

Rule 8.4 Misconduct
(Proposed Rule Adopted by the Board on March 9, 2017)

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] This rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4
(Current Rule 1-120)
Misconduct

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-120 (Assisting, Soliciting, or Inducing Violations) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 8.4 (concerning professional misconduct of a lawyer). 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 8.4 (Misconduct).

Rule As Issued For 90-day Public Comment

Proposed rule 8.4 carries forward the substance of current rule 1-120 by prohibiting a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules of Professional Conduct or the State Bar Act. The proposed rule also adopts the substance of ABA Model Rule 8.4 which contains a similar prohibition as well as additional provisions addressing misconduct that warrants imposition of discipline. The proposed rule is designed to collect in a single rule various misconduct provisions that are currently found in other California rules of professional conduct or in the Business and Professions Code. The rule is intended to facilitate compliance and enforcement by clearly stating these principles in a single rule where lawyers, judges and the public can identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply.

Paragraph (a), which carries forward the substance of current rule 1-120, prohibits a lawyer from violating the rules of professional conduct, or the State Bar Act, or knowingly assist, solicit or induce another to do so. In addition, this paragraph prohibits a lawyer from doing any of the aforementioned through the acts of another.

One issue considered was whether to follow the approach in ABA Model Rule 8.4(a) which would generally prohibit a lawyer from “attempting” to violate a rule or a provision of the State Bar Act. The Commission determined that the question of whether an attempted violation should be an independent basis for discipline is better addressed on a rule-by-rule basis. This approach means that any prohibition on an attempt would be tailored to a specific rule’s violation and potential harm rather than a generalized standard for all of the rules and the State Bar Act. This avoids possible unintended consequences of a one size fits all attempt standard that would not account for the specific purpose of individual rules. For example, in proposed rule 1.5 [4-200], the Commission has recommend a rule that provides a lawyer “shall not make an agreement for, charge, or collect an unconscionable fee or illegal fee.” The terms “make” and “charge” in effect prohibit an attempt to “collect” an unconscionable fee.¹ Although only the actual collection of an unconscionable fee will result in harm to a client, even an attempt to

¹ This is similar to the standard in Business and Professions Code section 6090.5 that, in part, prohibits a lawyer from agreeing or seeking an agreement that professional misconduct shall not be reported to the State Bar. This section was revised in 1996 in response to a State Bar Court finding that the prior version of the section did not include terms that could be construed fairly as a prohibition on attempts. (See [Assembly Bill No. 2787 \(Kuehl\)](#) 1995-1996 session; and *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752.)

impose a legal obligation on a client to pay an unconscionable or illegal fee should be prohibited as disciplinable misconduct. On the other hand, the Commission also recommends adoption of proposed rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. For this rule, the harm is the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with a lawyer-client relationship. A generalized prohibition against an attempt to engage in such a communication does not further the purpose of this rule and it would pose a risk of unduly interfering with a lawyer's ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person.

Paragraph (b) adopts the language of Model Rule 8.4(b) but adds a reference to "moral turpitude." This provision focuses on crimes committed by a lawyer that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, all of which are central principles in lawyer conduct. The reference to moral turpitude is added to maintain conformity with the broader public protection afforded by Business and Professions Code section 6106.

Paragraph (c) adopts the language of Model Rule 8.4(c) but adds the words "reckless or intentional" to modify "misrepresentation." The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of "reckless or intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that should result in discipline under this rule.²

Paragraph (d) adopts the language of Model Rule 8.4(d) concerning conduct "prejudicial to the administration of justice." The Commission concluded that a lawyer's fitness to practice law is called into question by conduct prejudicial to the administration of justice regardless of whether the conduct occurs in connection with the practice of law.

Some members of the Commission raised a concern that this provision may not survive a Constitutional challenge if it is not limited to situations where the lawyer's conduct occurs "in connection with the practice of law." Compare, *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996) (former Bus. & Prof. Code § 6068(f), prohibiting "offensive personality," was found to be unconstitutional.) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.

Paragraph (e) adopts the language of Model Rule 8.4(e) prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.

Paragraph (f) adopts the language of Model Rule 8.4(f) prohibiting a lawyer from knowingly assisting a judge in violation of judicial conduct rules. Expressly stating that such conduct is prohibited should contribute to the confidence that the public places in the legal profession and administration of justice is justified.

