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MCLE Self-Study Exam

Ethics and Evidence of Legislative Intent©

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This course of study covers the ethical and evidentiary issues involved when researching and using legislative history. We will address the strategies to successfully meet ethical and evidentiary obligations to clients, courts, and opposing counsel. Relevant Rules of Professional Conduct, Rules of Court, and statutory laws pertinent to these strategies will be our focus.

I. ETHICAL DUTY TO THE COURT

Does an attorney have a duty to disclose to the court legislative history research that is adverse to the attorney's client? The applicable body of law to this issue is the California Rules of Professional Conduct.

Business and Professions Code section 6068(d) and Rules of Professional Conduct, Rule 5-200(A) an (B) state that in presenting a matter to the court that the attorney has a duty to do so in such a way as is consistent with the truth and shall not seek to mislead the judge. *A copy of Rule 5-200 and section 6068 are set forth at the end of this self-study exam.* Cases interpreting Rule 5-200(A) and section 6068(d) focus on conduct that involves the attorney making misrepresentation to the court.

Practical application of these rules comes into play when using both "intrinsic" and "extrinsic" legislative history.

- "***Intrinsic***" legislative history aids are aids that derive meaning from the internal structure of the text and conventional or dictionary meaning of the terms used in it.

- "***Extrinsic***" legislative history aids are sources outside the text. These aids are the information that comprises the background of the text, such as legislative history and related statutes. The background information contains the circumstances which led to the enactment of the statute, the events surrounding enactment, and the developments pertinent to the subsequent operation.

(1) Statutory construction/intrinsic legislative history:

Reviewing statutes compels an attorney to know the correct history of that statute. For example, while most of the current Education Code was enacted in 1976 by Chapter 1010, this 1976 enactment was a massive non-substantive reorganization of the Education Code. A reorganization of a code does not usually trigger substantive changes. Thus, using case law predating 1976 is not misleading or untruthful. In fact, there are numerous Education Code statutes that can be traced back in time to 1959, 1943, 1931, 1929, and 1872. In another example, the current Civil Discovery Act was enacted in 2004, but this 2004 legislation was merely a continuation of former sections without substantive changes and these former Code of Civil Procedure sections can also be traced to prior years, all the way back to the 1850 California Practice Act in some cases.

But if the statute in question was substantively changed, the attorney needs to be very careful in citing caselaw that predated that substantive change. The attorney needs to carefully look at the language of the prior code section and compare it with the language of the current code section. If the change was tangential to the case, if the attorney's case is right on point, and if the attorney wants to use it, then she may need to use extrinsic legislative history to make sure there is nothing in the history that says the new section's language was overruled or superseded.

(2) Extrinsic legislative history:

The attorney needs to carefully review the legislative history materials for dates and amended versions of the bill. If an attorney finds a legislative committee analysis of a bill as it was amended on May 15th, but the bill was again amended later on June 3rd with substantive changes to the language in question, then the fact that the language was substantially changed is important to the tell the court. To not inform the court could possibly mislead the judge if the attorney only used the analysis of the earlier version of the bill.

To illustrate this point, in the case of *Kelly v. Methodist Hospital*, 22 Cal.4th 1108, 118, fn4 (2000), there was an issue of whether an employer that is a religious corporation or association or educational institution was exempt from some of the labor laws only when the employment was connected with carrying on by the organization. Assembly Bill 1047 of 1977 as introduced read as follows:

> Employer does not include a ~~social club, fraternal, charitable, educational or~~ religious association or corporation ~~not organized for private profit~~ *when employing persons directly involved in carrying out the religious purposes of the religious association or corporation.*

On August 17, 1977, the following amendment was passed:

> Employer does not include a religious corporation, association, educational institution or society ~~with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such religious corporation, association, educational institution, or society of its activities.~~

A few days later, on August 24, 1977, the language was amended as follows:

> Employer does not include a religious ~~corporation, association, educational institution~~, *or association or corporation not organized for private profit* ~~society~~.

In this case, the bill's amended versions provided an answer to the court's question. The fact that the Legislature put in the limitation and then deleted it from the bill provided evidence of legislative intent. In addition, and for our purpose of looking at what may constitute "misleading the court," the date on the analysis of Assembly Bill 1047 that the attorney relied upon for his arguments was critical.

