ATTACHMENT 1

SELECT PROPOSED RULES FROM BATCH 1 ~ COMPARISON TABLES

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.1 Competence

December 2008
(Draft rule revised following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.1 is a departure from the ABA Model Rule's approach to regulating competence. The Commission decided to retain the California disciplinary standard in current rule 3-110 and not to adopt ABA Model Rule 1.1 for two reasons:

1. Model Rule 1.1 does not protect the public adequately because it focuses on a lawyer's possession of the components of competence rather than requiring the lawyer to use and apply legal knowledge, skill, and thoroughness in the performance of legal services. Thus, under the ABA Rule it is possible for a lawyer who had actually failed to apply extensive learning and skill in the performance of legal services for the client to be absolved, while a lawyer who had competently performed legal services could be disciplined simply for not having demonstrated the appropriate level of legal knowledge.

2. The Commission also observed that states that have adopted Model Rule 1.1 or a variant of it ordinarily do not impose discipline for a single act of negligence. Instead, most jurisdictions, including California, apply the rule to intentional, reckless and repeated acts, including acts of gross negligence, and not to acts of simple negligence. That fact is hidden in Model Rule 1.1 and makes the rule misleading to lawyers and the public.

Accordingly, the Commission determined that rather than hide that fact in a rule comment or in rulings from disciplinary proceedings that often remain confidential, the standard of the existing California rule should be retained. In making this determination, the Commission assessed the Supreme Court's public policy stated in *Lewis v. State Bar* (1981) 23 Cal.3d 683 ["This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence."] and reaffirmed that a lawyer's single act of ordinary negligence does not suggest that the lawyer is unfit to practice law, and that the discipline system should not be burdened with conduct that is best addressed as a civil issue.

A minority of the Commission disagrees with the Commission's decision to continue the current California approach to competence. The minority points out that Model Rule 1.1 is the majority rule throughout the states and sets an appropriate public protection standard in providing for an unqualified duty of lawyer competence. The minority also notes that many jurisdictions include a comment that discipline cannot be imposed for a single act of negligence and that the Commission's proposed Comment [6] makes this point by stating that the Rule is not intended to apply to "a single act of negligent conduct or a single mistake in a particular matter." The minority argues that by including proposed Comment [6], the Commission majority should not be hesitant to adopt the language of Model Rule 1.1. The minority also argues that the current rule suggests to the California public that the legal profession in California tolerates incompetent legal services that do not involve intentional, reckless, or repeated acts. The minority also does not believe resort to a legal malpractice lawsuit is the appropriate default for what should be disciplinable incompetence. Lastly, the minority emphasizes the Commission's charge to foster a national standard and observes that lawyer competence is a foundational standard of professional responsibility that should not change when a lawyer crosses the California border.

ABA Model Rule **Rule 1.1 Competence**	Commission's Proposed Rule* **Rule 1.1 Competence**	Explanation of Changes to the ABA Model Rule
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation	~~A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation~~ (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.	The proposed language of paragraph (a) is taken directly from current rule 3-110. Please see the Introduction for discussion of the Commission's recommendation to retain current rule 3-110's approach.
	(b) For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.	This language is taken verbatim from current rule 3-110(B) and is similar to the language of current ABA Model Rule 1.1, but adds the further public protections of requiring mental, emotional, and physical ability reasonably necessary for the performance of such service. The experience of members of the Commission, many of whom have represented other lawyers in legal malpractice and disciplinary actions in California, demonstrates that such further components are necessary to protect the public from incompetence resulting from alcohol and substance abuse, mental illness and physical infirmities. The language is also similar to the explanation of competence in Comment [1] of the proposed Rule.
	(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.	Most of the language in paragraph (c) is taken directly from current rule 3-110(C), with some minor changes. As further client protection, the Commission also has added the third alternative of referral to a competent lawyer. This language is similar to language in Comment [2] of ABA Model Rule 1.1.

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ABA Model Rule **Rule 1.1 Competence** **Comment**	**Commission's Proposed Rule*** **Rule 1.1 Competence** **Comment**	**Explanation of Changes to the ABA Model Rule**
Legal Knowledge and Skill [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.	~~**Legal Knowledge and Skill**~~ ~~[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.~~ [1] It is the duty of every lawyer to provide competent legal services to the client.	The Commission's proposed Comment [1] deviates from Model Rule 1.1 Comment [1] for two reasons. First, the Model Rule comment addresses the standard used in the Model Rule that focuses on a lawyer's possession of legal knowledge and skill. Thus, the Model Rule's emphasis is substantively different from the Commission's proposed Rule that focuses on a lawyer's use and application of that knowledge and skill in actually providing competent performance of legal services. See Introduction. Second, Model Rule 1.1 Comment [1] unnecessarily lengthens the Rule by addressing generalized points that are more appropriate in a treatise than in a rule comment.

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ABA Model Rule **Rule 1.1 Competence** **Comment**	**Commission's Proposed Rule*** **Rule 1.1 Competence** **Comment**	**Explanation of Changes to the ABA Model Rule**
[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.	~~[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.~~	The substance of Model Rule 1.1, Comment [2], was already contained in current rule 3-310(C) and the Commission recommends retaining the concept in the blackletter of the proposed Rule. Paragraph (c) of proposed Rule 1.1 is a slightly revised version of current rule 3-110(C) and provides: (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent. The Commission believes the above language effectively conveys the relevant guidance and that the inclusion of Model Rule 1.1 Comment [2] would unnecessarily lengthen the proposed Rule without any significant additional benefit.

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ABA Model Rule **Rule 1.1 Competence** **Comment**	**Commission's Proposed Rule*** **Rule 1.1 Competence** **Comment**	**Explanation of Changes to the ABA Model Rule**
NOTE: Below is Comment [1] of *Model Rule 1.3* Diligence. [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.	**NOTE: The Comparison for proposed Comment [2] is to Comment [1] of *Model Rule 1.3* Diligence.** [2] Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. ~~A lawyer should pursue~~ This includes pursuing a matter on behalf of a client ~~despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever~~ by taking lawful and ethical measures required to ~~vindicate a~~ advance the client's cause or ~~endeavor~~ objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may ~~have authority to~~ exercise professional discretion in determining the means by which a matter should be pursued. See Rules [1.2] and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.	This comment includes language relating to diligence, a subject that is found in Model Rule 1.3 that the Commission has tentatively voted not to adopt since its subject is already contained in current rule 3-110 as an important component of competence. See rule 3-110(B). The Commission therefore recommends its retention in proposed Rule 1.1(b) instead of creating a separate rule on diligence. Finally, because the Commission is including the concept of diligence in its proposed Rule 1.1, the relevant language from Comment [1] of Model Rule 1.3, which the Commission believes provides valuable guidance, is adapted and added here.

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ABA Model Rule **Rule 1.1 Competence** **Comment**	Commission's Proposed Rule* **Rule 1.1 Competence** **Comment**	Explanation of Changes to the ABA Model Rule
	[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.	This comment makes it clear that a lawyer who accepts employment knowing he or she is not competent for the matter, and who does not expect to become competent is subject to discipline. The substance of this comment is not found in the comments to Model Rule 1.1. It adds further public protection by putting the lawyer on notice of the standard for accepting or continuing a matter regarding competence.
[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.	[~~35~~4] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances~~, for ill-considered action under emergency conditions can jeopardize the client's interest~~.	This comment is substantially similar to Comment [3] of the ABA Rule. The last clause was deleted as surplusage.

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ABA Model Rule Rule 1.1 Competence Comment	Commission's Proposed Rule* Rule 1.1 Competence Comment	Explanation of Changes to the ABA Model Rule
[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.	~~*[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies*~~ ~~as well to a~~ ~~*lawyer who is appointed as counsel for an unrepresented person.*~~ ~~See also Rule 6.2.~~ <u>*[5] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This* provision *applies to* lawyers generally, including *a lawyer who is appointed as counsel for an unrepresented person.*</u> <u>[See also Rule 6.2]</u>	Comment [5] of the Commission's Proposed Rule is a slight variation of Comment [4] of Model Rule 1.1. The slight change is to clarify that the concept of acquiring competence through reasonable preparation applies generally to all lawyers and not just lawyers appointed as counsel for a unrepresented person. The reference to Rule 6.2 has been placed in brackets pending the Commission's final recommendation concerning that Rule.
Thoroughness and Preparation [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).	~~**Thoroughness and Preparation**~~ ~~[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).~~	The Commission did not include this comment for the same reasons that the Commission did not include Model Rule 1.1 Comment [1]. See Explanation of Changes for Comment [1], above.

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ABA Model Rule **Rule 1.1 Competence** **Comment**	Commission's Proposed Rule* **Rule 1.1 Competence** **Comment**	Explanation of Changes to the ABA Model Rule
Maintaining Competence [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.	~~**Maintaining Competence**~~ ~~[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.~~	The Commission did not include this comment because California requires all of its actively-licensed lawyers to comply with Mandatory Continuing Legal Education requirements. See also Explanation of Changes for Comment [1], above.
	[6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.	This comment succinctly reaffirms current California law, that is, current Rule 3-110 is not intended to subject a lawyer to discipline for a single negligent act. See Introduction, at ¶. (2).
	[7] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1(b) and 5.3 (b) with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.	This comment is designed to point lawyers to related Rules. The responsibilities of supervising lawyers are covered in current Rule 3-110, Discussion ¶. 1. Given the Commission's contemporaneous recommendation that California adopt Model Rules 5.1 to 5.3, the duty to supervise is more appropriately discussed in those Rules. Thus, it is necessary to cross-reference specific new Rules on the responsibilities of supervisory lawyers.

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Rule 1.1 Competence
(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(b) For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

Comment

[1] It is the duty of every lawyer to provide competent legal services to the client.

[2] Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may exercise professional discretion in determining the means by which a matter should be pursued. See Rules [1.2] and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person.

[5] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

[6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.

[7] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1(b) and 5.3(b) with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.5.1 Financial Arrangements Among Lawyer

December 2008
(Draft rule revised following consideration of public comment)

INTRODUCTION:

1. Proposed Rule 1.5.1 amends current California rule 2-200 and continues the policy that allows for payment of referral fees and for the division of fees between lawyers who are not in the same law firm. This subject is covered in ABA Model Rule 1.5(e), which the Commission decided not to adopt.

2. The key difference between ABA Model Rule 1.5(e) and rule 2-200 is that the ABA Rule does not embrace "pure" referral fees while the California rule does. A "pure" referral fee is one in which the referring lawyer does not continue to represent the client in the matter being referred. The Model Rule requires that both lawyers represent the client in the matter and that the division occur either in proportion to their work on the matter or on the basis that both are responsible for the client's matter. Rule 2-200 allows for a referral fee where the referring lawyer is not involved in the client's representation.