² Compare proposed rule 1.1, under which discipline is imposed only if a lawyer has "intentionally, recklessly, repeatedly, or with gross negligence" failed to act competently.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

Proposed rule 8.4 contains six comments intended to clarify how the rule is to be applied. Of particular note is Comment [6] which, as noted above, has been added to clarify that the paragraph (d) does not apply to constitutionally-protected conduct.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission removed the references to "moral turpitude" from both 8.4(b) and 8.4(c). Paragraph (f) was modified to be parallel with paragraph (a) to include inducement and solicitation, and to clarify the meaning of judge and judicial officer. The Commission also modified Comment [4] to provide notice to lawyers that Bus. & Prof. Code § 6106 remains a source of discipline for acts of moral turpitude, dishonesty, or corruption. Finally, Comment [6] was modified to clarify that paragraph (c) does not extend to activities protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.

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

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.4 [1-120]

Commission Drafting Team Information

Lead Drafter: George Cardona

Co-Drafters: Judge Karen Clopton, Robert Kehr, Howard Kornberg, Carol Langford,
Toby Rothschild, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 1-120 Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 8.4 [1-120]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 8.4 [1-120]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.4 [1-120] Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these rules, the State Bar Act, or other law; or

- (f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, “judge” and “judicial officer” have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] This rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

IV. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-120)

Rule 8.4 [1-120] ~~Assisting, Soliciting, or Inducing Violations~~ Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, ~~A member shall not~~ knowingly* assist ~~in,~~ solicit, or induce ~~any violation of these rules or the State Bar Act~~ another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit or reckless or intentional misrepresentation;

- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, “judge” and “judicial officer” have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] This rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

V. RULE HISTORY

Rule 1-120 was originally a part of the comprehensive proposed rules considered by the Board in 1987. Rule 1-120 was entirely new and had not been contained in the original proposal of the first Commission. Therefore, no public comment had been solicited on the rule. Based on the recommendation of a Board committee, the full Board determined to withdraw the rule from the comprehensive proposal and circulate it for a 90-day public comment period. (At that time, the rule was numbered as proposed new rule 1-110. It was later renumbered as rule 1-120 when another proposal was adopted by the Board as rule 1-110.) The comment period extended from August 29, 1987, through November 30, 1987. Three comments were received on the rule.

The Bar Association of San Francisco stated that “[t]he Board of Directors adopted the position of the Association’s Ethics Committee in support of the rule itself.” The second comment was received from Robert C. Fellmeth, State Bar Discipline Monitor. Mr. Fellmeth urged adoption of the proposed rule. Mr. Fellmeth stated that in his position as Discipline Monitor, he had seen time and time again that a major cause of attorney misfeasance was the refusal to self-enforce ethical standards. Mr. Fellmeth believed that adoption of the rule would signal to the public that attorneys are taking steps necessary to identify and prohibit misconduct and that attorneys must not be a party to another attorney’s misconduct. The third comment, from the Los Angeles County Bar Association, stated that, “[t]he LACBA Board of Trustee approved this rule as proposed.”

Following discussion of the public comments, the Commission recommended that the rule be adopted in the form in which it was circulated for public comment. The Board Committee considered the recommendation of the Commission at its May 6, 1988 meeting and recommended that the Board adopt the rule as proposed by the Commission. At its June 18, 1988 meeting, the Board adopted the rule in the form recommended by the Commission and directed that the rule be forwarded to the California Supreme Court with a request that the Court approve the rule. (Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Supplemental Memorandum and Supporting Documents in Explanation, September 1988, at pp. 16 – 19.)

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 is concerned that subsection (a) prohibits only knowingly assisting, soliciting, or inducing another to violate the rules for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

Commission Response: The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in paragraph (a) in imposing vicarious liability for a Rule violation committed by another, and will not encourage willful blindness or failure to investigate. The Rule does not apply the “knowingly” standard to violations committed by the lawyer him or herself.