You do not mislead the court if you submit only a few of the documents from the legislative history. Like any legal argument, once you cite the source, you cannot misrepresent what the document states. However, unlike case law, legislative history is rarely clear cut. There will be times when the legislative committee analyses or related documents clearly state the specific purpose of the legislation, but it is more likely that there will be no clear intent language and that what language you are able to find may be so broad or vague that it does not answer your specific issue. The courts look at the following criteria to discern the legislative intent of a legislative measure:

1. The "problem" the Legislature sought to remedy
2. The "ostensible objects to be achieved" and
3. The drafting history of the statutory language by that bill (which includes the deleted and introduced language throughout each amended version of the bill)

II. ETHICAL DUTY TO THE CLIENT

An attorney owes a general duty of competence under Rules of Professional Conduct, Rule 3-110. Competency means to apply the (1) diligence, (2) learning and skill, and (3) performance of the service.

1. Violation of Rule 3-110 requires intentional, reckless, or repeated failure to act without competence.
2. Legal Malpractice – negligence: the duty to use the skill, prudence, and diligence that an attorney of ordinary skill and capacity commonly possesses and exercise in the performance of the task.

There is a clear duty to undertake diligent research of the law and facts. If the law is unsettled, the attorney has a duty to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to reasonable course of conduct.

The California Supreme Court held in Smith v. Lewis, 13 Ca.3d 349, 358 (1975) as follows:

> When rendering advice to a client an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make

> an informed decision as to a course of conduct based upon an intelligent assessment of the problem. . . . This includes a duty to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.

Under certain circumstances, the clear duty to undertake diligent research of the law and facts includes the duty to research and analyze legislative history. When an attorney has a statutory construction issue and there is no case law on that issue, he may have a duty to look at the legislative history to best advocate his legal argument. Code of Civil Procedure § 1859 states that "In the construction of a statute the intention of the Legislature is to be pursued . . . if possible."

The California Supreme Court and the California appellate courts have held that when a statute is ambiguous or falls under one of the exceptions to this ambiguous or "plain meaning rule" the court must look to the extrinsic sources such as the legislative history to determine the statute's meaning pursuant to §1859. (For more information, see our California Points and Authorities)

III. WORK PRODUCT PRIVILEGE

Attorneys using outside services to provide legislative history research seek to protect the confidentiality of the course of their strategy and legal research. Under Code of Civil Procedure § 2018.030(a), if the communication is in writing and it reflects your "impressions, conclusions, opinions, or legal research or theories" it is not discoverable. An attorney requesting legislative history research in writing can protect the information in the communication between the independent research firm and the attorney as a work product privilege. If the communication by the attorney is not in writing, then it is not discoverable unless the court determines that the denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice. With legislative history research available to the parties, there is no prejudice to the party seeking discovery.

IV. EVIDENTIARY CONSIDERATIONS

(1) Offering Legislative History Documents into Court:

Legislative history documents are considered to be "official acts of the legislature" and as such may be judicially noticed under Evidence Code § 452(c) as "extrinsic aids to the court."

Evidence Code § 453 provides for the procedure to make it mandatory for a court to judicially notice documents if there is a noticed motion for judicial notice.

Evidence Code § 459 grants appellate courts the same right and power to take judicial notice as the trial court even if the request is made for the first time in the appellate court. Under California Rules of Court rule 8.252(a), Judicial Notice on Appeal, an appellant must serve and file a separate motion with proposed order.

Several decisions of the California Supreme Court found judicial notice unnecessary, ruling that a simple citation to "published" legislative documents is sufficient to bring the legislative history to a court's attention. (*Sharon S. v. Superior Court (Annette F)*, 31 Cal.4th

417, 440, fn.18 (2003); *Quelimane Co., Inc.v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 46, fn.9 (1998)) "Published" legislative history documents appear to be legislative bills, committee and floor analyses or any other documents published in book format or on the web by the Legislature.. (Id.)

(2) Partial v. Full Legislative History:

A *partial* legislative history is merely submitting a few documents out of the legislative history materials available on any legislative measure. A *full* legislative history is submitting all of the surviving documents on the Legislature's consideration of the bill.

