



THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE,
PLANNING, AND DEVELOPMENT

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DATE: June 22, 2009

TO: Members of the Board Committee on Regulation, Admissions & Discipline Oversight

FROM: Randall Difuntorum, Director, Professional Competence

RE: Commission for the Revision of the Rules of Professional Conduct: Proposed Amendments to the Rules of Professional Conduct -- Request for release for public comment

EXECUTIVE SUMMARY

This agenda item requests Board Committee authorization to publish proposed amendments to the Rules of Professional Conduct for a 90-day public comment period. This agenda item also requests authorization to conduct a public hearing on the proposed amendments.

The proposed amendments are the fourth group of proposed rules developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The Commission is assigned to conduct a thorough review of all of the rules and to recommend comprehensive amendments. In accordance with Board guidance, each proposed rule is presented in a comparison table format showing changes to its ABA Model Rule counterpart and providing specific explanations for each deviation from the Model Rule.

It is anticipated that representatives of the Commission will attend the Board Committee's meeting to present this item. Board members with questions about this agenda item may contact Randall Difuntorum at (415) 538-2161.

ISSUE

The Board of Governors ("Board") has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct.^{1/} The amendments adopted by the Board

^{1/} Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State."

are submitted to the Supreme Court for approval and upon approval become binding disciplinary standards for all members of the State Bar.^{2/}

The State Bar's procedures for considering amendments to the Rules of Professional Conduct require publication for public comment. (Board Book, Tab 12, Title 1, Division 2, Rule 1.10.) The Board Committee on Regulation, Admissions, and Discipline ("RAD") oversees the Commission's requests for public comment authorization. This agenda item requests authorization (1) to publish proposed amendments to the Rules of Professional Conduct for a 90-day public comment period and (2) to gather additional input by conducting a public hearing.

BACKGROUND

The last complete revision of the California Rules of Professional Conduct occurred in the 1980's and it was at that time that the State Bar established its Special Commission for the Revision of the Rules of Professional Conduct ("the Commission"). At the end of its work, the Commission was placed in an abeyance status until such time that another complete revision of the rules would be needed. That time came in 2001 when the State Bar reactivated the Commission and assigned it to conduct a thorough study of the rules and to recommend comprehensive amendments. In part, the State Bar's action responded to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project to revise the ABA Model Rules of Professional Conduct.

The Commission made a presentation to the Board at the Board's January 10, 2009 planning meeting and in accordance with commentary from Board members, the Commission has changed the format of its proposed rules. The proposed rules are presented in a comparison table format. The table format has three columns. The first column presents the clean version of an ABA Model Rule counterpart, if any. The second column presents a redline draft of the Commission's proposal that shows changes to the ABA Model Rule counterpart. The third column presents the Commission's explanation of each deviation from the ABA Model Rule language. In addition, at the end of each table are the clean version of the Commission's proposed rule and a summary of selected state variations. This format is intended to simplify identification of changes to the ABA Model Rules and to make plain the Commission's rationale whenever it deviates from the ABA.

At the Board's January 10, 2009 planning meeting, a Board subcommittee was created to consider the Commission's charge and report back on any recommended amendments. The Board subcommittee has met and discussed the Commission's charge and presently is working with the State Bar President to obtain Supreme Court input on the Commission's charge. At the same time, in an effort to maintain progress on the Commission's inventory of work, issuance of the fourth group of the Commission's proposed rules is being sought.

^{2/} Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar."

DISCUSSION

In 2006, the Commission completed its initial work on twenty-seven proposed new and amended rules and these rules were the Commission's first public comment group. This first batch had a 120-day public comment period which ended on October 16, 2006 and addressed topics such as: lawyer advertising; competent representation; communication with clients; and lawyers acting as third-party neutrals.

In 2007, the Commission distributed its second group of proposed rules. This second batch presented five rules with a 90-day public comment period which ended on October 26, 2007 and addressed topics such as: prohibited discrimination in law practice operation; client gifts to lawyers; payment of a client's personal expenses by a lawyer; and lawyer purchase of property at a foreclosure sale.

In 2008, the Commission distributed its third group of proposed rules. This third batch presented thirteen rules with a 90-day public comment period which ended on June 6, 2008 and addressed topics such as: communication with a party represented by counsel; sale of a law practice; business transactions with clients; and fees for legal services.