3. The Restatement (Third) of the Law of Lawyering § 47, cmt. *b*, explains the rationale for the ABA Model Rule approach as follows:

"The traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than that lawyer's qualifications. The prohibition has also been defended as preventing overcharging that may otherwise result when a client pays two lawyers and only one performs services. Beyond that, the prohibition reflects a general hostility to commercial methods of obtaining clients.

Those grounds do not warrant a complete ban on fee-splitting between lawyers. It is often desirable for one lawyer to refer a client to another, either because the services of two are appropriate or because the second lawyer is more qualified for the work in question. Allowing the referring lawyer to receive reasonable compensation encourages such desirable referrals. Lawyers are more able than other referral sources to identify other lawyers who will best serve their client. Even if a referring lawyer is compensated for the referral, that lawyer has several reasons to refer the client to a good lawyer rather than a bad one offering more pay. The referring lawyer will wish to satisfy the client, will to an extent remain responsible for the work of the second lawyer (see Subsection (1) & Comment *c* hereto), and, because fee-splitting arrangements most commonly occur in representations in which only a contingent fee is charged, will usually receive no fee at all unless the second lawyer helps the client to prevail. The reasonable-fee requirement of Subsection (3), moreover, reduces the likelihood that fee-splitting will lead to client overcharging. The balance between the dangers and advantages of fee-splitting is sufficiently close that informed clients should be able to agree to it, provided the safeguards specified in this Section are followed."

4. California has taken a different approach, which recognizes that the policy allowing for referral fees may best serve client interests by not requiring the referring lawyer's continuing involvement in the client's matter. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the court held that the payment of referral fees is not contrary to public policy. In so doing, the court stated, "If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields." (*Moran v. Harris, supra*, 131 Cal.App.3d at 921-922.)

5. No case since *Moran* has questioned the policy of permitting referral fees. The Commission did not receive public comment advocating that referral fees should not be permitted.

6. Because the Commission concluded that the payment of "pure" referral fees should continue, it was necessary to deviate from the Model Rule language. In addition, proposed Rule 1.5.1 incorporates a number of client protective provisions not found in the Model Rule.

7. Proposed Rule 1.5.1 is also a departure from current California rule 2-200. The proposed Rule will require that the agreement to divide a fee be in writing and that the client consent to the division after full disclosure at the time the lawyers enter into the agreement to divide the fee. These changes were made

because an underlying reason for the rule is to assure that the client's representation is not adversely affected as a result of an agreement to divide a fee. Under the current rule, disclosure and client consent are not required until the fee is to be divided. A majority of the Commission concluded that deferring disclosure and client consent to the time the fee is divided denies the client a meaningful opportunity to consider the concerns the rule is intended address.

8. *A Note on the Rule Number:* The Commission has also departed from the Model Rule by making this Rule on fee division a separate rule and giving it the number "1.5.1". Given that California is one of only several jurisdictions that permit "pure" fee referrals, the fact that the Commission is recommending several revisions to current rule 2-200 to impose more obligations on lawyers and enhance client protection, the fact that this Rule is a free-standing rule in the current California Rules of Professional Conduct, and the large amount of litigation this Rule has traditionally engendered, the Commission determined that this Rule should remain free-standing, rather than be part of a rule on legal fees as is the case of the Model Rule. Having a separate rule will help ensure that lawyers have notice and comply with the rule's provisions intended to enhance client protection.

9. *Paragraph (b) of current rule 2-200:* The Commission has moved the concept that is contained in current rule 2-200(B) to proposed Rule 7.2(b) to conform to the logic of the Model Rule organization.

ABA Model Rule **Rule 1.5(e) Fees**	**Commission's Proposed Rule*** **Rule 1.5.1 Financial Arrangements Among Lawyers**	**Explanation of Changes to the ABA Model Rule**
(e) A division of a fee between lawyers who are not in the same firm may be made only if:	(~~e~~a) ~~A division of a fee between lawyers~~ Lawyers who are not in the same law firm ~~may be made only if~~shall not divide a fee for legal services unless:	Proposed paragraph (a) is a variation on Model Rule 1.5(e). The Model Rule states that a division of fees between lawyers who are not in the same law firm "*may be made* only if" the lawyer complies with the subparts. The proposed Rule states that lawyers who are not in the same law firm "*shall not* divide a fee for legal services" unless the lawyers comply with the subparts. Substantively, the difference reflects a policy to permit, but not encourage referral fees and other fee divisions. See discussion of In *Moran v. Harris* (1982) 131 Cal.App.3d 913, in the Introduction, ¶. 4. Stylistically, proposed paragraph (a) is in the active voice, the preferred style for California Rules of Court. In addition, the draft Rule refers to "a fee for legal services," which also is in current Rule 2-200. The Model Rule refers to a "division of a fee between lawyers" without specifying whether the fee is one for legal services. The Rule is intended to address issues that could affect legal representation of clients as a result of a division of fees obtained from the representation. As a result, the Commission believes that the Rule should be directed to fees for legal services rather than fees that are obtained in performing non-legal services In light of the fact that the phrase "fee for legal services" is in the current California rule, deleting that phrase from the proposed Rule could be misinterpreted as an intent to broaden the scope of the Rule. Given the considerable litigation that has occurred under the current rule, the Commission concluded that the reference in Rule 2-200(a) should not be changed.

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ABA Model Rule Rule 1.5(e) Fees	Commission's Proposed Rule* Rule 1.5.1 Financial Arrangements Among Lawyers	Explanation of Changes to the ABA Model Rule
(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;	~~(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;~~ (1) The lawyers enter into a written agreement to divide the fee;	Proposed paragraph (a)(1) is new. It differs from paragraph (e)(1) of the Model Rule, which restricts fee divisions to lawyers who work on a client's matter or assume joint responsibility for it, and so precludes referral fees and other types of fee division arrangements. As explained in the discussion of paragraph (a)(2), the Commission adopted an approach that will require client consent to the division at the time the lawyers agree to the division of the fee for legal services. Requiring that the agreement to divide the fee be in writing aids enforcement. Failure to comply with the requirement renders a fee division agreement unenforceable. The requirement for a written agreement also creates a fixed time for obtaining the client's consent.
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and	~~(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and~~ (2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and	Proposed paragraph (a)(2) provides better client protection than Model Rule 1.5(e) by requiring full written disclosure and setting out the specific matters that must be disclosed to the client. The Model Rule states that the client must merely "agree to the arrangement, including the share each lawyer receives." Under the Model Rule, while the client's agreement must be in writing, the disclosure is not required to be in writing. Proposed paragraph (a)(2) requires not only client consent in writing, but also full disclosure in writing that a division will be made, the identity of the lawyers who are parties to the agreement and the terms of the division. Paragraph (a)(2) also substantially changes the requirements in current Rule 2-200. A division of fees raises concerns that should be disclosed to the client at the time the lawyers entered

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ABA Model Rule **Rule 1.5(e) Fees**	**Commission's Proposed Rule*** **Rule 1.5.1 Financial Arrangements Among Lawyers**	**Explanation of Changes to the ABA Model Rule**
		into the agreement to divide the fee. The concerns may include (1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based only on the agreement to divide the fees, (2) whether the lawyer dividing the fee will devote sufficient time to the client's matter in light of the fact that the lawyer is receiving a reduced fee, and (3) whether the client would prefer a different arrangement. Neither the Model Rule nor the current California rule mandate that the client be informed at the time the lawyers enter into the agreement to divide the fee. See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838 (the rule's requirement that the client's consent be obtained before the fee division "cannot reasonably be read to require the client's written consent prior to the lawyer's entering into a fee-splitting arrangement, or prior to the commencement of work, or at any time other than prior to the division of fees.") Both require a client's agreement to occur before the fee is divided, which could occur at the end of the case. The requirement for client consent to occur at the time the lawyers enter into the agreement to divide the fee assures that the client has a meaningful opportunity to assess the concerns that a division of fees may present. A minority of the Commission dissented from the Commission's decision to revise the timing of the disclosure and consent requirement. In their opinion, the client will have a better understanding of the consequences of the agreement to divide fees when the fee is about to be divided than at the beginning of the arrangement between the lawyers, because at the time the fee will be divided, the amount of fees to be divided will be known instead of speculative.

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ABA Model Rule **Rule 1.5(e) Fees**	**Commission's Proposed Rule*** **Rule 1.5.1 Financial Arrangements Among Lawyers**	**Explanation of Changes to the ABA Model Rule**
(3) the total fee is reasonable.	(3) ~~the~~The total fee charged by all lawyers is ~~reasonable~~not increased solely by reason of the agreement to divide fees.	Proposed paragraph (a)(3) deviates from Model Rule paragraph (e)(3) in order to afford greater client protection. The Model Rule provides that the total fee must be reasonable. The current California rule requires that the total fee to the client must not be increased by reason of the division. Under the Model Rule, clients can end up paying higher fees as a result of the division of fees. So long as the total fee is reasonable, there is no violation of the Model Rule. The current California rule prevents that result from occurring, so that the division of fees does not result in a higher cost to the client. The Commission decided to retain the more client protective standard in the current California rule. In addition, the question of whether a lawyer may charge an unreasonable fee or an illegal and unconscionable fee is addressed in proposed Rule 1.5. It is unnecessary to repeat the limitation in this Rule. Proposed Comment [7] to this Rule informs lawyers that proposed Rule 1.5 also applies to the fee to be divided.

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ABA Model Rule **Rule 1.5 Fees** **Comment**	**Commission's Proposed Rule*** **Rule 1.5.1 Financial Arrangements Among Lawyers** **Comment**	**Explanation of Changes to the ABA Model Rule**
Division of Fee [7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.	~~**Division of Fee**~~ ~~[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.~~	Model Rule Comment [7] defines a division of a fee as a single billing covering the fee of two or more lawyers who are not in the same firm. The comment is directed to the narrow focus of the Model Rule. The Comment notes that the Model Rule typically applies in contingency fee cases where a referring lawyer brings in a specialist, but remains involved in the case. The Commission elected not to retain this Comment for two reasons. First, the Comment reflects the limited focus of the Model Rule and is inconsistent with the proposed Rule. Second, the Comment presents a limited definition of a fee division (a single billing covering the fees of two or more lawyers not in the same firm). It does not cover situations where one lawyer bills the client, but divides the fee the client pays with another lawyer. The California Supreme Court recognized that such an arrangement would be a division of a fee in *Chambers v. Kay* (2002) 29 Cal.4th 142 (adopting a test stated in State Bar Formal Opinion 1994-138). The Commission believes that the division of a fee in this manner presents the same need for client protection in the form of full disclosure and consent as the form of division referenced in the Model Rule Comment. Based on the Model Rule Comment, it might be possible for one lawyer to bill a client and divide the fee the client pays with another lawyer without having to obtain the client's consent. The Commission concluded that a broader definition provides greater client protection, reflects the manner in which fee divisions occur in practice and closes a loophole in the Model Rule that would allow a lawyer to avoid the disclosure requirements in the Rule.

