

**Rule 1.16 Declining Or Terminating Representation  
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  - (1) the lawyer knows\* or reasonably should know\* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;
  - (2) the lawyer knows\* or reasonably should know\* that the representation will result in violation of these rules or of the State Bar Act;
  - (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or
  - (4) the client discharges the lawyer.
  
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
  - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
  - (2) the client either seeks to pursue a criminal or fraudulent\* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes\* was a crime or fraud;\*
  - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;\*
  - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;
  - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable\* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
  - (6) the client knowingly\* and freely assents to termination of the representation;
  - (7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

- (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
  - (9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or
  - (10) the lawyer believes\* in good faith, in a proceeding pending before a tribunal,\* that the tribunal\* will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal,\* a lawyer shall not terminate a representation before that tribunal\* without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable\* steps to avoid reasonably\* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
- (1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,\* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably\* necessary to the client's representation, whether the client has paid for them or not; and
  - (2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

## Comment

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. See rule 3.1(b).

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code § 6068(e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal\* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.16**  
**(Current Rule 3-700)**  
**Declining or Terminating Representation**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-700 (Termination of Employment) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.16 (Declining or Terminating Representation). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.16 (Declining or Terminating Representation).

**Rule As Issued For 90-day Public Comment**

Proposed rule 1.16 follows the substance and format of ABA Model Rule 1.16 while carrying forward certain concepts found in current rule 3-700. In concert with ABA Model Rule 1.16, proposed rule 1.16 applies to both the acceptance and termination of representation. The proposed rule follows the format of ABA Model Rule 1.16 in that situations mandating withdrawal are set forth in paragraph (a) while permissive withdrawal situations are addressed in paragraph (b). The provisions in current rule 3-700(A)(1) and (A)(2) concerning seeking a tribunal’s permission to withdraw and the duty to not prejudice the client have been moved to paragraphs (c) and (d), respectively.

Paragraph (a)(1) carries forward the substance of current rule 3-700(B)(1), which prohibits a lawyer from representing a client where the action lacks probable cause and is brought to harass. In addition to formatting changes, the proposed rule substitutes the defined term, “reasonably should know” for the current rule’s “should know.”

Paragraph (a)(2) carries forward the substance of current rule 3-700(B)(2), which prohibits a lawyer from representing a client where doing so violates that lawyer’s ethical obligations. In addition to formatting changes, the proposed rule substitutes the defined term “reasonably should know” for the current rule’s “should know.”

Paragraph (a)(3) carries forward the substance of current rule 3-700(B)(3), which provides that a lawyer shall not represent a client if the lawyer’s mental or physical condition renders the lawyer ineffective.

Paragraph (a)(4) is a substantive change derived from ABA Model Rule 1.16(a)(3) requiring withdrawal and compliance with the rule when the client discharges the lawyer. Although case law provides that a client has the right to discharge his or her lawyer for any reason, see *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385], this concept is lacking in the current rule. Because lawyers will sometimes attempt to resist a client’s attempts to discharge them, making this a disciplinary offense protects the public.

Paragraph (b)(1) carries forward the substance of current rule 3-700(C)(1)(a) but clarifies that a lawyer’s ability to withdraw based on a client’s pursuit of a meritless claim applies in both litigation and non-litigation matters.

Paragraphs (b)(2) and (b)(3) carry forward the substance of current rule 3-700(C)(1)(b) and (c), but add concepts derived from ABA Model Rule 1.16 which permit withdrawal based on fraudulent as well as unlawful conduct.

Paragraph (b)(4) carries forward current rule 3-700(C)(1)(d), which permit withdrawal when a client's conduct renders it unreasonably difficult for the lawyer to continue effectively.

Paragraph (b)(5) expands the breadth of current rule 3-700(C)(1)(f) by adopting the concepts in ABA Model Rule 1.16(b)(5). Paragraph (b)(5) permits withdrawal when a client breaches any agreement or obligation to the lawyer, including those not related to an agreement or obligation for fees or expenses. The lawyer must warn the client before withdrawing under the circumstances.

Paragraph (b)(6) permits a lawyer to withdraw with the consent of the client.

Paragraph (b)(7) carries forward current rule 3-700(C)(3), which permits withdrawal if a lawyer is unable to work with co-counsel.

Paragraph (b)(8) permits withdrawal for the reasons stated in paragraph (a)(3).

Paragraph (b)(9) permits withdrawal for the reasons stated in paragraph (a)(2).

Paragraph (b)(10) permits withdrawal from cases pending before a tribunal on the grounds that the lawyer has a good faith belief that the tribunal will find good cause for withdrawal.

Paragraph (c) carries forward the substance of current rule 3-700(A)(1), which provides that a lawyer shall seek the permission of the tribunal before terminating the representation if permission is required by the tribunal.

Paragraph (d) carries forward the substance of current rule 3-700(A)(2), which provides that a lawyer shall not terminate representation before taking reasonable steps to avoid foreseeable prejudice to the client.

