia, Hawaii, Idaho, Kentucky, Massachusetts, Michigan, Mississippi, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, and West Virginia.

[3] The eight jurisdictions are: Alaska, Arkansas, Hawaii, Idaho, Michigan, Mississippi, New York, and Pennsylvania.

[4] Current rule 1-500 instead states in the introductory clause the two specific prohibitions on (i) a restriction on practice made as part of a settlement or (ii) any other restriction on practice, then states three exceptions to the prohibition.

- Pros: The Model Rule structure more accurately distinguishes the two kinds of prohibited agreement, recognizing that the former kind (partnership, etc.) is subject to exceptions, while the latter kind (agreement as part of settlement) is not. Current rule 1-500 is confusing because none of the three exceptions in paragraph (A) would apply to an agreement made as part of a settlement that restricts a lawyer's practice. In addition, all other 50 jurisdictions have adopted the Model Rule structure. Adopting the Model Rule structure should facilitate compliance with the rule's limitations on partnership agreements by multijurisdictional law firms.

- Cons: There is no evidence that the structure of current rule 1-500 has been confusing or misleading.

2. Include a proviso at the start of paragraph (a) that would permit a practice restriction that "is authorized by law."

   - Pros: The exception would codify the general holding in *Howard v. Babcock* (1993) 6 Cal.4th 409 [25 Cal.Rptr.2d 80] that a partnership can impose reasonable costs on a departing lawyer in compliance with Bus. & Prof. Code § 16602. The Commission has recommended a general "authorized by law" exception because of the wide range of restrictive arrangements that law firms might employ under § 16606 and that any attempt to describe more specifically the holding in *Howard v. Babcock* would be inaccurate.[5]

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[5] In addition to general exception recommended, the Commission also considered the following variations for paragraph (a)(1):

> (1) [**ALT1**] a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) imposes reasonable costs on a departing partner or shareholder who competes with the law firm, provided that such costs are imposed for only a limited time in a limited geographical area;
>
> (1) [**ALT2**] a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) imposes reasonable costs as authorized by Business and Professions Code § 16602 on a departing partner or shareholder who competes with the law firm;
>
> (1) [**ALT3**] a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by Business and Professions Code § 16602;

The Commission also considered not including a new exception for the *Howard v. Babcock* situation but instead address it in a comment.

- Cons: It is not certain that *Howard v. Babcock* created an exception to rule 1-500; rather, it is arguable that court viewed the law firm's agreement in compliance with Bus. & Prof. Code § 16602 as not having violated rule 1-500.

3. Recommend adoption of Model Rule 5.6(b) as proposed Rule 5.6(a)(2).

   - Pros: Proposed paragraph (a)(2) adheres to the recommended structure of Model Rule 5.6. (See Section IX.A.1.) This would not be a substantive change from current rule 1-500, which includes the same prohibition in the introductory clause to paragraph (A).

   - Cons: None identified so long as the Model Rule structure is approved.

4. Recommend retaining current rule 1-500(B) (prohibiting agreements not to report violations of the Rules).

   - Pros: The provision is an important public protection and should be retained in the Rules. Although this prohibition on agreements *not to report rule violations* arguably does not fit in a rule that is intended to prohibit restrictions on practice, by retaining the provision in this Rule.

   - Cons: None identified.

5. Recommend retention of current rule 1-500(A)(3), which provides an exception for agreements that impose restrictions on practice as part of disciplinary proceedings pursuant to Bus. & Prof. Code §§ 6092.5(i) and 6093. (See paragraph (c).)

   - Pros: There is no evidence that there is a problem with this provision. Removing it could lead to unnecessary litigation as to whether the Bus. & Prof. Code sections trumped Rule 5.6's prohibitions on agreements restricting practice. Placing the provision in a separate paragraph is not intended as a substantive change but is recommended to conform to the recommended Model Rule structure. (See Section IX.A.1, above.)

   - Cons: None identified.

6. Recommend adoption of proposed Comment [1], which includes citations to Bus. & Prof. Code § 16602 and *Howard v. Babcock*.

   - Pros: Provides importance guidance on how the "authorized by law" exception in paragraph (a)(1)(ii) might be applied. The Commission believes that rather than attempting to accurately characterize the holding in *Howard v. Babcock*, it is more helpful to provide citations to § 16602 and the case for the requisite interpretive guidance.

   - Cons: None identified.

7. Recommend adoption of proposed Comment [2], which is based on Model Rule 5.6, Cmt. [2], and explains how paragraph (a)(2) is applied.