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ABA Model Rule **Rule 1.5 Fees** **Comment**	**Commission's Proposed Rule*** **Rule 1.5.1 Financial Arrangements Among Lawyers** **Comment**	**Explanation of Changes to the ABA Model Rule**
[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.	~~[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.~~	Model Rule Comment [8] states that the Rule does not apply to a division of fees for work done when the lawyers were associated in the same law firm. The Comment is tied to the narrow definition of a division of a fee in Comment [7], which is tied to a single billing of two lawyer's fees. Although poorly worded, Comment [8] attempts to state that if the lawyers were in the same law firm at the time the fees were billed, the Rule does not prohibit the payment of the divided fee if, at the time the fee is paid, the lawyers are no longer in the same law firm. The Commission concluded that the Comment is inconsistent with the proposed Rule in that it is based on a narrower, less client-protective concept of what constitutes a division of a fee. Furthermore, as written the Comment could exempt situations that should be covered by the Rule. For example, if two lawyers in the same law firm had an agreement to divide a contingency fee in a case, but shortly after the case commences, one of the lawyers leaves the firm, the client would be in the same position as the client would be in if the lawyers had never been in the same law firm. Yet, if the Comment is applied to the proposed Rule, the former situation would be exempt from the proposed Rule.
	[1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]; State Bar Formal Opn. 1994- 138.	Proposed Comment [1] replaces the first sentence in Model Rule Comment [7] with a definition of a division of a fee that the Supreme Court endorsed in *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

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ABA Model Rule Rule 1.5 Fees Comment	Commission's Proposed Rule* Rule 1.5.1 Financial Arrangements Among Lawyers Comment	Explanation of Changes to the ABA Model Rule
	[2] Paragraph (a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.	Proposed Comment [2] replaces the balance of Model Rule Comment [7]. It explains the situations in which the proposed Rule applies.
	[3] Paragraph (a) is intended to require both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.	Proposed Comment [3] was added in response to comments from the Office of Chief Trial Counsel ("OCTC"). OCTC requested that the Rule make clear that each lawyer who is a party to the division has the obligation to assure the client is fully informed and consents to the arrangement. OCTC was concerned that each lawyer might attempt to avoid the obligations under the Rule by claiming that the other was supposed to inform the client and obtain the client's consent. Proposed Comment [3] states that the proposed Rule requires both the lawyer dividing the fee and the lawyer receiving the fee to comply with the proposed Rule's requirements.
	[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's	Proposed Comment [4] explains the rationale for requiring disclosure and client consent at the time the lawyers enter into the agreement to divide the fee. It is intended to inform lawyers about the considerations to be addressed when fully informing the client about the agreement to divide the fee.

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ABA Model Rule **Rule 1.5 Fees** **Comment**	**Commission's Proposed Rule*** **Rule 1.5.1 Financial Arrangements Among Lawyers** **Comment**	**Explanation of Changes to the ABA Model Rule**
	agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.	
	[5] This Rule is not intended to apply to a division of fees pursuant to court order.	Proposed Comment [5] excludes divisions of fees pursuant to court order. The Commission concluded that the courts are in a position to protect client interests when issuing an order to divide fees. Lawyers who divide fees pursuant to the direction of a court should not be subject to discipline for complying with the order.
	[6] This Rule is not intended to subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).	Proposed Comment [6] addresses an issue that arose about what act constitutes the grounds for discipline. As written the Model Rule, the current California rule and the proposed Rule all state the prohibition as being the division of the fee without complying with the Rules' requirements. OCTC submitted a comment stating that OCTC considers the agreement to divide the fee to be the violation rather than the division. OCTC requested the Commission clarify this point in the proposed Rule. The Commission unanimously disagreed with OCTC's construction, but agreed that the proposed Rule should make clear when a lawyer is subject to discipline. Comment [6] provides that clarification. Numerous court decisions have unanimously held that an agreement to divide a fee made in violation of existing Rule 2-200 is void. (See *Chambers v. Kay* (2002) 29 Cal.4th 142; *Margolin v. Shemaria* (2000) 85 Cal.App.4th 891; *Scolinos v. Kolts* (1995) 37

ABA Model Rule Rule 1.5 Fees Comment	Commission's Proposed Rule* Rule 1.5.1 Financial Arrangements Among Lawyers Comment	Explanation of Changes to the ABA Model Rule
		Cal.App.4th 635.) Under the proposed Rule, that result would extend to any agreement not in writing, or about which a client has not been informed, or to which the client has not consented at the time the agreement is made. The Commission concluded that it would not be appropriate to subject lawyers to discipline for entering into a void agreement that does not result in the division of a fee.
	[7] Under Rule [1.5], a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule [1.5] a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.	Proposed Comment [7] addresses the concept contained in Model Rule 1.5(e)(3)~~,~~ by making clear that the fee to be divided must comply with the restrictions on illegal and unconscionable fees in proposed Rule 1.5.

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Rule 1.5.1 Financial Arrangements Among Lawyers
(Commission's Proposed Rule – Clean Version)

(a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:

(1) The lawyers enter into a written agreement to divide the fee;

(2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and

(3) The total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

(b) Except as permitted in paragraph (a) of this Rule or Rule [1.17], a lawyer shall not compensate, give, or promise anything of value to another lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to another lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer's law firm shall not of itself violate this Rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Comment

[1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2 536]; State Bar Formal Opn. 1994- 138.

[2] Paragraph (a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.

[3] Paragraph (a) is intended to require both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the

lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

[5] This Rule is not intended to apply to a division of fees pursuant to court order.

[6] This Rule is not intended to subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).

[7] Under Rule [1.5], a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule [1.5] a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.10 Sexual Relations with Client

December 2008
(Draft rule revised following consideration of public comment)

INTRODUCTION:

1. The sex with a client rule appears in the ABA Model Rules (MR) as 1.8(j). The Commission has not proposed that California follow the MR conflicts of interest rules construct of having a single rule 1.8 that amalgamates all conflicts rules, regardless of their relationship to one another, that do not neatly fit within current client, former client, or government lawyer conflict situations. Therefore, the Commission's proposed sex with a client rule appears as a stand-alone rule, numbered 1.8.10 to correspond to MR 1.8(j). However, as the comparison chart illustrates, contrary to current California rule 3-120, the Commission has proposed a rule that follows ABA Rule 1.8(j) which essentially bans, rather than merely limits, sexual relations between lawyers and their clients.

2. The version that originally went out for public comment closely followed existing rule 3-120, in that it limited, but did not ban virtually all, sexual relationships. The Commission originally passed this version by a vote of 8 to 1.

3. During the public comment period, one person spoke against the proposed rule, and in favor of adopting ABA 1.8(j)'s broader rule. COPRAC also wrote urging adoption of the ABA rule. The person who spoke in opposition to the original version argued that she had conducted an "informal poll" of State Bar prosecutors and judges which indicated that prosecutions under California's current rule were rare because of proof problems. She also expressed the belief that the situation was worsening because she had "seen" cases involving vulnerable clients, sex with minors, contingency cases, and lawyers having sex with strippers using trust account funds.

4. COPRAC also expressed the view that a complete ban would make it "easier" for the State Bar to enforce the rule, thereby having a salutary effect by inhibiting attorneys from entering into such relations. It also suggested that the incidence of violations of Rule 3-120 is "underreported." COPRAC concluded by urging that a total ban on post-engagement sexual relations "is not too much to ask" of lawyers, further pointing out that the impact of such a ban is blunted by the exception in Rule 1.8(j) for pre-engagement relationships. The COPRAC letter ends with approving references to ABA commentary to MR 1.8(j), including that "the attorney-client relationship is almost always unequal," and that "it is unlikely a client can provide informed consent due to the "client's own emotional involvement."

5. Subsequently, the Commission voted 7 to 6 not to retain the rule as sent out for public comment. Instead, the commission voted 8 to 6 to adopt ABA 1.8(j) as the "foundation" for our rule, which was modified, as described above.

6. During the public comment period, a minority of the Commission argued that a virtual ban like that in MR 1.8(j) conflicted with Business and Professions Code § 6106.9, which limits, but does not ban, sexual relations between lawyers and clients. Current rule 3-120 is consistent with section 6106.9. At the public hearing, it was suggested that the Legislature "does not really understand how the rule works," and that it can "fix" the statute to conform to the rule. However, the fact remains that adoption of 1.8(j) will conflict with existing state law.

7. The minority also noted the paucity of empirical evidence suggesting that the current rule is not working in the sense that clients are complaining about improper sexual relationships with their lawyers, or failing to complain because of enforcement concerns. Therefore, it is questionable that enacting a virtual ban on such relationships will provide further protection to the public.

8. The minority also notes that the proper focus of the ethical rules is the regulation of conduct of individuals as lawyers. Outside the context of having a deleterious effect on a lawyer-client relationship, the social habits of lawyers that do not reach the level of moral turpitude should not be the subject of disciplinary action by the State Bar. Concern properly arises where such a relationship occurs under circumstances where the professional relationship is compromised. Current rule 3-120 addresses this problem.

9. The minority notes the same criticism can be leveled at COPRAC's unsupported claim that making it easier to prove a violation would also have a salutary effect by inhibiting attorneys from entering into such relations. Apparently, the thinking is that making enforcement incrementally more difficult encourages lawyers to have sexual relations with clients. However, inhibiting lawyers and clients from exercising the

right to choose their personal and sexual partners is not necessarily a good thing. There is more than a trivial public interest furthered in not over-regulating consenting sexual relationships between attorneys and clients. For every non-coerced sexual relationship that does not produce a deleterious effect on the attorney's representation, a client is making a choice that presumably is enhancing his or her life. In some cases it may turn out that the personal relationship that develops ultimately between client and attorney transcends in importance the professional relationship. To the extent clients benefit from having the freedom to choose to engage in a sexual relationship with an attorney that does not result in actual harm to their legal matter, a bright-line ban as per MR 1.8(j) will have a chilling effect on that freedom.