2. OCTC is concerned that this rule does not prohibit attempting to violate these rules or the State Bar Act for the same reasons expressed in OCTC’s comment to proposed Rule 1.2.1. Moreover, by excluding attempts to violate the rules or the State Bar Act, the proposed rule deviates unnecessarily from the ABA Model

Rules and the rule in most jurisdictions, which call for discipline for an attorney's attempt to violate the rules. (See, e.g., Model Rule 8.4(a); *People v. Katz* (Colo. 2002) 58 P.3d 1177, 1192 ["The fortuitous discovery and frustration of his intended misappropriation of those funds does not lessen the seriousness of his actions."].) California law also provides for discipline for attempting to violate an attorney's ethical standards. (*Werner v. State Bar* (1944) 24 Cal.2d 611, 618 [attempted bribe, whether or not there was any intention to carry it out, is an act of moral turpitude]. See also *In re Conflenti* (1981) 29 Cal.3d 120, 124 [moral turpitude found following conviction for attempt to receive stolen property]; *In re Lesansky* (2001) 25 Cal.4th 11, 17 [moral turpitude found following conviction for attempt to commit a lewd or lascivious act on a child].¹) Exempting attempts to violate the rule and the State Bar Act is contrary to the purposes of attorney discipline: to inquire into the fitness of the attorney to continue in that capacity for the protection of the courts and legal profession. (*Bradpiece v. State Bar* (1974) 10 Cal.3d 742, 748. See also *In re Attorney Discipline* (1998) 19 Cal.4th 582, 609 ["The basic purpose [of disciplinary proceedings] is to protect the public and the profession from the objectionable activities of persons unfit to practice law . . ."].) An attorney who attempts to violate a rule or the State Bar Act by a direct act, but does not complete the act due to some fortuity, still raises concerns about his fitness to be an attorney. The Supreme Court should not have to wait until the attorney causes actual harm.

Commission Response: The Commission debated at length whether to include a general attempt prohibition in this Rule. As discussed in the Report and Recommendation, the Commission rejected this approach as overbroad given that certain Rules do not lend themselves to discipline for attempted violations.

3. Concerned with subsection (f)'s "knowing" standard. Also concerned with use of "judge" or "judicial officer" as opposed to "tribunal." Rule should administrative law judges or arbitrators. Subsection (f) should also include "solicitation" as grounds for violation.

Commission Response: The Commission has modified paragraph (f) to be parallel with paragraph (a) to include inducement and solicitation. The Commission believes that paragraph (f)'s reference to "judicial officers" includes

¹ In *In re Lesansky*, *supra*, 25 Cal.4th at p. 17, the Supreme Court wrote: "Here, petitioner's conviction was for an attempt rather than for a completed offense, and it does not appear that any child was actually harmed, but neither of these circumstances alters our conclusion that his criminal conduct necessarily involves moral turpitude. 'An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.' (Pen. Code, § 21a.) The act "must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action." (*People v. Kipp* (1998) 18 Cal.4th 349, 376 [75 Cal.Rptr.2d 716, 956 P.2d 1169].) Thus, by his commission of an attempt, petitioner fully demonstrated a readiness to engage in a serious sexual offense likely to result in harm to a child. This is sufficient to warrant discipline." There is no principled reason why an attorney's attempt to violate the rules should not be disciplinable if the attorney commits a direct but ineffectual act toward its commission.

administrative law judges. The Commission does not believe that extending paragraph (a) to a “tribunal” makes sense, and notes that assisting, soliciting, or inducing a violation of applicable portions of the Code of Judicial Ethics by a lawyer serving as a temporary judge, referee, or court-appointed arbitrator would violate Rule 8.4(a) through Rule 2.4.1 (Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator).

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017
(In response to 45-day public comment circulation):**

1. Subsection (a)’s use of the word “knowingly” is problematic and inconsistent with California law. The rules should not encourage willful blindness, gross negligence, recklessness, or failure to investigate.

Commission Response: The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in paragraph (a) in imposing vicarious liability for a Rule violation committed by another, and will not encourage willful blindness or failure to investigate. The Rule does not apply the “knowingly” standard to violations committed by the lawyer him or herself.

2. The rule does not prohibit attempted violations of the rules.

Commission Response: The Commission debated at length whether to include a general attempt prohibition in this Rule. As discussed in the Report and Recommendation, the Commission rejected this approach as overbroad given that certain Rules do not lend themselves to discipline for attempted violations.

3. Paragraph (b) does not include other misconduct warranting discipline and thus creates a different standard than under Business and Professions Code § 6101.

Commission Response: The Commission believes that paragraph (b) as drafted reflects consistency with the ABA Model Rule and appropriately highlights a focus on criminal acts that reflect adversely on the lawyer’s honesty, trustworthiness or fitness. Comment 3 makes clear that discipline may still be imposed for criminal acts triggering application of the referenced State Bar Act sections.

4. OCTC supports subsections (c), (d), and (e).

Commission Response: No response required.