Submitting a partial or complete legislative history is an exercise of discretion that requires the attorney to consider the significance of the issue of statutory construction in light of: 1) the overall case at hand, 2) the volume of legislative history available, 3) the quality of available discussion in all legislative documents, 4) the tenor of the court and opposing counsel, and 5) the regular practice of the court to require either partial or full legislative history.

There have been several cases that criticize counsel for not submitting a complete legislative history. (See, for example, *Drouet v. Superior Court (Broustis)*, 31 Cal.4th 583, 598 (2003); *Fremont Indemnity Co. v. Fremont General Corp.*, 148 Cal.App.4th 97, 128-129 (2nd Dist., Div. 3, 2007); *Alch v. Superior Court (Time Warner Entertainment)*, 122 Cal.App.4th 339, 364, fn.11 and fns. 11 & 12 (2nd Dist., Div. 8, 2004); and *People v. Valenzuela*, 92 Cal.App.4th 768, 776, fns.3 & 4 (4th Dis., Div. 2, 2001).

Other cases accepted and reviewed the complete legislative history. (See, for example, *People v. Cole*, 38 Cal.4th 964, 989 (2006); *Frazier Nuts v. American Ag Credit*, 141 Cal.App.4th 1263, 1272 (5th Dist., 2006).

In 2005, there was a Third District Court of Appeal decision that directed that only specific documents would be accepted as legislative history. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 CalApp.4th 26 (3rd Dist., 2005). However, less than one year later, the Third District Court of Appeal reviewed the complete legislative history in the case of *Wirth v. State of California*, 142 Cal.App.4th 131, 141, fn.6 (3rd Dist. 2006).

Thus, attorneys must review the five components noted when determining whether to submit partial or full legislative history.

(3) Authentication:

Judicial notice is a substitute for proof; judicially noticed materials are not evidence per se. When documents are judicially noticed "the judge does not proceed in accordance with the rule of . . . authentication of writings, nor is he restricted by the exclusionary rules (opinion rule, hearsay rule, best evidence rule, etc.) . . . ." (Witkin California Evidence (3rd Ed.) Judicial Notice, section 82, pages 75-76).

Despite this, "[s]ome judges still insist on authentication of any material submitted in support of a judicial notice request. (See *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 46, fn9). In these cases, it is good practice to submit the material with a supporting affidavit from an expert. (Imwinkelreid, Wydick and Hogan, California Evidentiary Foundations, 3d, 2000, pgs 590-591). Code of Civil Procedure § 2015.5 authorizes declarations

under penalty of perjury in lieu of affidavits. The declaration of attorneys working as legislative researchers appears to meet these requirements. (See *People v. Connor*, 115 Cal.App.4th 669, 681 (6th Dist., 2004); *Whaley v. Sony Computer America, Inc.*, 121 Cal.App.4th 479, 487 (4th Dist., 2004).

The attorney's declaration should identify whether the entire compiled legislative history is being submitted, or which particular documents from the compiled history are being submitted to the court. (Entire legislative history cited in *People v. Sanchez*, 24 Cal.4th 983, 992, fn.4 (2001); *People v. Brown*, 6 Cal.4th 322, 334 (1993); *Board of Retirement v. Superior Court*, 101 Cal.App.4th 1062, 1070 (2nd Dist., 2002); *People v. Connor*, 115 Cal.App.4th 669, 681, fn.3 (6th Dist., 2004)).

If only particular documents are selected to be submitted, an explanation may be provided as to why other available documents are not being submitted (e.g., the unsubmitted documents are not pertinent to issues or history or the remaining unsubmitted documents are voluminous and would be burdensome on the court and all parties to include but are available upon request.).

Rules of Professional Conduct Rule 5-200 and Business and Professions Code § 6068 read as follows:

Rule 5-200. Trial Conduct
In presenting a matter to a tribunal, a member:
(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Business and Professions Code § 6068. It is the duty of an attorney to do all of the following:
(a) To support the Constitution and laws of the United States and of this state.
(b) To maintain the respect due to the courts of justice and judicial officers.
(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

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

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.