10. Additionally, the minority argues that merely banning sexual relations without requiring some nexus to a lawyer's professional duties could encourage personally dissatisfied clients to use the existence of a sexual relationship with a lawyer as retaliation against the attorney for some perceived personal slight or offense. They pointed out that the State Bar disciplinary system should not be a venue in which jealous romantic partners seek vengeance.

11. As noted, the COPRAC letter concludes with approving references to ABA commentary developed during the discussion concerning 1.8(j). Comments such as "the attorney-client relationship is almost always unequal," and that "it is unlikely a client can provide informed consent due to the 'client's own emotional involvement,'" appear to some RCC members to be hyperbolic, overly simplistic conclusions offered to explain complex social interactions, as well as being unduly paternalistic. To the extent these conditions exist in a given relationship resulting from the use of coercion, quid pro quo demands, or causing harm to the attorney-client relationship, current rule 3-120 bans the conduct.

12. The minority also argues that the purported reasons for the new prohibition of sexual relations between lawyer and client are inconsistent with the only exception to the proposed Rule. If it is adopted, a lawyer may represent a client with whom she or he has an existing sexual relationship, regardless of whether the lawyer's performance of legal services will adversely be affected by that relationship. Conversely, if the proposed Rule is adopted, and a lawyer and client become romantically involved but comply with the Rule by remaining chaste until they marry or become domestic partners, the literal wording of the rule will prohibit them from consummating their otherwise legitimate relationship.

13. Last but perhaps most importantly, the proposed rule following Model Rule 1.8(j) implicates both the federal and California constitutional rights of sexual privacy. It has long been settled that there is a federal and state constitutional right to sexual privacy. In fact, this penumbra right is one of individual autonomy thereby requiring the existence of a compelling state interest before it can be abridged. (*Griswold v. Connecticut* (1965) 381 U.S. 479) One prong of the "compelling state interest test" is whether the law is narrowly tailored to meet the needs of the public. The U.S. Supreme Court has recently affirmed this tenet of constitutional law, in striking down Texas' sodomy law. (*Lawrence v. Texas* (2003) 539 U.S. 558) Our state supreme court follows this same analytical path when scrutinizing laws affecting sexual privacy under the California constitution. (*In re Marriage Cases* (2008) 43 Cal.4th 757; see also Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, Geo. J. Legal Ethics (Winter 1997).)

ABA Model Rule **Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules**	**Commission's Proposed Rule*** **Rule 1.8.10 Sexual Relations With Client**	**Explanation of Changes to the ABA Model Rule**
(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.	(~~j~~a) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the ~~client-~~lawyer-client relationship commenced.	Subdivision (a) is nearly identical to MR 1.8(j). The Commission has substituted "lawyer-client" for the Model Rules' "client-lawyer" rubric to conform the phrase to the style used in California statutes, e.g., "Lawyer-Client Privilege," Evid. Code §§ 950-962. In addition, "lawyer-client" is typically used judicial opinions.
	(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.	Subdivision (b) adds a definition of "sexual relations" (imported verbatim from existing California rule 3-120) which is absent from the ABA rule.

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ABA Model Rule **Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comment**	**Commission's Proposed Rule*** **Rule 1.8.10 Sexual Relations With Client Comment**	**Explanation of Changes to the ABA Model Rule**
Client-Lawyer Sexual Relationships [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.	~~Client-Lawyer Sexual Relationships~~ ~~[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.~~	Comment [1] replaces MR 1.8, Comment [17] and can be found immediately following the deleted Model Rule comment in the second column. While repeating some of the core ethical principles that inform the proposed Rule, Comment [1] cites to California case law supporting the referenced principles. It also eliminates much of Comment [17]'s argumentative language and tone, some of which appears to overstate the concerns motivating enactment of this Rule. See discussion of minority position, above in the "Introduction" section. In addition, the minority notes that the last sentence of the Model Rule Comment proves that the prohibition is imposed regardless of whether the rationales for the Rule are correct and regardless of whether they apply to the facts and circumstances of the relationship between the lawyer and client.

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ABA Model Rule **Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comment**	**Commission's Proposed Rule*** **Rule 1.8.10 Sexual Relations With Client Comment**	**Explanation of Changes to the ABA Model Rule**
	[1] This Rule is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a lawyer must keep clients' interests paramount in the course of the lawyer's representation.	

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ABA Model Rule **Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comment**	**Commission's Proposed Rule*** **Rule 1.8.10 Sexual Relations With Client Comment**	**Explanation of Changes to the ABA Model Rule**
[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).	[~~18~~2] ~~Sexual relationships that~~ This Rule is not applicable to ongoing consensual sexual relations which predate the ~~client-~~initiation of the lawyer-client relationship ~~are not prohibited. Issues~~because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the ~~client-~~lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be ~~materially limited~~adversely affected by the relationship. See ~~Rule~~Rules [1.7(~~a~~d) (~~2~~conflicts of interest)], 1.1 (competence) and 2.1 (independent judgment).	The changes made in Comment [2], when compared to MR 1.8, cmt. [18], are largely stylistic. However, the Commission is proposing that, even where a pre-existing sexual relationship exists, the lawyer should consider whether his or her competence in performing legal services will be "adversely affected." This language was chosen over the MR language in Comment [18], "materially limited," because the former phrase appears to be broader.
[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.	[~~19~~3] When the client is an organization, ~~paragraph (j) of~~ this Rule ~~prohibits~~is applicable to a lawyer for the organization (whether inside counsel or outside counsel) ~~from having a~~who has sexual ~~relationship~~relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See Rule [1.13].)	The changes proposed to Comment [3], which is close to MR Comment [19], are stylistic. The cross-reference to Rule 1.13, concerning the organization as client, refers the lawyer to that Rule for further guidance on the intricacies of representing an organization. The minority argues that the proposed Comment belies the rationale that the Rule applies because the lawyer is taking advantage of the client. If the chief executive officer of an organizational client initiates a sexual relationship with a staff lawyer, the lawyer will be disciplined for violation of this Rule, even though the "client" has the dominant position in the lawyer-client relationship. Even if the staff lawyer successfully sues the chief executive officer for sexual harassment and discrimination, the lawyer will have violated this new disciplinary Rule.

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ABA Model Rule Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule* Rule 1.8.10 Sexual Relations With Client Comment	Explanation of Changes to the ABA Model Rule
	[4] This Rule addresses the conduct of the individual lawyer engaged in prohibited sexual relations. The conduct of that lawyer is not imputed to other firm lawyers. But see Rules 5.1, 5.2, 8.3 and 8.4.	Comment [4] was added to make explicit the notion that a lawyer who has sexual relations with a client in violation of this Rule is not imputed to others in the same law firm. However, the comment references other Rules of Professional Conduct that might otherwise apply, depending on the facts. This comment is not in the ABA Rule explicitly, but the same result is achieved by MR 1.8(k), which imputes the prohibitions of MR 1.8(a) through (i), but not (j), to other firm lawyers. The Commission still has MR 1.8(k) under study.

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Rule 1.8.10 Sexual Relations With Client

(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

Comment

[1] This Rule is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character, and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a lawyer must keep clients' interests paramount in the course of the lawyer's representation.

[2] This Rule is not applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be adversely affected by the relationship. See Rules [1.7(d) (conflicts of interest)], 1.1 (competence) and 2.1 (independent judgment).

[3] When the client is an organization, this Rule is applicable to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See Rule [1.13].)

[4] This Rule addresses the conduct of the individual lawyer engaged in prohibited sexual relations. The conduct of that lawyer is not imputed to other firm lawyers. But see Rules 5.1, 5.2, 8.3 and 8.4.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Recommendation to Not Adopt ABA Model Rule 3.2 Expediting Litigation

December 2008

INTRODUCTION:

Following consideration of this ABA Model Rule, the Commission made a tentative decision to not recommend adoption of any California counterpart.

The Commission rejected the Rule for the following reasons: (1) the Rule is not intended to protect the client (who is protected by the lawyer's duty of competence, Rule 1.1), but rather to protect the interests of the justice system and of adverse parties. Any complaint under this Rule would be made by someone other than the client, and the lawyer's defense likely would require the lawyer to disclose confidential client information; (2) the Rule lacks the specificity necessary for a rule that may result in a lawyer being disciplined. In effect, the Rule's "reasonable efforts" standard is a negligence standard that would require the State Bar Court to retroactively determine how a case might have been better handled. The Commission believes that professional discipline should not be based on a judgment call as to how a representation might have been done better; and (3) the concept of a rule is adequately covered by proposed Rule 3.1 Meritorious Claims and Contentions (see Current rule 3-200).

A minority of the Commission favored enactment of the Rule. The minority explains that the principal reason for having the rule is that lawyers' dilatory tactics impede the administration of justice and are a burden upon opposing parties and a waste of public resources. Engaging in tactics that have no purpose other than delay leads to frustration with the courts and eventually disrespect for the law.

ABA Model Rule Rule 3.2 Expediting Litigation	Commission's Proposed Rule* NO RULE RECOMMENDED BY THE COMMISSION	Explanation of Changes to the ABA Model Rule
A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.	~~A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.~~	The Commission rejected the adoption of this Rule for the following reasons: (1) the Rule lacks the specificity necessary for a Rule that may result in a lawyer being disciplined; (2) the concept of Rule is adequately covered by proposed Rule 3.1; and (3) the Rule is destructive of civility among lawyers in that it invites denial of customary and reasonable requests for extensions of time. Certain members favoured enactment of the Rule on the basis that any reduction of delay will inure to the benefit of the public in that delay is always costly.

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ABA Model Rule **Rule 3.2 Expediting Litigation Comment**	**Commission's Proposed Rule*** **THE ADOPTION OF A COMMENT IS NOT RECOMMENDED BY THE COMMISSION**	**Explanation of Changes to the ABA Model Rule**
[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.	~~[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~	See **Introduction** for explanation.

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COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, Or Involuntarily Inactive Member

December 2008
(Draft rule revised following consideration of public comment)

INTRODUCTION:

There is no ABA Model Rule counterpart to proposed Rule 5.3.1. Proposed Rule 5.3.1 amends current California Rule 1-311 and continues the restrictions on a lawyer's employment of a disbarred, suspended, resigned, or involuntarily inactive member.

The Commission determined not to make substantive changes to the disciplinary standards in the existing rule because there is no ABA counterpart and the rule was adopted by the Board of Governors and approved by the Supreme Court relatively recently notwithstanding considerable opposition – the current rule was approved by the Supreme Court in 1996 and amended in 2008. The 2008 amendments were non-substantive changes that updated cross-references to several rules of court.