5. Subsection (f) only prohibits “knowingly” assisting a judge or judicial officer in conduct that is a violation of applicable rules and is thus inconsistent with California law.

Commission Response: See response to #1, above

6. Concerned with use of the word judge or judicial officer as opposed to “tribunal.” This subsection should also include assisting an administrative law judge or arbitrator.

Commission Response: The Commission believes that paragraph (f)’s reference to “judicial officers” includes administrative law judges. The Commission does not believe that extending paragraph (a) to a “tribunal” makes sense, and notes that assisting, soliciting, or inducing a violation of applicable portions of the Code of Judicial Ethics by a lawyer serving as a temporary judge, referee, or court-appointed arbitrator would violate Rule 8.4(a) through Rule 2.4.1 (Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator).

7. Subsection (f) should also include soliciting or inducing a judge or judicial officer to violate the applicable rules.

Commission Response: Paragraph (f) as drafted is parallel with paragraph (a) and includes inducement and solicitation.

8. OCTC supports the Comments to this rule.

Commission Response: No response required.

- **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, ten public comment were received. One comment agreed with the proposed Rule, one comment disagreed, seven agree only if modified, and one did not indicate a position. During the 45-day public comment period, one public comment was received. That one comment agreed with the proposed Rule if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule if modified.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Professional Competence is not aware of any provisions in California law that are directly related to rule 1-120. However, there are some provisions that appear to be consistent with the general policy that a lawyer should be subject to regulation when assisting, soliciting or inducing another person’s actions. Examples include: (1) a lawyer’s use of a “runner” or “capper” to procure clients (Business and Professions Code § 6150 et. seq.; (2) a lawyer aiding in the unauthorized practice of law (rule

1-300(B)); (3) a lawyer's association with, or employment of, a disciplined attorney (rule 1-311 and Business and Professions Code § 6133); (4) a lawyer's duty to supervise other lawyers and nonlawyers (rule 3-110 (and case law cited in the Discussion section); and (5) a lawyer's role in special admissions (MJP) circumstances (such as serving as the attorney of record in a non-California lawyer's application to appear as counsel pro hac vice pursuant to rule 9.40 of the California Rules of Court). Regarding the duty to report another person's misconduct, the California Code of Judicial Ethics includes a provision concerning a judge's possible reporting of misconduct by another judge (Canon 3D(1)) and a provision on a judge's possible reporting of lawyer misconduct (Canon 3D(2)).

B. ABA Model Rule Adoptions

- **Model Rule 8.4.** The ABA State Adoption Chart for Model Rule 8.4 addresses paragraph (a) of the model rule which is the direct counterpart to rule 1-120 as well as other provisions referenced in OCTC's recommendation. The chart is posted at:
 - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf [Last visited 2/7/17]
 - Thirteen jurisdictions have adopted Model Rule 8.4 verbatim.² Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 8.4.³ Eight jurisdictions have adopted a version of the rule that is substantially different from Model Rule 8.4.⁴
- **Model Rule 8.4, Comment [3] & Proposed Rule 8.4.1.** Comment [3] to Model Rule 8.4 prohibits lawyers from knowingly manifesting bias or prejudice by words or conduct when such actions are prejudicial to the administration of justice. Similar language was also included in Comment [3] of the first Commission's proposed Rule 8.4. The subject matter of Comment [3] is addressed in proposed Rule 8.4.1. (See Rule 8.4.1 Report and Recommendation.)

Twelve jurisdictions have adopted Model Rule 8.4, Comment [3] verbatim.⁵ Seven jurisdictions have adopted a slightly modified version of Model Rule 8.3,

² The thirteen jurisdictions are: Arizona, Arkansas, Connecticut, Idaho, Montana, Mississippi, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Utah and West Virginia.

³ The thirty-one jurisdictions are: Alabama, Alaska, Colorado, Delaware, District of Columbia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

⁴ The eight jurisdictions are: California, Florida, Georgia, Illinois, Maine, New York, Texas, and Washington.

⁵ The twelve jurisdictions are: Delaware, Idaho, Illinois, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

Comment [3].⁶ Fourteen jurisdictions have adopted a version of Comment [3] that is substantially different from Model Rule 8.3.”⁷ Eighteen jurisdictions have not adopted a version of Comment [3].”⁸

C. ABA Model Rule Adoptions

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3],” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf [Last visited 2/7/17]

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

A. Concepts Accepted (Pros and Cons):

General Concepts. The Commission has used as its starting point current rule 1-120, which prohibits a lawyer from knowingly assisting in, soliciting or inducing a violation of the Rules or the State Bar Act, and ABA Model Rule 8.4, which contains a similar prohibition as well as additional misconduct provisions.