Paragraphs (e)(1) and (e)(2) carry forward current rule 3-700(D)(1) and (D)(2), which provide that a lawyer must promptly return a client's file and property and promptly refund any unearned fees. Paragraph (e)(1) has been modified to provide that "client materials and property" includes those stored electronically. Paragraph (e)(2) has been modified to require the return of any unused advanced expenses.

Comment [1] clarifies that the rule applies to the sale of a law practice.

Comment [2] explains that withdrawal from one client matter does not necessarily require withdrawal from another in which the lawyer represents that same client. This concept is important in avoiding prejudice to the client.

Comment [3] emphasizes a lawyer's duty of confidentiality when seeking permission from the tribunal to withdraw.

Comment [4] provides citations to certain statutes that place limits on a lawyer's duty to provide the client with the file upon withdrawal.

Comment [5] carries forward current rule 3-700, discussion paragraph 3, regarding a lawyer's right to make a copy of the client's file and seek recovery of the lawyer's expense for doing so.

### **Post-Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised subparagraph (b)(4) to substitute the word "representation"

for “employment.” This subparagraph describes a basis for permissive withdrawal where the client’s conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively. The Commission substituted the term “representation” for “employment” because the latter might suggest the presence of an actual employer-employee relationship when the intended scope of this subparagraph is intended to encompass all lawyer-client relationships, including those that are independent contractor relationships and not an employment relationship.

The Commission also revised subparagraph (e)(1) to substitute the phrase “statute or regulation” for “statutory limitation.” This subparagraph refers to applicable non-disclosure considerations such as a protective order or a non-disclosure agreement. The Commission determined that the reference to non-disclosure considerations arising from a “statutory limitation” was too narrow. The phrase “statute or regulation” was considered to be a broader and a more appropriate reference.

In the rule Comments, the Commission added a new Comment [3] to clarify that the mandatory withdrawal provision in subparagraph (a)(1) does not mandate withdrawal where a lawyer for a defendant in a criminal or similar proceeding defends the proceeding by requiring that every element of the case be established.

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 1.16 [3-700]

### Commission Drafting Team Information

**Lead Drafter:** Howard Kornberg

**Co-Drafters:** Joan Croker, Carol Langford, Raul Martinez

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### I. CURRENT CALIFORNIA RULE 3-700

#### Rule 3-700 Termination of Employment

##### (A) In General.

- (1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

##### (B) Mandatory Withdrawal.

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

- (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
- (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

##### (C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) The client
  - (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
  - (b) seeks to pursue an illegal course of conduct, or
  - (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
  - (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
  - (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
  - (f) breaches an agreement or obligation to the member as to expenses or fees.
- (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
- (3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
- (4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
- (5) The client knowingly and freely assents to termination of the employment; or
- (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

- (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

- (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

## **Discussion**

Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member’s own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member’s expense in any subsequent legal proceeding.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 1.16 [3-700]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.16 [3-700]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

## **III. COMMISSION’S PROPOSED RULE (CLEAN)**

### **Rule 1.16 [3-700] Declining Or Terminating Representation**

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the lawyer knows\* or reasonably should know\* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;
  - (2) the lawyer knows\* or reasonably should know\* that the representation will result in violation of these rules or of the State Bar Act;
  - (3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or
  - (4) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
  - (2) the client either seeks to pursue a criminal or fraudulent\* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes\* was a crime or fraud;\*
  - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;\*
  - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;
  - (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable\* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
  - (6) the client knowingly\* and freely assents to termination of the representation;
  - (7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;
  - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
  - (9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or

- (10) the lawyer believes\* in good faith, in a proceeding pending before a tribunal,\* that the tribunal\* will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal,\* a lawyer shall not terminate a representation before that tribunal\* without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable\* steps to avoid reasonably\* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
- (1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. “Client materials and property” includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,\* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably\* necessary to the client's representation, whether the client has paid for them or not; and
  - (2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

## Comment

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. See rule 3.1(b).

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code § 6068(e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal\* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

#### IV. **COMMISSION'S PROPOSED RULE** **(REDLINE TO CURRENT CALIFORNIA RULE 3-700)**

##### **Rule 1.16 [3-700] Termination of Employment Declining Or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(A) ~~In General.~~

~~(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.~~

~~(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.~~

(B) ~~Mandatory Withdrawal.~~

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

~~(1) The member~~the lawyer knows\* or reasonably should know\* that the client is bringing an action, conducting a defense, asserting a position in litigation, or

taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; ~~or~~

- (2) ~~The member~~the lawyer knows\* or reasonably should know\* that ~~continued employment~~the representation will result in violation of these ~~rules~~rules or of the State Bar Act; ~~or~~
- (3) ~~The member's~~the lawyer's mental or physical condition renders it unreasonably difficult to carry out the ~~employment~~representation effectively; ~~or~~

~~(G) Permissive Withdrawal:~~

~~If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:~~

- ~~(14) The~~the client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- ~~(a1)~~ the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; ~~or;~~
- ~~(b2)~~ the client either seeks to pursue ~~an illegal~~a criminal or fraudulent\* course of conduct; ~~or~~ has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes\* was a crime or fraud;\*
- ~~(c3)~~ the client insists that the ~~member~~lawyer pursue a course of conduct that is ~~illegal or that is prohibited under these rules or the State Bar Act,~~ ~~or~~criminal or fraudulent;\*
- ~~(d4)~~ the client by other conduct renders it unreasonably difficult for the ~~member~~lawyer to carry out the ~~employment~~representation effectively; ~~or;~~
- (5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable\* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
  - ~~(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or~~