Proposed Rule 5.3.1 retains current rule 1-311 largely intact. The changes are not substantive and reflect adherence to ABA format. The only substantive change is to paragraph (d), providing that the notice served on the State Bar (whenever a lawyer employs a disbarred, suspended, resigned, or involuntarily inactive member) “may” be made available to the public.

Both the current rule and the proposed Rule are intended to foster client protection by preventing a licensed lawyer from acting as a screen behind which a disbarred, suspended, resigned, or involuntarily inactive lawyer effectively could continue practicing law. To the extent the Rule permits a disbarred, etc., lawyer to work in a law firm, it also fosters client control over the engagement by requiring the employing lawyer to notify the client of the disbarred, etc., lawyer’s role.

A minority of the Commission opposed adoption of the Rule as unduly onerous and as restricting the possible rehabilitation of disciplined lawyers.

ABA Model Rule NO COMPARABLE ABA MODEL RULE	Commission's Proposed Rule* **Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member**	Explanation of Changes to California Rule 1-311
	(~~A~~a) For the purposes of this ~~rule~~Rule: (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid; (2) "Member" means a member of the State Bar of California. (3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and ~~professions~~Professions Code sections 6007, 6203(~~c~~d)(1), or California Rule of Court 958(d); and (~~3~~4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.	See Introduction for a general note on the changes in the proposed Rule. As noted in the Introduction, the changes for the most part are not substantive and merely reflect adherence to ABA format or correction of typographical errors in the current rule. The added language in paragraph (d) that the "State Bar may make such information available to the public" is a substantive change and is intended to obviate a possible restriction on disclosure in the interests of protecting the public. Note on the use of "lawyer" vs. "member". In keeping with the style of the ABA Model Rules, the Commission has, throughout its proposed rules, substituted "lawyer" for the term "member [of the State Bar]." Nevertheless, "member" and "resigned member" remain defined terms in proposed Rule 5.3.1 as those terms are applied to the former lawyer employee. As with current rule 1-311, the proposed Rule is limited to the employment of disciplined former members of the State Bar of California.

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ABA Model Rule NO COMPARABLE ABA MODEL RULE	Commission's Proposed Rule* Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member	Explanation of Changes to California Rule 1-311
	(~~B~~b) A ~~member~~lawyer shall not employ, associate professionally with, or aid a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the ~~member's~~lawyer's client: (1) Render legal consultation or advice to the client; (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer; (3) Appear as a representative of the client at a deposition or other discovery matter; (4) Negotiate or transact any matter for or on behalf of the client with third parties; (5) Receive, disburse or otherwise handle the client's funds; or (6) Engage in activities which constitute the practice of law.	

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ABA Model Rule NO COMPARABLE ABA MODEL RULE	Commission's Proposed Rule* Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member	Explanation of Changes to California Rule 1-311
	(~~C~~c) A ~~member~~lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to: (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents; (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or (3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the ~~active member~~lawyer who will appear as the representative of the client.	

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ABA Model Rule NO COMPARABLE ABA MODEL RULE	Commission's Proposed Rule* Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member	Explanation of Changes to California Rule 1-311
	~~(D~~d)~~)~~ ~~prior~~Prior to or at the time of employing a person the ~~member~~lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the ~~member~~lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (~~B~~b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The ~~member~~State Bar may make such information available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The ~~member~~lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the ~~member's~~lawyer's employment ~~with~~by the client.	

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ABA Model Rule NO COMPARABLE ABA MODEL RULE	Commission's Proposed Rule* Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member	Explanation of Changes to California Rule 1-311
	(~~E~~e) A ~~member~~lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities. (~~F~~f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the ~~member~~lawyer shall promptly serve upon the State Bar written notice of the termination.	

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ABA Model Rule NO COMPARABLE ABA MODEL RULE	Commission's Proposed Rule Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member Comment	Explanation of Changes to California Rule 1-311
	~~For discussion of the activities that constitute the practice of law, see *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535 [209 p. 363]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 p.2d 960].)~~ [1] Paragraph (~~D~~d) is not intended to prevent or discourage a ~~member~~lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a ~~member's~~lawyer's client is an organization, then the written notice required by paragraph (~~D~~d) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See ~~rule 3-600~~Rule [1.13].)	

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ABA Model Rule **NO COMPARABLE ABA MODEL RULE**	**Commission's Proposed Rule** **Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member** **Comment**	**Explanation of Changes to California Rule 1-311**
	[2] Nothing in ~~rule 1-311~~this Rule shall be deemed to limit or preclude any activity engaged in pursuant to ~~rules 983, 983.1, 983.2, and 988~~Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel *pro hac vice*], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.	

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Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
(Commission's Proposed Rule – Clean Version)

(a) For the purposes of this Rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Member" means a member of the State Bar of California.

(3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d); and

(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the practice of law.

(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The State Bar may make such information available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.

(e) A lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall promptly serve upon the State Bar written notice of the termination.

Comment

[1] Paragraph (d) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a lawyer's client is an organization, then the written notice required by paragraph (d) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule [1.13].)

[2] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel *pro hac vice*], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

December 2008
(Draft rule revised following consideration of public comment)

INTRODUCTION:

Proposed Rule 5.5 amends current Rule of Professional Conduct 1-300. In substance, it continues the prohibitions in rule 1-300 against aiding any person or entity in the unauthorized practice of law and against a member of the California bar practicing law in another jurisdiction in violation of the regulations of that other jurisdiction. However, the proposed Rule adds from the ABA Model Rule prohibitions against a lawyer who is not admitted to practice in California maintaining an office or systematic presence in California and from holding out that he or she is admitted to practice law in California.

The proposed Rule, however, does not adopt either paragraph (c) or (d) of Model Rule 5.5, or most of the comment to MR 5.5 because the subject matter of those Model Rule provisions are governed by California Rules of Court 9.47 and 9.48, both of which were promulgated by the California Supreme Court's Multijurisdictional Practice Task Force, and decisional law.

ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**	**Explanation of Changes to the ABA Model Rule**
	(a) *A lawyer admitted to practice law in* California shall not:	Proposed paragraph (a) is an introductory paragraph to subparagraphs (1) and (2). This Rule deals with two different scenarios. The first [covered by paragraph (a)] is misconduct by a lawyer admitted to practice law in California. The second [proposed paragraph (b)] is misconduct by a lawyer who is not admitted to practice in this State. Because proposed paragraph (a) deals with two different offenses, it was given an introductory paragraph for the two different offenses that are described in the subparagraphs (1) and (2).
(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.	(~~a~~1) ~~A lawyer shall not~~ practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction~~,~~; or ~~assist another in doing so.~~	Proposed paragraph (a)(1) is substantially the same as the first clause of ABA Model Rule 5.5(a). By drafting an introductory paragraph (a) in the proposed Rule, in subparagraph (1) we were able to combine the two complementary concepts of current Rule of Professional Conduct 1-300 in one part of the proposed Rule applicable to California lawyers and made the proposed Rule briefer by deleting the first four words of the Model Rule. The second clause of Model Rule 5.5(a) is covered by subparagraph (a)(2). See explanation for paragraph (a)(2).
	(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.	Current California Rule of Professional Conduct 1-300(A) is an important public protection rule. It subjects a lawyer who is admitted in California to discipline if he or she aids another person or entity in the unauthorized practice of law. Absent such a rule, a lawyer who commits that offense would not likely be subject to discipline in the State Bar Court. However, the Model Rule is not as explicit as the current California rule, and the second clause of Model Rule 5.5(a) is only a subset of the broader proscription contained in the current California rule. Therefore, the proposed Rule adds current Rule 1-300(A) to Model Rule 5.5(a).