1. In accordance with the approach of Model Rule 8.4, expand the scope of current rule 1-120 and collect in a single rule various misconduct provisions that are currently found in other rules of professional conduct or in the Business and Professions Code.
 - Pros: There would be a single Rule that lawyers, judges and the public can consult to identify basic standards of conduct addressing honesty, trustworthiness and fitness to practice with which a lawyer must comply. Placing these standards in a single Rule should facilitate compliance with and enforcement of the Rules by clearly stating these basic principles and also

⁶ The seven jurisdictions are: Arizona, Colorado, Connecticut, Iowa, Maine, North Dakota, and Tennessee.

⁷ The fourteen jurisdictions are: Alaska, Arkansas, District of Columbia, Florida, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Texas, and Washington.

⁸ The eighteen jurisdictions are: Alabama, California, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, Virginia, and Wyoming.

promote confidence in the legal profession and the administration of justice by prominently placing the principles in a single Rule.⁹

- Cons: The principles already exist in the current rules or the State Bar Act. Collecting them in a single Rule will create another source for a disciplinary charge, risking duplication of charging in the disciplinary process.
2. Address the concept of discrimination by a lawyer either in the practice of law or in the operation and management of a law practice in a separate rule, proposed Rule 8.4.1, rather than addressing it as either a blackletter provision¹⁰ or Comment¹¹ to this Rule.
- Pros: See discussion in Report & Recommendation re proposed Rule 8.4.1.
 - Cons: See discussion in Report & Recommendation re proposed Rule 8.4.1.
3. Address the concept of an “attempt” to violate a rule or a provision of the State Bar Act in individual rules rather than generally make an “attempt” a potential violation of any rule.
- Pros: Similar to the first Commission, the Commission believes¹² that the Commission should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. This approach should result in any prohibition on an attempt being tailored to a specific rule’s violation

⁹ The ABA similarly collected dispersed principles into Model Rule 8.4 by bringing together concepts from ABA Model Code of Professional Responsibility, DR [Disciplinary Rule] 1-102(A), DR 9-101(C), EC [Ethical Consideration] 7-34, and EC 9-1.

¹⁰ Although there is no blackletter provision in the Model Rules that expressly addresses discrimination by a lawyer, the ABA Standing Committee on Ethics and Professional Responsibility has recently proposed adoption of new paragraph 8.4(g), which would provide it is professional misconduct for a lawyer to:

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

The proposed amendment also includes a substantial reworking of MR 8.4, Cmt. [3]. Both proposed paragraph 8.4(g) and the original and reworked comment [3] are discussed in detail in the Report & Recommendation relating to proposed Rule 8.4.1.

¹¹ Currently, Model Rule 8.4, Cmt. [3] provides:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

and potential harm, and avoid creating a blunt instrument for discipline that would serve little purpose when applied to most rules. For example, in proposed Rule 1.5 [4-200], this Commission has recommended a rule that provides a lawyer “shall not make an agreement for, charge, or collect an unconscionable or illegal fee.” The terms “make” and “charge” in effect prohibit an attempt to “collect” an unconscionable fee. Although only the actual collection of an unconscionable fee will result in harm to a client, even an attempt to impose a legal obligation on a client to pay such a fee should be prohibited. On the other hand, the Commission also recommends adoption of proposed Rule 4.2 [2-100], which prohibits a lawyer who represents a client in a matter from communicating about the subject of the representation with a person who is represented by a lawyer in the same matter. The harm is in the actual communication with the represented person that could result in the disclosure of privileged information or otherwise interfere with the lawyer-client relationship. Prohibiting an attempt to engage in such a communication poses the risk of unduly interfering with a lawyer’s ability to investigate a claim as a lawyer often cannot know that a person is represented until the lawyer has contacted the person. An additional example where problems would be created by a general provision authorizing discipline for an attempted violation is Rule 1.4, which requires a lawyer to “promptly” provide information to clients. With a general attempt provision, any delay not long enough to constitute an actual violation of Rule 1.4 might be characterized as indicating an attempt subject to discipline.