- (~~f~~6) ~~breaches an agreement or obligation to the member as to expenses or fees.~~ the client knowingly\* and freely assents to termination of the representation;
  - (~~2~~) ~~The continued employment is likely to result in a violation of these rules or of the State Bar Act; or~~
  - (~~3~~7) ~~The~~the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; ~~or~~
  - (~~4~~8) ~~The member's~~the lawyer's mental or physical condition renders it difficult for the ~~member~~lawyer to carry out the ~~employment~~representation effectively; ~~or~~
  - (~~9~~) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or
  - (~~5~~) ~~The client knowingly and freely assents to termination of the employment; or~~
  - (~~6~~10) ~~The member~~the lawyer believes\* in good faith, in a proceeding pending before a tribunal,\* that the tribunal\* will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal,\* a lawyer shall not terminate a representation before that tribunal\* without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable\* steps to avoid reasonably\* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (~~D~~e) ~~Papers, Property, and Fees.~~ Upon the termination of a representation for any reason:

~~A member whose employment has terminated shall:~~

- (1) ~~Subject~~subject to any applicable protective order ~~or,~~ non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all ~~the~~ client ~~papers~~materials and property. "Client ~~papers~~materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,\* exhibits, and physical evidence, ~~expert's reports~~whether in tangible, electronic or other form, and other items reasonably\* necessary to the ~~client's~~client's representation, whether the client has paid for them or not; and

- (2) ~~Promptly~~the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not ~~been~~earned or incurred. This provision is not applicable to a true retainer fee ~~which is~~ paid solely for the purpose of ensuring the availability of the ~~member~~lawyer for the matter.

### Comment~~Discussion~~

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. See rule 3.1(b).

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code § 6068(e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal\* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. See Business and Professions Code §§ 6068(b) and 6103. This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. See, e.g., Penal Code §§ 1054.2 and 1054.10.

~~Subparagraph (A)(2) provides that “a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients.” What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.~~

~~Paragraph (D) makes clear the member’s duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590~~

~~[124 Cal.Rptr. 297].) Paragraph (D) also requires that the member “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).~~

[6] Paragraph ~~(D) is~~(1) does not ~~intended to~~ prohibit a memberlawyer from making, at the member’slawyer’s own expense, and retaining copies of papers released to the client, ~~nor~~to prohibit a claim for the recovery of the member’slawyer’s expense in any subsequent legal proceeding.

## V. RULE HISTORY

### A. Summary of 1989 Amendments

Rule 3-700 became operative on May 27, 1989. The predecessor to current rule 3-700, former rule 2-111, originally approved and made operative on January 1, 1975, was entitled “Withdrawal from Employment.” Prior to the enactment of rule 2-111, there was no rule of professional conduct that governed a lawyer’s withdrawal from representation of a client. However, Code of Civil Procedure §§ 284-285.1 set forth procedures governing withdrawal of a lawyer from proceedings *before a tribunal*.

Former rule 2-111 largely tracked Disciplinary Rule (“DR”) 2-110 of the ABA Model Code of Professional Responsibility (“ABA Code”) and governed withdrawal from representations in both litigation and non-litigation matters.<sup>1</sup> Aside from non-substantive changes such as substituting the term “member of the State Bar” for “lawyer” and the phrase “these Rules of the State Bar Act” for the term “a Disciplinary Rule,” former rule 2-111 changed Disciplinary Rule 2-110 by adding concepts derived from the ABA Code, Disciplinary Rules 5-101 and 5-102.<sup>2</sup> This resulted in the addition of several prophylactic

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<sup>1</sup> Chapter 2 of the 1975 Rules of Professional Conduct largely tracked the corresponding organization of the ABA Code. However, the 1975 Rules added rule 2-101 (General Prohibition Against Solicitation of Professional Employment), with the corresponding Disciplinary Rules in the ABA Code being renumbered.

<sup>2</sup> Disciplinary Rules 5-101 and 5-102 provided:

**DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.**

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

provisions in paragraph (A) that addressed the withdrawal of a lawyer, or a lawyer in the lawyer's firm, when either might be called as a witness on behalf of the client in litigation concerning the subject matter of the representation, or if the lawyer's testimony might be prejudicial to the client.<sup>3</sup> The provisions addressing a lawyer as a witness have since been moved into current rule 5-210 (Member As Witness).<sup>4</sup>

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- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
  - (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
  - (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

**DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.**

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

<sup>3</sup> Specifically, former rule 2-111 added to DR 2-110(A) the following subparagraphs, (A)(4)(a)-(d) and (A)(5):

- (4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the following circumstances:
  - (a) If the member's testimony will relate solely to an uncontested matter; or
  - (b) If the member's testimony will relate solely to a matter of formality and there is not reason to believe that substantial evidence will be offered in opposition to the testimony; or
  - (c) If the member's testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; or
  - (d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.
- (5) If, after undertaking employment in contemplated or pending litigation, a member of the State Bar learns or it is obvious that he or a lawyer in his firm may be

Rule 2-111(A)(3) also contained a sentence not found in Disciplinary Rule 2-110(A)(3), which clarified that the requirement to promptly refund unearned fees did not apply to a “true retainer.”<sup>5</sup> That sentence remains in current rule 3-700.