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ABA Model Rule Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	**Commission's Proposed Rule*** Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law	**Explanation of Changes to the ABA Model Rule**
		Subparagraph (a)(2) is necessary to preserve the greater consumer and client protection that California residents have under current Rule 1-300(A). The California Rules of Court and the Legislature have greatly expanded what areas of the practice of law are "authorized" even though performed by a non- member of the State Bar of California. Notwithstanding these changes in the law, there are still individuals who will not comply with these new laws and thereby harm California residents. While unauthorized practice of law statutes may be enforced to regulate this unlawful behavior, they do not normally reach lawyers who aid and abet unauthorized practice. Regulation by the State Bar of California of lawyers who aid and abet such unlawful behavior is a necessary adjunct of such enforcement. Subparagraph (a)(2) adds the *mens rea* requirement of "knowingly" assisting another in the unlicensed practice of law. A lawyer should not be subject to discipline for assisting another whom the lawyer, in good faith, believes to be an active member of the State Bar or otherwise authorized to practice by statute or court rule. Model Rule 5.5 does not have a *mens rea* requirement. Model Rule 8.4(a), which prohibits assisting or inducing another to commit a violation of the Rules, does have such a requirement. In this respect, they are inconsistent. We have been unable to discover any reason for that inconsistency. Adding "knowingly" to proposed Rule 5.5 makes it consistent with both Model Rule 8.4 and the Commission's proposed Rule 8.4. However, the addition of a *mens rea* requirement causes proposed Rule 5.5 to diverge from both Model Rule 5.5 and current rule 1-300.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**	**Explanation of Changes to the ABA Model Rule**
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:	(b) A lawyer who is not admitted to practice law in ~~this jurisdiction~~California shall not:	Proposed paragraph (b) is substantially the same as ABA Model Rule 5.5(b). The word "law" has been added to the proposed Rule to make the subject matter of the lawyer's admission explicit, and the word "California" has been substituted for the phrase "this jurisdiction" for brevity, because that is the convention used in the California Rules of Court regulating multijurisdictional practice, and because the phrase "this jurisdiction" is ambiguous in that it could refer to jurisdictions or venues within the State, when the intention is to refer to admission to practice in the State of California.
(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or	(1) except as authorized by these Rules or other law, establish ~~an~~or maintain a resident office or other systematic ~~and~~or continuous presence in ~~this jurisdiction~~ California for the practice of law; or	The practice of law in California by attorneys not admitted to practice in this State but who are temporarily in this State as part of litigation is governed by California Rule of Court 9.47. The phrase "an office" in Model Rule 5.5 has been changed in the proposed Rule to the phrase "or maintain a resident office" to conform to the wording of California Rule of Court 9.47(d)(2). The phrase "this jurisdiction" has been changed to "California" for the reasons stated in the preceding paragraph.
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.	(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in ~~this jurisdiction~~ California.	The phrase "this jurisdiction" has been changed to "California" for the reasons stated two paragraphs above.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:	~~(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:~~	Proposed Rule 5.5 deletes paragraphs (c) and (d) of ABA Model Rule 5.5 because their subject matter is already governed by California Rules of Court 9.47 and 9.48.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**	**Explanation of Changes to the ABA Model Rule**
(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.	~~(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;~~ ~~(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;~~ ~~(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or~~ ~~(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.~~	ABA Model Rule 5.5(c) speaks to the subject of when a lawyer not admitted in the jurisdiction adopting the Model Rule, but who is admitted to practice law in another United States jurisdiction, may temporarily provide legal services in that jurisdiction. That subject is not addressed by the current Rules of Professional Conduct or by the State Bar Act. However, it is addressed by California Rules of Court 9.47 and 9.48. Because those subjects are governed by Rules of Court, it is not necessary for the Rules of Professional Conduct to do so. In addition to the Rules of Court, judicial decisions and federal law also govern this subject. Accordingly, Model Rule 5.5(c) and (d) are not needed, and may conflict with Rules of Court, statutes, or applicable decisional law. They have therefore been deleted. However, proposed Comment [2], *infra*, refers attorneys to the relevant statutes, Rules of Court, and some federal judicial decisions. Because the California Rules of Court were amended after the first batch of proposed Rules were circulated for public comment, the references in proposed Comment [2] will have to be updated. The Commission concluded that attempting to restate in a Rule of Professional Conduct all of the nuances of the statutes, Rules of Court, and judicial decisions in California and in federal courts would make the proposed Rule unwieldy and unnecessarily long, and, because judicial decisions on the subject of unauthorized practice of law are constantly evolving, the proposed Rule could not possibly be complete, even if it attempted to do so. Therefore, the brief references in proposed Comment [2] are offered for succinct guidance.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**	**Commission's Proposed Rule[*]** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**	**Explanation of Changes to the ABA Model Rule**
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.	~~(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:~~ ~~(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or~~ ~~(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.~~	See explanation regarding paragraph (c) above.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.	[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. ~~*A lawyer*~~ ~~may be~~ ~~*admitted to practice law in*~~ ~~a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis.~~ Paragraph (a) ~~applies to~~prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.	Comment [1] is substantially the same as ABA Model Rule Comment [1]. The second sentence is deleted from the proposed Comment because it is an inaccurate and incomplete statement of when a lawyer may practice law in the State of California under applicable statutes, Rules of Court, and decisional law. In the third sentence of the Comment to the Model Rule, the word "applies to" is not an accurate description of paragraph (a) of the rule. Therefore, in the proposed rule, the phrase "applies to" has been changed to the phrase "prohibits the." The phrase ". . . in the performance of activities that constitute the unauthorized practice of law" has been added to the last sentence of the Comment because it makes the last sentence of the Comment a more accurate and complete summary of the provisions of paragraph (a).
[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3	~~[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.~~	Comment [2] of ABA Model Rule 5.5 has been deleted because its first two sentences are only a generalized comment about admission to practice law throughout the United States and are irrelevant to the California Rules. The third sentence has been deleted because that subject will be covered by proposed new Rule 5.3.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	**Explanation of Changes to the ABA Model Rule**
	[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel *pro hac vice*], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)	In place of ABA Comment [2], the proposed rule substitutes a new Comment [2] that refers the public, courts, and lawyers to relevant statutes, rules of court, and federal decisions. See explanation of changes regarding paragraph (c), *supra*. The Commission endeavored to draft a definition of the practice of law in this State but does not recommend that such a definition be included in these rules. It would lengthen the Comment by at least six pages and would still not be a complete definition of what constitutes the practice of law in this State, in part, because judicial decisions are constantly re-interpreting that concept in light of the facts of specific cases.
[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.	~~[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.~~	ABA Comment [3] is deleted from the proposed rule because it is an incomplete and inaccurate statement of the law in California regarding lawful practice by non-lawyers. See, for example, Bus. & Prof. Code §§ 6400, *et seq.*, dealing with Legal Document Assistants and Unlawful Detainer Assistants. This subject is best addressed in Rule 5.3.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	**Explanation of Changes to the ABA Model Rule**
[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).	~~[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).~~	Comment [4] has been deleted from the proposed rule because it is an incomplete and inaccurate restatement of part of paragraph (b) of the proposed rule.
[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.	~~[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.~~	Comments [5] through [21] have been deleted because they discuss paragraphs (c) and (d), both of which have been deleted from the proposed Rule because the subject matter is already governed by Rules of Court, Rules 9.47 and 9.48, and decisional law.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	**Explanation of Changes to the ABA Model Rule**
[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.	~~[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.	~~[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.	~~[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	Commission's Proposed Rule* **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	Explanation of Changes to the ABA Model Rule
[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.	~~[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.	~~[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.

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<u>ABA Model Rule</u> **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	<u>Commission's Proposed Rule</u>* **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	<u>Explanation of Changes to the ABA Model Rule</u>
[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.	~~[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.	~~[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.	~~[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*..

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	Commission's Proposed Rule* **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	Explanation of Changes to the ABA Model Rule
[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].	~~[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*..

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ABA Model Rule **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	**Commission's Proposed Rule*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	**Explanation of Changes to the ABA Model Rule**
[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.	~~[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.	~~[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.

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ABA Model Rule Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	Commission's Proposed Rule* Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment	Explanation of Changes to the ABA Model Rule
[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.	~~[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.	~~[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).	~~[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.
[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).	~~[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.

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<u>ABA Model Rule</u> **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment**	**<u>Commission's Proposed Rule</u>*** **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law Comment**	**<u>Explanation of Changes to the ABA Model Rule</u>**
[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.	~~[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.~~	See explanation regarding paragraphs (c) and (d) and Comments [5] through [21], *supra*.

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Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
(Commission's Proposed Rule – Clean Version)

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel *pro hac vice*], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.3 Reporting Professional Misconduct

December 2008
(Draft rule revised following consideration of public comment)

INTRODUCTION:

1. Proposed Rule 8.3 would add new disciplinary standards not currently found in the California rules in any form. Paragraph (a) of proposed Rule 8.3 states a lawyer may, but is not required to, report misconduct of another lawyer. It thus differs from the mandatory reporting requirement in ABA Model Rule 8.3 and most states. The Commission believes that a balancing of the policies involved favors permissive reporting.

2. The Commission agrees with the concepts that the self-regulation of the legal profession requires each lawyer to be vigilant for ethical violations, and that lawyers should be encouraged to report the misconduct of other lawyers, but it believes that this standard should not be mandatory. There are several reasons for rejecting a mandatory reporting requirement. These include the following:

3. First, mandatory reporting is inconsistent with the lawyer's duty of undivided loyalty to his or her client. This important client-protection principle is enforced more robustly in California than under the Model Rules, and the Commission supports maintaining the obligation of lawyers to focus principally on client welfare and interests. See *Flatt v. Superior Court*, 9 Cal.4th 281, 289 (1994) ["A lawyer's fiduciary duty of

loyalty is to protect the client in every possible way and not to assume a position adverse or antagonistic to his or her client without the client's free and intelligent consent given after full knowledge of all the facts and circumstances. Absent such informed consent, a lawyer is precluded from assuming any relation which would prevent him from devoting the lawyer's entire energies to the client's interests."] Cf. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) [lawyer suspended who abided by client's directive not to report her former counsel's misconduct]. As exemplified by *Himmel*, mandatory lawyer reporting compels the client to be a participant in the disciplinary process without the client's consent and even over the client's objections. The Commission considers the client loyalty issue paramount. Mandatory reporting of another lawyer's misconduct could prejudice the reporting lawyer's client, e.g., by: (i) disclosing the client's confidential information; (ii) interfering with the pursuit of the client's legitimate objectives; (iii) implicating the client in wrongdoing; and (iv) as mentioned below (see ¶. 9 of this Introduction), embroiling the client as a witness in the disciplinary proceedings.

4. Second, mandatory reporting creates the risk that lawyers will be subject to unexpected disciplinary charges because of the vagueness of the Rule 8.3 standard of a "substantial question" (Model Rule 1.0(l) defines "substantial" as "... of clear and weighty importance.").

5. Third, lawyers would be at risk of a third-party civil claim for placing a client's interests first or for arguably misunderstanding what is meant by a "substantial" question about another lawyer's honesty, trustworthiness, or fitness. In addition, California's mandatory self-reporting requirement (see Comment [3], below) avoids all the uncertainties of the Model Rule, and it has been described as a substitute for the Model Rule (See Greenbaum, The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform, 16 Geo. J. Legal Ethics 259, 264 n.18 and accompanying text (2003).

6. Fourth, the Commission is not aware of any evidence of an underreporting of lawyer misconduct in California. To the contrary, statistics in the 2007 Report on the State Bar of California Discipline System suggest that the volume of lawyer complaints already strains the disciplinary system.

7. The Commission therefore believes that the report obligation should be permissive and left to the exercise of a lawyer's professional judgment; a lawyer's fitness to practice law is not called into question by a decision to not report another person's ethical violation. This view is implemented in proposed paragraph (a), below.

8. Kentucky has attempted to address some of the weaknesses in Model Rule 8.3 through a currently-pending proposal that, among other things, would: (i) substantially modify paragraph (a) by replacing the Model Rule's reference to violations of the Rule and replacing it with "conduct involving dishonesty, fraud, or deceit" [to narrow somewhat the scope of the reporting requirement]; (ii) add an immunity provision for the lawyer who makes the Rule 8.3 report [but overlooks the civil risk to a lawyer who exercises judgment to not report]; (iii) add an extremely limited self-reporting obligation [limited to a lawyer who is disciplined in another jurisdiction. Cf. Comment [3], below]; and (iv) add a reporting obligation for the criminal prosecutor who successfully prosecutes a lawyer. The Commission has not yet studied the Kentucky proposal, of which it just recently became aware, but it intends to do so before the proposed Rules are distributed for final public comment.

9. In addition to the ABA concept that lawyer-self-regulation implies an obligation on all lawyers to report misconduct by other lawyers, which is mentioned above, proponents of mandatory reporting argue that lawyers often are in the best position to identify the misconduct of other lawyers. While this might be true sometimes, with most disciplinary charges, it is only the client who can be a material, competent witness against the lawyer, and the Commission believes this means that the offending lawyer's client should determine whether or not to report the misconduct; that person otherwise might be drawn into disciplinary proceedings in a way that he or she does not wish, for example, because of a desire to protect his or her confidential information. Washington and Georgia have rejected mandatory reporting and instead have permissive reporting obligation along the lines of the Commission's proposal.