- Cons: ABA Model Rule provides it is misconduct to “attempt to violate” any rule, so the proposed rule reflects a divergence from the national model.

Blackletter Provisions. Each of the proposed blackletter provisions is discussed in the following paragraphs:

4. Recommend adoption of paragraph (a) of Model Rule 8.4, without the concept of “attempt”.
 - Pros: Paragraph (a) largely carries forward current rule 1-120. Concerning the concept of “attempt,” see paragraph 3, above.
 - Cons: Proposed paragraph (a) does not go far enough in modifying Model Rule 8.4(a). The first Commission deleted from the Model Rule not only the concept of attempt, but also the concept that it is misconduct to “violate the Rules of Professional Conduct.” As the first Commission explained: “[A]ny conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation.” Ultimately,

¹² It should also be noted that during the initial consideration of a rule based on current rule 1-120 in May 2015, the Chair inquired and determined that it was the view of a significant majority of the Commission that attempts should be addressed on a rule-by-rule basis. Similarly, RRC-1 appears to have voted unanimously to reject inclusion of a general attempt provision.

however, the proposed rule circulated by the Board included the concept that it was professional misconduct to violate the Rules or the State Bar Act.

5. Recommend adoption of paragraph (c) of Model Rule 8.4, with the words “reckless or intentional” added to modify “misrepresentation.”

- Pros: The conduct prohibited in this provision – dishonesty, fraud, deceit and reckless or intentional misrepresentation – are central concepts of conduct in which lawyers must not engage if respect for the legal profession and the proper administration of justice is to be maintained. The addition of “reckless or intentional” is intended to clarify that negligent misrepresentation is not regarded as dishonesty that would trigger this Rule. This clarification is consistent with the intended scope of the ABA’s rule and with the interpretation in disciplinary proceedings in states that have adopted the Model Rule. (See, e.g., *State ex rel. Oklahoma Bar Ass’n v. Besly* (Okla., 2006) 136 P.3d 590 [2006 OK 18] and *In re Clark* (Ariz. 2004) 207 Ariz. 414 [87 P.3d 827].) Including these modifiers avoids the aspirational nature of the Model Rule provision. Compare proposed Rule 1.1, under which discipline is imposed only if a lawyer has “intentionally, recklessly, repeatedly, or with gross negligence” failed to act competently.
- Cons: None identified.

6. Recommend verbatim adoption of paragraph (d) of Model Rule 8.4, concerning conduct “prejudicial to the administration of justice.”

- Pros: A lawyer’s fitness to practice law is called into question by conduct prejudicial to the administration of justice in whatever capacity the lawyer acts. See also Comment [1], which clarifies that a violation of this Rule can occur even when a lawyer is not practicing law or acting in a professional capacity.
- Cons: There is a concern that this provision might not pass Constitutional challenge if it is not limited to situations where the lawyer’s conduct occurs “in connection with the practice of law.” (Compare *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110 [Former Bus. & Prof. Code § 6068(f), prohibiting “offensive personality,” was found to be unconstitutional.].) Proposed Comment [6] seeks to address this concern by specifying that paragraph (d) does not apply to constitutionally-protected conduct.

7. Recommend adoption of paragraph (e) of Model Rule 8.4, prohibiting a lawyer from stating or implying the ability to improperly influence a government agency or official.

- Pros: This provision, which in the original Model Rules (1983) was part of the advertising rules, (MR 7.1(b)), more properly belongs in this general Rule regarding professional misconduct, as the prohibition should not be limited to advertising or soliciting legal business.
- Cons: None identified.

8. Recommend adoption of paragraph (f), prohibiting a lawyer from knowingly assisting a judge in a violation of judicial conduct rules.

- Pros: Expressly stating that such conduct is prohibited acts to ensure the confidence the public places in the legal profession and the administration of justice is justified.
- Cons: None identified.

Comments to Proposed Rule 8.4. The Commission recommends six comments, some derived from Model Rule comments, some derived from comments proposed by the first Commission, and some new comments to address California-specific law.

9. Recommend adoption of Comment [1], which has no counterpart in the Model Rule.

- Pros: Comment [1] clarifies that the Rule applies to lawyer misconduct not only in connection with the representation of a client but also applies when the lawyer acts *in propria persona* as well as when the lawyer is not acting in a professional capacity.
- Cons: The clarification is unnecessary as there is nothing in the language of the rule that limits its application to when a lawyer is representing a client.