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-700, which became operative on May 27, 1989. Rule 3-700 for the most part adheres to the organizational structure and language of former rule 2-111, but it adds paragraph (D) and a Discussion section. The following legislative black line version of the rule shows the changes to the provisions of the 1979 version of former rule 2-111 that were carried forward into rule 3-700.<sup>6</sup>

### Rule ~~2-111.3-700~~ Withdrawal from Termination of Employment

(A) In ~~general~~General.

- (1) If permission for ~~withdrawal from termination of~~employment is required by the rules of a tribunal, a member ~~of the State Bar~~ shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) ~~In any event, a~~A member ~~of the State Bar~~ shall not withdraw from employment until ~~he~~the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of ~~his~~the client, including giving due notice to ~~his~~the client, allowing time for employment of other counsel, ~~[MOVED TO 3-700(D)(1)] delivering to the client all papers and property to which the client is entitled~~complying with rule 3-700(D), and complying with applicable laws and rules.

~~[MOVED TO 3-700(D)(2)] (3) A member of the State Bar who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. However, this rule shall not be applicable to a true retainer fee which is paid solely for the purpose of insuring the availability of the attorney for the matter.~~

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called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

<sup>4</sup> Subsequent amendments to those provisions are addressed in the Report & Recommendation for Proposed Rule 3.7.

<sup>5</sup> Rule 2-111(A)(3) differed from Disciplinary Rule 2-110(A)(3) as follows:

- (3) A ~~lawyer~~member of the State Bar who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. However, this rule shall not be applicable to a true retainer fee which is paid solely for the purpose of insuring the availability of the attorney for the matter.

<sup>6</sup> The deleted text of rule 2-111(A)(4) and (5), which was moved to current rule 5-210, is not shown.

(B) Mandatory Withdrawal.

A member ~~of the State Bar~~ representing a client before a tribunal, shall withdraw from employment with ~~its~~ the permission of the tribunal, if required by its rules, ~~shall withdraw from employment~~, and a member ~~of the State Bar~~ representing a client in other matters shall withdraw from employment, if:

- (1) ~~He~~ The member knows or should know that ~~his~~ the client is bringing ~~a legal~~ an action, conducting a defense, asserting a position in litigation, or ~~otherwise having steps taken for him solely taking an appeal, without probable cause and~~ for the purpose of harassing or maliciously injuring any person ~~or solely out of spite, or is taking or prosecuting an appeal merely for delay, or for any other reason not in good faith~~; or
- (2) ~~He~~ The member knows or should know that ~~his~~ continued employment will result in violation of these ~~Rules of Professional Conduct~~ rules or of the State Bar Act; or
- (3) ~~His~~ The member's mental or physical condition renders it unreasonably difficult ~~for him~~ to carry out the employment effectively.

(C) Permissive Withdrawal.

If ~~Rule 2-111~~ rule 3-700(B) is not applicable, a member ~~of the State Bar~~ may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) ~~His~~ The client:
  - (a) ~~Insists~~ insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or
  - (b) ~~Personally~~ seeks to pursue an illegal course of conduct; or
  - (c) ~~Insists~~ insists that the member ~~of the State Bar~~ pursue a course of conduct that is illegal or that is prohibited under these ~~Rules of Professional Conduct~~ rules or the State Bar Act; or
  - (d) ~~By~~ by other conduct renders it unreasonably difficult for the member ~~of the State Bar~~ to carry out ~~his~~ the employment effectively; or
  - (e) ~~Insists~~ insists, in a matter not pending before a tribunal, that the member ~~of the State Bar~~ engage in conduct that is contrary to the judgment and advice of the member ~~of the State Bar~~ but not prohibited

under these ~~Rules of Professional Conduct~~rules or the State Bar Act;  
or

- (f) ~~Deliberately disregards~~breaches an agreement or obligation to the member ~~of the State Bar~~ as to expenses or fees; ~~or.~~
- (2) ~~His~~The continued employment is likely to result in a violation of these ~~Rules of Professional Conduct~~rules or of the State Bar Act; or
- (3) ~~His~~The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
- (4) ~~His~~The member's mental or physical condition renders it difficult for ~~him~~the member to carry out the employment effectively; or
- (5) ~~His~~The client knowingly and freely assents to termination of ~~his~~the employment; or
- (6) ~~He~~The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

#### (D) Papers, Property, and Fees.

A member whose employment has terminated shall:

- (1) [MOVED FROM 2-111(A)(2)] Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

[MOVED FROM 2-111(A)(3)] (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

#### Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

The then Rules Revision Commission explained the proposed revisions to former rule 2-111 that would result in rule 3-700:

Proposed rule 3-700 generally continues the regulations found in current rule 2-111 regarding termination of employment.