10. Paragraph (b) continues the prohibition found in current California Rule 1-500(B) against agreements not to report violations. Following public comment, some revisions were made for clarity and a comment added to emphasize that this new Rule is not intended to abrogate a lawyer's obligations under California Rule 5-100 ("Threatening Criminal, Administrative, or Disciplinary Charges").

ABA Model Rule **Rule 8.3 Reporting Professional Misconduct**	Commission's Proposed Rule* **Rule 8.3 Reporting Professional Misconduct**	Explanation of Changes to the ABA Model Rule
(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.	~~(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.~~	As discussed in detail in the Introduction, the Commission believes that a balancing of the policies involved favors permissive reporting over mandatory reporting. Therefore, the Commission recommends substitution of its proposed paragraph (a), providing for permissive reporting, for the mandatory reporting requirement in Model Rule 8.3(a).
	(a) A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act unless precluded by the lawyer's duties to a client, or a former client, or by law.	See Explanation of Changes for deleted paragraph (a) of Model Rule 8.3, above.
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.	~~(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.~~	The Model Rule expands the scope of the concept of lawyer self-regulation to include a duty to report judicial misconduct. The Commission does not agree that there is any such connection. In addition, and to a far greater extent than might be true with a lawyer's decision to report under paragraph (a), a lawyer's decision to report judicial misconduct could undermine the lawyer's ability to represent other clients in the jurisdiction, including other current clients – and this might be particularly true in California's many smaller counties. The Commission believes it would be unduly harsh to subject a lawyer to the threat of discipline for deciding not to report judicial misconduct because of concerns about how doing so might affect the lawyer's other current clients or the lawyer's self interest. It recommends the rejection of MR 8.3(b).

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ABA Model Rule **Rule 8.3 Reporting Professional Misconduct**	**Commission's Proposed Rule*** **Rule 8.3 Reporting Professional Misconduct**	**Explanation of Changes to the ABA Model Rule**
	(b) A lawyer shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these Rules.	The Commission recommends replacing Model Rule 8.3(b) with this restatement of California's statutory prohibition located at Business and Professions Code section 6090.5. The Commission is concerned that the statutory provision is difficult to locate and not well known, and the lawyer's compliance would be improved by including the provision as a Rule of Professional Conduct.
(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.	~~(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.~~	The Commission agrees that a lawyer should not make a report under this Rule if doing so would compromise client information, but it disagrees with Model Rule 8.3(c) because: (i) it is too narrow in referring only to confidentiality as there are other client interests that a lawyer should consider before deciding whether to report under paragraph (a); and (ii) this provision is not disciplinary in nature but rather a comment on a lawyer's appropriate reporting considerations that is better placed in a Comment. The Commission recommends the rejection of Model Rule 8.3(c) and the placement of an expanded discussion in the Comment. See proposed Comment [2].

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ABA Model Rule Rule 8.3 Reporting Professional Misconduct Comment	Commission's Proposed Rule Rule 8.3 Reporting Professional Misconduct Comment	Explanation of Changes to the ABA Model Rule
[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.	~~[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.~~	The Commission recommends the rejection of Model Rule 8.3, Comment [1], because it is inconsistent with its recommended paragraph (a).
	[1] In deciding whether to report a violation of these Rules or the State Bar Act, a lawyer may consider among other things whether the violation raises a substantial question as to honesty, trustworthiness or fitness as a lawyer. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.	The Commission agrees with the premise of MR 8.3 that the seriousness of the other lawyer's misconduct is a proper concern in deciding whether to report that misconduct. The Commission therefore recommends the adoption of this Comment [1], which borrows that concept from MR 8.3(a), but in the form of an explanatory comment rather than in the form of a disciplinary standard. The last sentence of this Comment is taken from Model Rule 8.3, Comment [3].
[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.	~~[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.~~	As explained above with respect to paragraph (c), the Commission recommends replacing the reference to confidentiality with a broader discussion of pertinent concerns. The Commission's recommendation is immediately below.

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ABA Model Rule **Rule 8.3 Reporting Professional Misconduct Comment**	**Commission's Proposed Rule** **Rule 8.3 Reporting Professional Misconduct Comment**	**Explanation of Changes to the ABA Model Rule**
	[2] This Rule is not intended to allow a lawyer to report a violation of these Rules or the State Bar Act if doing so would: (a) violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068(e) [or Rule 1.6 or 1.18]; (b)would prejudice the interests of the lawyer's client; or (c) involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.	See Explanation of Changes for Model Rule 8.3, Comment [2]. The bracketed references to Rules 1.6 and 1.18 are to rules concerning the confidentiality of client information that are still under consideration by the Commission.
[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.	~~[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.~~	For the most part, Model Rule 8.3, Comment [3], is unrelated to the Rule that the Commission recommends, and it therefore recommends the comment's removal. As already noted, the Commission recommends the addition of the fifth sentence of Model Rule 8.3, Comment [3], to its proposed Comment [1]. See Explanation of Changes concerning Comment [1], above. The Commission's proposed Comment [3] is on a different topic and is given and explained immediately below.

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<u>ABA Model Rule</u> **Rule 8.3 Reporting Professional Misconduct Comment**	<u>Commission's Proposed Rule</u> **Rule 8.3 Reporting Professional Misconduct Comment**	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[3] This Rule is not intended to abrogate a lawyer's obligations to report conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, subdivision 6068(o).)</u>	California is unique in the self-reporting requirement cited in this proposed Comment. Because of the relationship between proposed Rule 8.3 and the separate issue of self-reporting, the Commission believes it would be helpful to include this cross-reference.
[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.	~~[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.~~	Because the Commission recommends a permissive rather than a mandatory reporting requirement, it believes that Model Rule 8.3, Comment [4] would add length needlessly, and it therefore recommends its removal. The Commission's proposed Comment [4] is on a different topic and is given and explained immediately below.
	<u>[4] Nothing in this Rule is intended to abrogate a lawyer's obligations to refrain from threatening to file administrative or disciplinary proceedings to obtain an advantage in a civil dispute in violation of Rule [5-100].</u>	As with proposed Comment [3], the Commission believes it could be helpful to lawyers to provide this cross-reference to the Rule that prohibits lawyers from threatening administrative or disciplinary charges.

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ABA Model Rule Rule 8.3 Reporting Professional Misconduct Comment	Commission's Proposed Rule Rule 8.3 Reporting Professional Misconduct Comment	Explanation of Changes to the ABA Model Rule
[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.	~~[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.~~	Model Rule 8.3's mandatory reporting requirement creates a conflict whenever a lawyer learns in a confidential setting information that must be reported under the ABA's version of the Rule. Model Rule 8.3, Comment [5] addresses one example of that kind of conflict, which is when a lawyer obtains information while participating in an assistance program for lawyers or judges. The Commission believes that this conflict does not exist under the proposed permissive Rule. Therefore, we would remove Model Rule 8.3, Comment [5] entirely. See also proposed Comment [2].

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Rule 8.3 Reporting Professional Misconduct
(Commission's Proposed Rule – Clean Version)

(a) A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act unless precluded by the lawyer's duties to a client, or a former client, or by law.

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

Comment

[1] In deciding whether to report a violation of these Rules or the State Bar Act, a lawyer may consider among other things whether the violation raises a substantial question as to honesty, trustworthiness or fitness as a lawyer.

[2] This Rule is not intended to allow a lawyer to report a violation of these Rules or the State Bar Act if doing so would: (a) violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068, subdivision (e); (b) would prejudice the interests of the lawyer's client; or (c) involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.

[3] This Rule is not intended to abrogate a lawyer's obligations to report conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, subdivision 6068(o).)

[4] Nothing in this rule is intended to abrogate a lawyer's obligations to refrain from threatening to file administrative or disciplinary proceedings to obtain an advantage in a civil dispute in violation of Rule [5-100].

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.4 Misconduct

December 2008
(Draft rule revised following consideration of public comment)

INTRODUCTION:

The text of proposed new Rule 8.4 retains current California Rule 1-120 (Assisting, Soliciting, or Inducing Violations) as paragraph (a) and includes most of the provisions found in ABA Model Rule 8.4, thus collecting in one rule various misconduct provisions. Some of the included ABA provisions have counterparts in current California rules or in sections of the Business and Professions Code. The text of proposed Rule 8.4 differs from ABA Model Rule 8.4 by: (i) not proscribing *attempts* to violate the Rules in paragraph (a); (ii) including the concept of moral turpitude in paragraph (b); (iii) restricting discipline to misrepresentations that are intentional in paragraph (c); (iv) limiting violations for conduct prejudicial to the administration of justice to conduct in connection with the practice of law (paragraph (d)); and (v) adding a provision concerning statements or conduct that manifests bias or prejudice (paragraph (e)).

Many of the Comments are based on corresponding comments in ABA Model Rule 8.4, but have been revised for brevity and clarity, and to conform to the differences in the rule texts. In addition, several comments have been added to apprise California lawyers of statutory and decisional law that might provide bases for discipline beyond that in Rule 8.4.

ABA Model Rule **Rule 8.4 Misconduct**	**Commission's Proposed Rule*** **Rule 8.4 Misconduct**	**Explanation of Changes to the ABA Model Rule**
It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;	It is professional misconduct for a lawyer to: ~~(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;~~ (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;	There are two principle changes in paragraph (a). First, paragraph (a) removes "... violate ... the Rules of Professional Conduct ...." The reason for this change is that any 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. Second, paragraph (a) eliminates an "attempt" to violate a Rule as a general disciplinary offense. It was the consensus of the Commission that during the drafting process, it should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. As a result, the Commission decided not to include attempts to violate as a general rule of discipline.
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;	(b) commit a criminal act that (i) involves moral turpitude or ~~that~~ (ii) reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer ~~in other respects~~;	The Commission added moral turpitude to the Model Rule to maintain conformity with the broader public protection afforded by the Business and Professions Code, specifically, section 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. See Explanation concerning Model Rule 8.4, Comment [2], below. Some states 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 decided to add "moral turpitude" to the proposed Rule.