   - Pros: The Comment does not merely restate the black letter, which expressly prohibits an agreement that restricts a lawyer's right to practice, which by its terms could include an agreement to cease all practice of law. The Comment clarifies that this prohibition is intended to apply to the specific situation where a lawyer agrees not to represent particular persons, e.g., plaintiffs who might bring a similar claim.

   - Cons: The Comment merely restates the substance of paragraph (a)(2).

8. Recommend adoption of proposed Comment [3], which excepts from the application of the Rule agreements for the sale of a law practice.

   - Pros: An agreement to sell a law practice will likely include a clause that restricts the selling lawyer's ability to continue practice and compete with the practice after it is sold. This rule should not frustrate the policy underlying proposed Rule 1.17 to permit a solo practitioner to receive compensation for the good will developed. Finally, this Comment has been adopted by nearly every jurisdiction, although eight jurisdictions include the exception in the black letter of their rule.[6]

   - Cons: The provision should not be included unless the Commission recommends adopting Model Rule 1.17, which permits the sale of an area (field) of practice and not just the entire practice. The policy underlying proposed Rule 1.17, which requires sale of the *entire* practice, is to permit a solo practitioner to receive compensation for the good will developed upon the selling lawyer's retirement from practice. Where the seller retires, there should be no need for a practice restriction clause in the sale agreement.

B. Concepts Rejected (Pros and Cons):

1. Retain current rule 1-500, Discussion ¶.1, which concerns agreements restricting a lawyer's right to practice made as part of a settlement.

   - Pros: There is no evidence that Discussion ¶. 1 has caused problems. It is an articulate statement of the practice that proposed paragraph (a)(2) is intended to prohibit.

   - Cons: Proposed Comment [2], which is derived from Model Rule 5.6, Cmt. [2], is a more succinct statement of the same subject matter.

[6] See note 3, above.

2. Retain current rule 1-500, Discussion ¶. 2, which concerns practice restrictions in partnership agreements.

    - Pros: The Discussion paragraph elaborates on the prohibition against restrictions on practice in partnership agreements.

    - Cons: The Discussion paragraph merely restates the rule provision it is intended to explain. Moreover, it is an incomplete statement of the current law in light of *Howard v. Babcock*.

3. Recommend adoption of a provision that would prohibit confidential settlement agreements.

    - Pros: Confidential settlements undermine public safety to the extent evidence of dangerous products is concealed by preventing disclosure of the evidence in a case. Confidential settlements also potentially frustrate the objective of Rule 5.6 to prevent restrictions on practice as part of a settlement; with a confidential settlement, there is no evidence whether Rule 5.6 was violated.

    - Cons: If confidential settlements are to be prohibited, it should be accomplished by statute or rule of procedure, not a rule of professional conduct. There are many policy decisions that implementing such a rule would require that are beyond the scope of the Commission's Charter.

4. Recommend adoption of a provision that would prohibit institutional clients from requiring that a lawyer, as part of a retention agreement, not represent certain persons, e.g., a competitor of the client.[7] (See 6/29/2015 Letter to Chair & Commission from Anthony Davis, on behalf of Law Firm General Counsel.)

    - Pros: According to the author, the provision would avoid frustrating a subsequent client from retaining counsel of choice because of the agreement. Provision would presumably apply to sophisticated clients who tend to seek such agreements.

    - Cons: As with a provision prohibiting confidential settlements, this provision would require policy decisions for implementation that are beyond the scope of the Commission's Charter.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together

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[7] The proposed provision would provide:

(c) A member shall not be a party to or participate in offering or making an agreement with a client containing a categorical restriction against: (i) the representation of parties that are mere competitors of the client not adverse to the client in a matter or (ii) the representation of parties in matters adverse to legal entities that lack a unity of interest with that client."

with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. See Section IX.A.1, above, re the adoption of Model Rule 5.6 structure and rejection of the current California structure. However, although the rule's appearance will be different, the substantive duties will largely remain the same. (See Section IX.C.2, below.)

2. The addition of the "authorized by other law" exception is a substantive change to current rule 1-500, but should not result in a change of duties as lawyers and firms are already subject to the holding in *Howard v. Babcock*. (See Section IX.A.2, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

1. The alternatives considered were: (i) to retain the structure of current rule 1-500 (see, Sections IX.A.1); and (ii) to consider addressing the *Howard v. Babcock* exception with detailed blackletter rule language (see, IX.A.2, footnote 5, above.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.6 [1-500] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.6 [1-500] in the form attached to this Report and Recommendation.