Proposed amendments to subparagraph (A)(1), which currently requires permission for withdrawal if such permission is required by a tribunal, make clear that the rule is applicable in all situations where termination of employment occurs and not merely in situations involving withdrawal from representation before a tribunal.

Subparagraph (A)(2), which currently prohibits an attorney from withdrawing until certain steps are taken to avoid foreseeable prejudice to the rights of the client, would be amended to specify a consistent standard: "reasonably foreseeable". This standard has been well-defined by the courts. The requirement that the attorney deliver to the client all the client's papers and property, which is currently included in subparagraph (A)(2), has been moved to subparagraph (D)(1) of the proposed rule and has been expanded to clarify the troubling issue of what constitutes "client papers and property".

The deletion of subparagraph (A)(3), which requires an attorney who withdraws to promptly refund any part of a fee paid in advance that has not been earned, would not constitute a substantive change. The substance of this rule is continued in proposed new subparagraph (D)(2).

Subparagraphs (A)(4) and (A)(5), dealing with members as witnesses, have been consolidated and moved to a separate new rule 5-210. This important topic should have its own rule so that it may be more easily located.

No substantive changes are proposed to paragraph (B) which sets forth the circumstances under which an attorney must withdraw from employment.

No substantive changes are proposed to paragraph (C) which sets forth the circumstances under which an attorney may withdraw from employment, except

that subparagraph (C)(1)(f) would be amended to provide that a member may withdraw if a client breaches an agreement or obligation to the member as to expenses or fees. This change is intended to prevent the disputes that have taken place under present rule 2-111(C)(1)(f) as what constitute a client's "willful disregard" of an obligation to pay fees. Note however, that in this circumstance, as in all circumstances in which termination of employment occurs, the attorney may not withdraw unless he or she complies with paragraph (A) of the rule.<sup>7</sup>

Paragraph (D), which was a codification of existing case law, was added to clarify the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It also required that the member "promptly" return unearned fees paid in advance and reinforced a member's duty to comply with rule 4-100(A)(2) if the client disputes the amount.<sup>8</sup>

## **B. Summary of 1992 Proposed Amendments**

Amendments to rule 3-700 were proposed in 1992 in conjunction with proposed amendments to rule 4-100.<sup>9</sup> The proposed amendments to rules 3-700 and 4-100 required that all advance fees for legal services received by a member be deposited in the member's client trust account unless the member's written fee agreement with the client expressly provided that the fee paid in advance is earned when paid or is a "true retainer" (as set forth in rule 3-700(D)(2)). Although the proposed amendments avoided the use of the terms "fixed fee," "flat fee" or "non-refundable fee," such types of retainer fee agreements would have been permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provided that such fees, paid in advance of the provision of legal services, are earned when paid.

Proposed new subparagraph (B)(4) added a new requirement mandating that a member withdraw from representation of a client where the member or the member's law firm is

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<sup>7</sup> See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987, at pages 40-41.

<sup>8</sup> Rule 4-100(A)(2) provides:

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

<sup>9</sup> See "Request that the Supreme Court of California Approve Amendments To Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," Supreme Court case number S029270, October 1992.

discharged by the client. This requirement would have put lawyers on notice that a client has absolute power to terminate the attorney-client relationship.<sup>10</sup>

A proposed amendment to subparagraph (D)(2) would have expanded the definition of the term “true retainer fee” to include a fee paid solely for the purpose of ensuring the availability of the member either for a matter *or for a given period of time*:

- (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for ~~the~~ a matter or for a given period of time.

A proposed new third paragraph of the Discussion section would have taken the last two sentences of the second paragraph of the current rule Discussion and modified them in a non-substantive manner. New language would then have been added to clarify that: 1) the fact that an advance for legal fees need not be placed in a trust account pursuant to rule 4-100 does not by itself mean that the member may not have to refund a portion thereof (reference would be provided to rule 4-200 (Fees for Legal Services)); and 2) all advances for costs and expenses must be placed in a trust account pursuant to rule 4-100.

Subparagraph (D)(2) ~~also~~ requires that the member “promptly” return an unearned fee paid in advance. If ~~a client disputes the amount to be returned such a fees have~~ has been placed in a trust account pursuant to rule 4-100, the member shall comply with the provisions of rule 4-100(A)(2), should the client dispute the amount to be returned. The fact that such fee need not be placed in a trust account does not by itself mean that the member may not have to refund a portion thereof. (See also rule 4-200.) In any event, all advances for costs and expenses must be placed in a trust account. (See Stevens v. State Bar (1990) 51 Cal.3d 283 [272 Cal.Rptr. 167].)