10. Recommend adoption of Comment [2], which is derived from the last sentence of Model Rule 8.4, Cmt. [1].

- Pros: This comment provides interpretative guidance by providing assurance that the prohibitions in paragraph (a) against assisting in violating a rule or the State Bar Act, or doing so through the acts of another, do not preclude a lawyer from advising a client concerning actions the client is legally entitled to make.
- Cons: This sentence, taken out of context from the rest of Model Rule 8.4, Cmt. [1] seems simply to state the obvious. It should be deleted, or the substance of the first part of the model rule comment should be restored to provide the necessary context.

11. Recommend adoption of Comment [3], which is derived from the first Commission's proposed Comment [2A].

- Pros: Comment [3] provides important guidance as to what is intended by the concept in California case law, "other misconduct warranting discipline." The cited case, *In re Kelley*, is the seminal Supreme Court case on this concept.
- Cons: The Comment does not provide guidance in applying or interpreting the Rule but instead appears to identify a separate basis for discipline. If that is the case, then it should appear in the blackletter of the Rule.

12. Recommend adoption of Comment [4], which is also derived from the first Commission's proposed Comment [2A].

- Pros: Comments [3] and [4] are both related to the concept of "other misconduct warranting discipline." This sentence, originally in the first Commission's Comment [2A] with proposed Comment [3], has been split into a separate comment to emphasize the fact that a lawyer can be subject to discipline for acts involving gross negligence.
- Cons: The comment does not provide guidance in applying or interpreting the Rule but instead appears to identify a separate basis for discipline. If that is the case, then it should appear in the blackletter of the Rule.

13. Recommend adoption of Comment [5], which is derived from the first Commission's proposed Comment [2C].

- Pros: The first Commission drafted this comment in response to a public comment from the Department of Justice. Given the first Commission's decision not to recommend a version of Model Rule 4.1 [Truthfulness in Statements To Others], the language addressing covert activity that the first Commission previously had considered for inclusion as Rule 4.1(b), was added as a comment to Rule 8.4. The comment clarifies that Rule 8.4(c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. Consideration was given to placing this comment in Rule 4.1, but it was determined that it should be included here in connection with proposed Rule 8.4(c)'s more general prohibition. A cross-reference has been recommended in the Comments to proposed Rule 4.1. (See proposed Rule 4.1, Cmt. [4].)
- Cons: None identified as to substance. However, this Commission has recommended a version of Model Rule 4.1, and this comment might more appropriately be placed in that rule.

14. Recommend adoption of Comment [6], which is derived from RRC1's proposed Comment [2D].

- Pros: This comment provides important interpretive guidance. It stresses that constitutional rights in a disciplinary context must be protected so that activities protected by the First Amendment do not become the subject of disciplinary proceedings or their exercise is not chilled. (See, e.g., *Ramirez v. State Bar* (1980) 28 Cal.3d 402, 411 [169 Cal.Rptr. 206] [a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth]; *Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr 775 [disciplinary rules governing the legal profession cannot

punish activity protected by the First Amendment]; *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 [a lawyer’s statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice].)

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of paragraphs (b) of Model Rule 8.4 but add a reference to “moral turpitude” to the paragraph.

- Pros: “Moral turpitude” and “fitness as a lawyer in other respects” means essentially the same thing. If the purpose of the rule is to alert lawyers to the case law in California concerning moral turpitude, it should be done by means of a comment.
- Cons: As explained more fully in ABA Model Rule 8.4, Cmt. [2], this provision focuses only on crimes committed by a lawyer that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer, central principles in lawyer conduct. The reference to moral turpitude is included to maintain conformity with the broader public protection afforded by the Business and Professions Code, specifically § 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. Some jurisdictions have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the Commission recommends adding “moral turpitude” to the proposed rule. In addition, there is a long history in California of discipline referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code §§ 6101 and 6102. That the crime is one of moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction.

2. Include in the Rule the concept of “attempt” to violate a rule.

- Pros: See Section IX.A.3, above.
- Cons: See Section IX.A.3, above.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together 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. The Commission believes that none of the proposed revisions of current rule 1-120 constitutes a change in duties for California lawyers, all of the provisions in the proposed Rule having counterparts in the current Rules, the State Bar Act, or case law. (See also Section IX.A.1, 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 approximate 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:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.4 [1-120] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.4 [1-120] in the form attached to this Report and Recommendation.