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ABA Model Rule **Rule 8.4 Misconduct**	**Commission's Proposed Rule*** **Rule 8.4 Misconduct**	**Explanation of Changes to the ABA Model Rule**
		In addition, there is a long history in California of referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code sections 6101 and 6102. Moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction. The Commission also recommends deletion of the phrase "in other respects" as surplusage.
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;	(c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;	The addition of "intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that triggers this Rule. The Commission believes this clarification is consistent with the scope of the ABA's Rule given the interpretation in disciplinary proceedings in states that have adopted the 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].
(d) engage in conduct that is prejudicial to the administration of justice;	(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;	The addition of "in connection with the practice of law" was added because of concern that the vagueness of the language might not overcome facial Constitutional challenges under the First Amendment. The Commission sought to delimit the scope of conduct proscribed under paragraph (d) by clarifying in advance that the specific conduct that might be at issue in connection with a charge of prejudice to the administration of justice had to be connected to the practice of law. A minority of the Commission disagrees with the language limiting the paragraph's scope to conduct "in connection with the

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ABA Model Rule **Rule 8.4 Misconduct**	**Commission's Proposed Rule*** **Rule 8.4 Misconduct**	**Explanation of Changes to the ABA Model Rule**
		practice of law" because a lawyer's fitness to practice law is called into question by conduct prejudicial to the administration of justice whatever the capacity in which the lawyer acts. Finally, a related issue was recently raised about whether a lawyer appearing *in propria persona* might not be engaging "in conduct in connection with the practice of law," and therefore would be immune under this provision. The Commission intends to resolve this issue before finalization of the Rule.
	(e) knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation, if prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not constitute a violation of this Rule.	Paragraph (e) is not found in the Model Rules. This provision, which tracks much of the language of MR 8.4, cmt. [3], was originally included in proposed Rule 8.4.1 [the counterpart to current California rule 2-400] during Rule 8.4.1's drafting process. After deliberation, the Commission determined the misconduct described in this provision was better placed in proposed Rule 8.4. In part, paragraph (e) was added because of the rule provisions in a few jurisdictions that have chosen to regulate this conduct (e.g., Illinois). This provision is also a response to the decision by the Ninth Circuit that invalidated Business and Professions Code section 6068(f) relating to "offensive personality" on constitutional grounds and the subsequent legislative deletion of that section. Because the standard used in paragraph (e) is similar to the standard used in current California rule 2-400, it is expected to survive constitutional challenge. Before finalization, paragraph (e) will be moved to the end of Rule 8.4 to retain the Model Rule lettering order for the other paragraphs.

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ABA Model Rule **Rule 8.4 Misconduct**	**Commission's Proposed Rule*** **Rule 8.4 Misconduct**	**Explanation of Changes to the ABA Model Rule**
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or	(~~e~~f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate ~~the~~these Rules ~~of Professional Conduct~~ or other law; or	The Commission has adopted the convention of referring to the Rules of Professional Conduct as "these Rules." Curiously, the ABA mostly refers to the Model Rules collectively as "these Rules" in its blackletter and comment, only occasionally (as here) referring to them as "the Rules of Professional Conduct." An inquiry to the Model Rules drafters (reporters) confirmed that no substantive meaning should be attached to the varied usages.
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.	(~~f~~g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.	Paragraph (g) is taken directly from Model Rule 8.4(f).

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ABA Model Rule **Rule 8.4 Misconduct** **Comment**	**Commission's Proposed Rule** **Rule 8.4 Misconduct** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.	[1] ~~Lawyers are~~ Under paragraph (a), a lawyer is subject to discipline ~~when they violate or attempt to violate the Rules~~for a violation of ~~Professional Conduct~~these Rules, and for knowingly ~~assist~~assisting or ~~induce~~inducing another to do so or to do so through the acts of another, as when ~~they request~~a lawyer requests or ~~instruct~~instructs an agent to do so on the lawyer's behalf. ~~Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.~~	The language has been clarified and attempted violation eliminated, as in the Rule itself. See Explanation for paragraph (a), above. The substance of the deleted last sentence of the Model Rule comment is the subject of proposed Rule 1.2.1, the counterpart to current rule 3-210. See Comment [9]. Before finalization of the Rule, the Commission intends to renumber the comments to conform the proposed comment numbers to Model Rule comment numbers with the same or similar content.
	[2] Paragraph (a) is also intended to apply to the acts of entities. (See, e.g., Bus. & Prof. Code, sections 6160 - 6172 (Law Corporations); Bus. & Prof. Code, section 6155 (Lawyer Referral Services).)	Comment [2] is new. It clarifies the applicability of the Rule to law corporations and similar entities. See Explanation of Changes to Comment [1]. This will be renumbered Comment [1A].

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ABA Model Rule **Rule 8.4 Misconduct** **Comment**	**Commission's Proposed Rule** **Rule 8.4 Misconduct** **Comment**	**Explanation of Changes to the ABA Model Rule**
[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.	[~~2~~3] ~~Many~~Regarding paragraph (b), many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication~~. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law.~~ Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. ~~A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.~~	The second sentence was deleted as an unnecessary because the Commission has retained "moral turpitude" in the Rule, for all the reasons set out in the Explanation for paragraph (b), above. At one point during the drafting process for this Rule, the Commission crafted a statement, based on the stricken sentence, that was intended to clarify that "offenses concerning matters of personal were not within the scope of the Rule. However, as it was unclear that such conduct, e.g., adultery, remains a criminal offense in California, the sentence was deleted as potentially confusing. The Commission deleted the last sentence of MR. 8.4, cmt.[2] because the proposition stated is unclear in the absence of a definition of what is considered a "minor" offense. This ambiguity could give rise to interpretations that grant less public protection than the existing protection afforded by California's standards of moral turpitude, discipline under Business and Professions Code section 6068(a), and conviction referrals under Business and Professions Code section 6101. A lawyer's conviction of a single misdemeanor charge could be construed as a "minor" offense under the ABA language; however, a pattern of that misconduct might not be a prerequisite for discipline under California's standards.

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ABA Model Rule **Rule 8.4 Misconduct** **Comment**	**Commission's Proposed Rule** **Rule 8.4 Misconduct** **Comment**	**Explanation of Changes to the ABA Model Rule**
	[4] Regarding paragraph (b), a lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)	This comment was added because there is a substantial body of case law that has confirmed discipline for "other conduct warranting discipline," as set out in the Supreme Court cases cited. See Explanation of Changes to Comment [1]. This will be renumbered Comment [2A].

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ABA Model Rule **Rule 8.4 Misconduct Comment**	Commission's Proposed Rule **Rule 8.4 Misconduct Comment**	Explanation of Changes to the ABA Model Rule
	[5] Regarding paragraph (b), a lawyer may be disciplined for acts of moral turpitude which constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)	This comment is intended to alert lawyers to the expansive case law on moral turpitude. See Explanation of Changes to Comment [1]. This will be renumbered Comment [2B].

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ABA Model Rule Rule 8.4 Misconduct Comment	Commission's Proposed Rule Rule 8.4 Misconduct Comment	Explanation of Changes to the ABA Model Rule
	[6] Paragraph (d) is not intended to 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. 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* (Rev. Dept 1997) 3 State Bar Court 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).	The Commission believed that it is important to stress the protection of constitutional rights in connection with discipline so that activities protected by the First Amendment do not become the subject of disciplinary proceedings. See also Explanation of Changes at paragraph (d), above. See Explanation of Changes to Comment [1]. This will be renumbered Comment [2C].

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ABA Model Rule **Rule 8.4 Misconduct** **Comment**	**Commission's Proposed Rule** **Rule 8.4 Misconduct** **Comment**	**Explanation of Changes to the ABA Model Rule**
[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.	[~~3~~7] 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~~,~~ or 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~~paragraph (b).	This comment is intended to clarify the scope of proposed Rule 8.4(e). See Explanation of Changes to Comment [1]. This will be renumbered Comment [3].
[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.	~~[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.~~	Model Rule 8.4, Comment [4], was revised for brevity and clarity. As revised, It was placed at the end of the comment section to proposed Rule 8.4 in accordance with California Rule style (cross-references to other rules in the Rules of Professional Conduct are placed at the end of the Discussion section). See Explanation of Changes to Comment [9], below, for a more detailed explanation of the revisions to the Model Rule comment. Before finalization of the Rule, what is now Comment [9], below, will be moved and renumbered Comment [4].

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ABA Model Rule Rule 8.4 Misconduct Comment	Commission's Proposed Rule Rule 8.4 Misconduct Comment	Explanation of Changes to the ABA Model Rule
[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.	~~[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.~~	The Commission originally deleted this Comment because it does not have any predicate in the Rule. No paragraph in the Rule refers to misconduct by a public official who is a lawyer, the subject of the first sentence. However, upon further reflection, the second sentence concerning fiduciaries, appears to have a rule predicate in paragraph (b) (criminal act "that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer") and paragraph (c) ("conduct involving dishonesty, fraud, deceit, or intentional misrepresentation"). Before finalization of the Rule, the Commission intends to revisit whether the second sentence or some variant of it should be retained.
	[8] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6100 et seq.), and the published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.	This Comment is intended as a clarification and to advise lawyers that there are bases for discipline other than the Rules. See Explanation of Changes to Comment [1]. This will be renumbered Comment [6].

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ABA Model Rule Rule 8.4 Misconduct Comment	Commission's Proposed Rule Rule 8.4 Misconduct Comment	Explanation of Changes to the ABA Model Rule
	[9] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2.1. Rule 1.2.1 is also intended to apply to challenges regarding the regulation of the practice of law.	This Comment is intended as a cross-reference to another Rule that is applicable to related conduct. It is the second sentence to Model Rule 8.4, Comment [4], revised and split into two sentences for clarity. No change in meaning was intended. See Explanation of Changes to Model Rule 8.4, Comment [4], above. The first sentence ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.") was deleted because it was not for the protection of the public, inconsistent with Bus. & Prof. Code section 6068(a), and over broad with respect to what a lawyer may do to challenge a law that he or she believes is invalid.

Rule 8.4 Misconduct
(Commission's Proposed Rule – Clean Version)

It is professional misconduct for a lawyer to:

(a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;

(b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;

(e) knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation, if prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not constitute a violation of this Rule.

(f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or

(g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Under paragraph (a), a lawyer is subject to discipline for a violation of these Rules, and for knowingly assisting or inducing another to do so or to do so through the acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

[2] Paragraph (a) is also intended to apply to the acts of entities. (See, e.g., Bus. & Prof. Code, sections 6160 - 6172 (Law Corporations); Bus. & Prof. Code, section 6155 (Lawyer Referral Services).)

[3] Regarding paragraph (b), many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

[4] Regarding paragraph (b), a lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal

income tax return]; In re Morales (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[5] Regarding paragraph (b), a lawyer may be disciplined for acts of moral turpitude which constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

[6] Paragraph (d) is not intended to 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. 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* (Rev. Dept 1997) 3 State Bar Court 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).

[7] 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 or sexual orientation, 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 paragraph (b).

[8] Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6100 et seq.), and the published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.

[9] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2.1. Rule 1.2.1 is also intended to apply to challenges regarding the regulation of the practice of law.