The State Bar later withdrew its request for the foregoing amendments following a letter inquiry from the Supreme Court that identified an ambiguity in the proposal:

The court wishes to advise the State Bar of a possible ambiguity in the proposed amendments to rules 3-700 and 4-100. If a fee agreement specifies that an advance fee is “earned” when paid, the fee does not fall within rule 3-700(D)(2)’s requirement that members return “unearned” advance fees. Similarly, the new discussion following that rule refers only to an “unearned” fee paid in advance and states that “such fee” may still have to be refunded even if not required to be in a trust account. (See also rule 1-100(C) [discussion cannot add independent basis for discipline].) Thus, the proposed rules appear to exempt advance fees

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<sup>10</sup> See *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]. The same provision had been proposed by the 1972 Special Committee to Study the ABA Code of Professional Responsibility, but was not included in former rule 2-111.

designated as earned when paid from the requirement of refunding fees paid for services that are not performed.

No further amendments to rule 3-700 have been requested or approved since 1992.

## **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 the Comments to this rule.

Commission Response: No response required.

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

1. OCTC supports this rule and the Comments to this rule.

Commission Response: No response required

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

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

During the 90-day public comment period, six public comments were received. Two comments agreed with the proposed Rule, three comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, one public comment was received. The one comment agreed with the proposed Rule. 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**

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]
- *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297]
- *In the Matter of Shalant* (Review 2005) 4 Cal. State Bar Ct. Rptr. 829
- *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]
- Penal Code §§ 1054.2 and 1054.10.
- *In re Aguilar and Kent* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874]

- CAL 2007-174 (Electronic Client Files)
- CAL 1992-127 (Cooperation with Successor Counsel)

## B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.16, which is a direct counterpart to rule 3-700, revised September 15, 2016, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_16.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_16.pdf) [Last visited 2/7/17]
- Every jurisdiction has adopted some version of ABA Model Rule 1.16. Twenty jurisdictions have adopted the Model Rule verbatim,<sup>11</sup> 27 jurisdictions have adopted a substantially similar rule,<sup>12</sup> and four jurisdictions have adopted a rule that diverges substantially from the Model Rule: California, Massachusetts,<sup>13</sup> Minnesota,<sup>14</sup> and New York.<sup>15</sup>

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<sup>11</sup> The twenty jurisdictions are: Alaska, Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming.

<sup>12</sup> The twenty-seven jurisdictions are: Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

<sup>13</sup> Massachusetts Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but includes a paragraph (e), which contains an expanded description of what constitutes a client file and provides:

(e) A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following:

(1) all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.

(2) all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer's actual cost for these materials, unless the client has already paid for such materials.

(3) all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.

(4) if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid.

(5) if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph

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(6) below). The client may be required to pay any copying charge consistent with the lawyer's actual cost for the copying of these materials.

(6) for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

(7) notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

<sup>14</sup> Like Massachusetts, Minnesota's Rule 1.16 largely tracks the Model Rule paragraphs (a) through (d) but has adopted an expanded definition of "client papers and property," and several other provisions:

(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise:

(1) in all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs;

(2) in pending claims or litigation representations:

(i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed, regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed, if the client has not paid the lawyer's fee for drafting or creating the documents; and

(ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions and statements, business records, witness statements, and other materials that may have evidentiary value;

(3) in nonlitigation or transactional representations, client files, papers, and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the document(s).

(f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge.

(g) A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers.

<sup>15</sup> New York, which was the last jurisdiction to abandon a set of rules based on the ABA Code of Professional Responsibility, has retained rule structure that is similar to California Rule 3-700,

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

**A. Concepts Accepted (Pros and Cons):**

1. Recommend following the ABA rule in applying to both acceptance and termination of representation and changing the title to “Declining or Terminating Representation” from “Termination of Employment”
  - Pros: The rule should apply both to the decision whether to accept or decline a representation and to the decision to withdraw from the representation.
  - Cons: There is no evidence that current rule 3-700 is inadequate.
2. Recommend following the ABA rule format and structure under which situations mandating withdrawal are set forth in paragraph (a), permissive withdrawal situations are in paragraph (b), and the provisions in current rule 3-700(A)(1) and (2) concerning a tribunal’s permission to withdraw and duty not prejudice the client are moved to paragraphs (c) and (d), respectively.
  - Pros: The current rule has a structure unique among jurisdictions. No substantive change is intended or will result from the reorganization and moving paragraphs (A)(1) and (2) to paragraphs that correspond to the Model Rule paragraphs will remove an unnecessary difference between California and other jurisdictions, promoting a national standard.
  - Cons: The current structure sets forth the primary considerations for a lawyer when withdrawing from a representation: the duty not to prejudice the client and the duty to inform the court of the withdrawal. These two duties should remain at the beginning of the Rule.
3. Recommend retaining current rule (B)(1) as paragraph (a)(1), with only format and style changes, including the substitution of a defined term, “reasonably should know” for the current rule’s “should know”.
  - Pros: There is no evidence that this provision no longer remains relevant to a decision to decline or withdraw from a representation. Its language parallels the language in current rule 3-200(A), which the Supreme Court directed the first Commission to restore to its proposed Rule 3.1 and which this Commission has recommended be included in its proposed Rule 3.1.
  - Cons: None identified.

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as both rules derive in large part from ABA Code, DR 2-110. New York also expands the section of its rule concerning permissive withdrawal.

4. Paragraph (a)(2). Recommend retaining current rule 3-700(B)(2), with only format and style changes, including the substitution of a defined term, “reasonably should know” for the current rule’s “should know” and the substitution of “representation” for “employment,” as has been done throughout the proposed Rules.
  - Pros: No evidence there is a problem with the provision.
  - Cons: None identified.
5. Recommend adoption of paragraph (a)(3), which carries forward the substance of current rule 3-700(B)(3), with some changes to clarify the rule’s application and the substitution of “representation” for “employment,” as has been done throughout the proposed Rules.
  - Pros: The substance of current rule 3-700(B)(3) appropriately mandates that a lawyer withdraw from representation under the conditions described. The revised provision, however, sharpens the standard by substituting “impairs” for “renders it unreasonably difficult” and “competently” for “effectively.” Substituting “impair” and “competent” creates a clear standard. In particular, “competently,” which is a standard referenced throughout the proposed Rules, “competently,” a word used throughout the proposed Rules, should be employed as the standard requiring *mandatory* termination of a representation. However, no substantive change is intended.
  - Cons: None identified.
6. Recommend addition of paragraph (a)(4), derived from Model Rule 1.16(a)(3), requiring withdrawal and compliance with the rule when the client discharges the lawyer.
  - Pros: Although a client’s right to discharge his or her lawyer for any reason is well-settled in California case law, (see *Fracasse v. Brent* (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385]), there is no similar provision in current rule 3-700, so the inclusion of proposed subparagraph (a)(4) would be substantive change to *the Rules of Professional Conduct*, though it should not represent a change in a California lawyer’s duties. This is an important provision to have because lawyers will sometimes attempt to resist client’s attempts to discharge them. Making this a disciplinary offense should avert most such situations.
  - Cons: Proposed paragraph (a)(4) states the obvious. It is unnecessary.
7. Recommend retaining current rule 3-700(C)(1)(a), but clarify that it applies in both litigation and non-litigation matters.
  - Pros: Adding the clause, “in litigation, or asserting a position or making a demand in a non-litigation matter” to the language in current rule 3-700(C)(1)(a) clarifies that the duty to withdraw applies in both litigation and

non-litigation representations. Although the application of current rule 3-700(C)(1)(a) to non-litigation matters arguably can be implied, the express statement of its will leave no doubt.

- Cons: None identified.
8. Recommend retaining current rule 3-700(C)(1)(b), but add a concept from Model Rule 1.16(b)(2) that the lawyer’s withdrawal is permitted if the client used the lawyer’s services in committing a fraud.
- Pros: The situation permitting withdrawal in proposed subparagraph (b)(2) is described in substantially more detail than current rule 3-700(C)(1)(b). It is appropriate in a rule provision that *permits* withdrawal to provide extra guidance on when withdrawal is permitted.
  - Cons: None identified.
9. Recommend expanding the breadth of current rule 3-700(C)(1)(f) by adopting the concepts in Model Rule 1.16(b)(5), so that withdrawal would be permitted when a client breaches any agreement or obligation to the lawyer, even if the breach is not related to an agreement or obligation regarding fees or expenses, and require that the lawyer warn the client that the lawyer will withdraw unless the client fulfills the obligation.
- Pros: Similar to the previous concept, a more detailed explanation of a lawyer’s duties is appropriate in a provision permitting withdrawal. In addition, two points should be noted. *First*, the lawyer’s right to withdraw is limited to the client’s breach of a material term of an agreement with the lawyer. *Second*, the lawyer’s obligation to warn the client of a possible termination must come after the client’s breach so that, for example, a warning cannot be buried in the initial fee agreement.
  - Cons: None identified.
10. Recommend retaining the remaining permissive withdrawal provisions in rule 3-700(C) in substantially the same form as in the current rule, including carrying forward paragraphs (C)(2), (C)(3), (C)(4), (C)(5) and (C)(6) as proposed paragraphs (b)(9), (b)(7), (b)(8), (b)(6) and (b)(10), respectively.
- Pros: There is no evidence that these provisions have caused problems in interpretation or application.
  - Cons: None identified.
11. Recommend that current rule 3-700(D)(1) be revised in paragraph (e)(1) to clarify that “client materials and properties” may be in electronic or other forms in addition to “tangible” forms and that certain statutory obligations may restrict the lawyer’s ability to provide the client with information from the file.

- Pros: Proposed subparagraph (e)(1) makes two substantive changes that are warranted by law or the current state of technology in law practice. First, in adding a reference to limitations imposed by applicable protective orders, non-disclosure agreements, and statutes or regulations, it recognizes, for example, the Proposition 15 limitations on the materials to which a criminal defendant is entitled. Second, the proposed subparagraph also clarifies that the material to be returned may be “in tangible, *electronic, or other form.*” (Emphasis added.) The current rule does not so expressly provide. Given the widespread maintenance of client files in electronic form, as exemplified by the extensive amendments to court procedural rules to address issues raised by electronic discovery, this clarification is an important addition to the rule.
  - Cons: None identified.
12. Recommend retaining as paragraph (e)(2) current rule 3-700(D)(2), modified to include the concept of returning expenses that have been advanced to the lawyer but not incurred.
- Pros: Expressly requiring the return of expenses that have been advanced to the lawyer but not incurred is client protective.
  - Cons: None identified.
13. Recommend adoption of six Comments.
- Pros: All six Comments are concise and provide guidance in applying or interpreting the rule by delimiting the rule’s scope: Comment [1] clarifies that the rule applies to the sale of a law practice. Comment [2] explains that withdrawal from one client matter does not necessarily require withdrawal from another matter in which the lawyer represents the same client. This is important in avoiding prejudice to the client. Comment [3] clarifies the application of paragraph (a)(1) when a lawyer is representing defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement. The Comment alerts such a lawyer to Rule 3.1, which permits a lawyer to require that every element of the case be established in such situations without violating Rule 3.1’s corresponding prohibition of the conduct described in paragraph (a)(1) of this rule. Comment [4] emphasizes the lawyer’s duty of confidentiality when seeking permission from a tribunal to withdraw. Comment [5] provides citations to certain statutes that place limits on a lawyer’s duty to provide the client with the file upon withdrawal. Comment [6] carries forward current Discussion ¶. 3 regarding a lawyer’s right to make a copy of the file released to the client and to seek recovery of the lawyer’s expense in doing so.
  - Cons: None.

14. Recommend rejection of all eight of the Model Rule Comments.

- Pros: The Comments to Model Rule 1.16 are largely discursive practice pointers that repeat the black letter of the rule, state the obvious, and provide little if any interpretative guidance.
- Cons: None identified.

**B. Concepts Rejected (Pros and Cons):**

1. In paragraph (a)(2), add the phrase “or other law” as in the Model Rule.

- Pros: The rule should explicitly identify the “violation of other law” as mandating that a lawyer decline or withdraw from a representation. Although the current rule arguably covers that situation by prohibiting a violation of “these Rules or the State Bar Act” which include, respectively, rule 3-200(A) and Bus. & Prof. Code § 6068(a) (It is the duty of an attorney “(a) To support the Constitution and laws of the United States and of this state”), rule 3-700 should not hide the ball by requiring such interpretative gymnastics.
- Cons: Including “or other law” would mandate withdrawal for every discovery violation in which a client might engage.

2. Retain in the proposed Rule the substance of current rule 3-700(C)(1)(e), which permits withdrawal from representation when the client “insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act.”

- Pros: Although this provision is a carryover from the ABA Code of Professional Responsibility that was not incorporated into the Model Rules, it identifies a situation that warrants permissive withdrawal.
- Cons: This provision was a carry-over from ABA Code of Professional Responsibility, Disciplinary Rule 2-110(C)(1)(e). (The ABA did not carry the provision forward when it adopted Model Rule 1.16 in 1983). The corresponding Model Rule provision that was intended to cover conduct previously addressed by subparagraph (C)(1)(e) was subparagraph (b)(5) of the 1983 version of the Model Rule (since re-designated “(b)(6)”). Although the first clause of Model Rule 1.16(b)(6) regarding the representation creating an unreasonable financial burden on the lawyer was rejected, the concept in the second clause, i.e., that the representation “has been rendered unreasonably difficult by the client,” is found in proposed Rule 1.16(b)(4). Because that provision adequately covers the conduct addressed by current rule 3-700(C)(1)(e), it was determined the latter provision should be deleted from the proposed rule, bringing the California rule in line with the ABA Model Rule.

3. Retain current rule 3-700, Discussion ¶. 1, in the proposed rule as a Comment.
  - Pros: Current Discussion ¶.1, regarding a lawyer’s duty to take reasonable steps to avoid prejudicing the client when withdrawing, provides valuable guidance.
  - Cons: Discussion ¶.1 merely states the obvious, i.e., that what constitutes reasonable steps “will vary according to the circumstances.” It provides little if any guidance of either an interpretative or practical nature.
4. Retain current rule 3-700, Discussion ¶. 2, in the proposed rule as a Comment.
  - Pros: Discussion ¶.2 provides citations to case law to assist a lawyer in complying with the lawyer’s duties under current rule 3-700(D) [proposed paragraph (e)].
  - Cons: Proposed paragraph (e) is sufficiently detailed and clearly written to provide adequate guidance.

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. Addition of paragraph (a)(4) [Model Rule 1.16(a)(3)] is a substantive change. (See Section IX.A.6, above.)
2. The expanded coverage of paragraph (b)(5), based on 3-700(C)(1)(f) is a substantive change. (See Section IX.A.9, above.)
3. Paragraph (e)(1)’s permitting lawyers to return files to the client in “in tangible, *electronic, or other form,*” is a substantive change in the rule, though arguably it simply recognizes the modern practice of how files are commonly maintained. (See Section IX.A.11, above.)
4. The addition of a duty to return advanced expenses that have not been spent in paragraph (e)(1) is a substantive change. (See Section IX.A.12, 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 conform 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 by various Rules of Court to practice in California 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.
3. The reorganization of current rule 3-700 is a non-substantive change. (See IX.A.2, above.)

**E. Alternatives Considered:**

None.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

The Commission recommends adoption of proposed Rule 1.16 [3-700] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 1.16 [3-700] in the form attached to this Report and Recommendation.