The Commission has now completed work on eight rules that are the subject of its present request for public comment authorization. In accordance with Board guidance, the proposed rules are presented in comparison table format. (Attachment 1 provides the rule comparison table for each of the eight rules, including clean versions and summaries of state variations.) The proposed rules are listed below.^{3/}

<u>Rule 1.8.6</u>	Third Party Payors [3-310(F)]
<u>Rule 1.8.7</u>	Aggregate Settlements [3-310(D)]
<u>Rule 1.15</u>	Safekeeping Property: Handling Funds and Property of Clients and Other Persons [1-400]
<u>Rule 3.3</u>	Candor Toward the Tribunal [5-200]
<u>Rule 3.6</u>	Trial Publicity [5-120]
<u>Rule 3.7</u>	Lawyer as Witness [5-210]
<u>Rule 6.3</u>	Membership in Legal Services Organization [n/a]
<u>Rule 6.4</u>	Law Reform Activities Affecting Client Interests [n/a]

This agenda item requests Board Committee authorization to publish the proposed rules for a 90-day public comment period. This agenda item also requests authorization to conduct a public hearing on the proposed amendments. If public comment is authorized, the proposed rules will be distributed in the provided comparison table format to facilitate public commentators' ability to evaluate the Commission's changes to the ABA Model Rule counterparts.

^{3/} Where applicable, the number of the current California Rule counterpart appears in brackets at the end of the rule title.

EFFECTIVE DATE OF PROPOSAL

Amendments to the Rules of Professional Conduct become operative only after they have been adopted by the Board and approved by the Supreme Court. The instant proposal is part of the Commission's ongoing comprehensive study. It is anticipated that the Commission's final comprehensive report and recommendation will be presented to the Board for adoption in 2010, at the earliest, and if adopted thereafter to the Supreme Court for approval.

In submitting the rule amendments to the Supreme Court, it is further anticipated the State Bar would request that the Supreme Court set an operative date for the amended rules that would afford a six month lead time to allow the State Bar to publicize the new rules.

FISCAL AND PERSONNEL IMPACT

The fiscal and personnel impact that will result from authorizing the requested public comment distribution and public hearing is anticipated to be absorbed by the presently budgeted funds and the staff of the Office of Professional Competence.

IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

Authorization of public comment and a public hearing on the Commission's proposed rules will not have an impact on the Board Book.

RULE AMENDMENTS

No rule amendments are effectuated by the Board Committee's action to authorize public comment. Only after consideration of public comments received, and following anticipated adoption by the Board and approval by the Supreme Court, would this matter result in amendments to the Rules of Professional Conduct of the State Bar of California.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Regulation, Admissions and Discipline Oversight Committee approve the request to release the Commission's proposed amended Rules of Professional Conduct, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight authorizes staff to make available for public comment for a period of 90-days, the proposed new or amended Rules of Professional Conduct prepared by the Special Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that staff is authorized to conduct a public hearing on the proposed new or amended Rules of Professional Conduct; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

ATTACHMENT 1

PROPOSED NEW AND AMENDED RULES IN ABA MODEL RULE COMPARISON TABLE FORMAT

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.6 Payments Not From Client

April 2009

(Draft rule to be considered for public comment)

INTRODUCTION:

ABA Model Rule 1.8(f) and proposed Rule 1.8.6 begin from the same premise: a lawyer has a potential conflict of interest when the lawyer is compensated by someone other than the client. However, proposed Rule 1.8.6 expands in important ways on the protection afforded a client by the Model Rule. The Model Rule requires compliance before a lawyer *accepts* compensation from someone other than the client; the proposed Rule extends this by also requiring compliance before a lawyer *enters into an agreement with or charges* someone other than the client. The proposed revision is designed to include in the Rule events that would create the conflict of interest the Rule is intended to address. Proposed Rule 1.8.6 also requires a higher standard of lawyer conduct than is found in the Model Rule because proposed Rule 1.8.6 requires that the lawyer obtain the client's consent in writing. To facilitate access to justice, the proposed Rule also excepts from the Rule certain legal services provided by government agencies.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.6 Payments Not From Client	<u>Explanation of Changes to the ABA Model Rule</u>
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:	~~(f)~~ A lawyer shall not <u>enter into an agreement for, charge, or</u> accept compensation for representing a client from one other than the client unless:	<u>Revisions to Enhance Client Protection.</u> Both the ABA and proposed California versions of this Rule recognize the potential conflict of interest that arises for a lawyer who accepts payment from someone other than the lawyer's client. However, California's proposed Rule makes one substantive addition to the Model Rule to extend the reach of the Rule for better client protection. The Model Rule restricts only the acceptance of compensation from someone other than the client. The proposed Rule recognizes it is not only the fact of the payment – which might be delayed or deferred for various reasons - but also the lawyer's expectation of payment from the non-client that could lead the lawyer to look to the interests of the payor rather than to those of the client. The proposed Rule therefore forbids not only the acceptance of payment, as does the Model Rule, but also prohibits the lawyer (i) from entering into an agreement with the non-client for payment of the lawyer's fee or (ii) actually charging the other person: the lawyer may not do any of these three things without first complying with the proposed Rule. <u>Approaches in Other Jurisdictions.</u> There are a number of jurisdictions that have varied the wording or organization of the Model Rule without fundamentally altering the thrust of the Rule. These jurisdictions include Mississippi, North Dakota, Virginia, Washington D.C., and Wyoming.

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.6 Payments Not From Client	<u>Explanation of Changes to the ABA Model Rule</u>
(1) the client gives informed consent;	(~~a~~⁴) the client gives informed <u>written</u> consent <u>at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public;</u>	<u>Revisions to Enhance Client Protection.</u> Paragraph (a) provides for client consent. However, it does so with two substantive variations from the Model Rule. <i>First</i>, paragraph (a) utilizes California's more client-protective requirement that the consent be written. This additional requirement adds a safeguard for the client by placing the lawyer's disclosure and the client's consent in a relatively permanent form that the client can review and discuss with others before giving consent, and the formality of the writing underlines the importance of the lawyer's request for consent. This provision also provides appropriate protection for the compliant lawyer by making it harder for a client to claim that the lawyer made an inadequate disclosure or that the client gave no consent. <i>Second</i>, paragraph (a) includes a timing requirement for obtaining the client's written consent. This is important for the client to be able to maintain supervision and control over the lawyer's conduct. <u>Other Revisions That Enhance Access to Justice.</u> In addition, as in the current California rule [3-310(F)], certain public agency representations are excluded from the Rule because the concerns addressed by the Rule do not come into play in those situations. <u>Approaches in Other Jurisdictions.</u> Montana has included the requirement of "written" consent, and a number of states have excluded insurance and in some cases other situations in which a third-person compensates the lawyer. These states include Connecticut, Louisiana, Ohio, Wisconsin, and perhaps Minnesota (its Rule and Comment do not make this clear, but it appears likely). The Commission recommends limiting the exclusions to the public agency and insurance situations. The former exclusion is included in the Rule itself because that can be done simply, without altering the Model Rule syntax; the latter exclusion is

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule</u> Rule 1.8.6 Payments Not From Client	<u>Explanation of Changes to the ABA Model Rule</u>
		included only in a Comment because this allows the Rule to adhere more closely to the Model Rule, and the Comment that is proposed is similar to the language in the Discussion to California's current rule, language that appears already to be well understood. See proposed Comment [3].
~~(2)~~(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	~~(2)~~<u>(b)</u> there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	No change in the Model Rule language is proposed for this paragraph.
(3) information relating to representation of a client is protected as required by Rule 1.6.	~~(3)~~<u>(c)</u> information relating to representation of a client is protected as required by Rule 1.6 <u>and by Business and Professions Code section 6068(e)</u>.	<u>Revision Identifying California's Unique Confidentiality Statute.</u> Paragraph (c) identifies the duty of confidentiality as a special concern. The proposed version broadens the Model Rule's reference to Rule 1.6 to include California's unique and vital statutory duty of confidentiality.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Payments Not From Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Person Paying for a Lawyer's Services [11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).	~~Person Paying for a Lawyer's Services~~ ~~[11] Lawyers are frequently~~<u>A lawyer might be</u> asked to represent a client ~~under circumstances in which a third~~<u>when another client or other</u> person will ~~compensate~~<u>pay the lawyer's fees</u>, in whole or in part. ~~The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests~~ <u>This Rule recognizes that</u> ~~differ from those~~ <u>any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to</u> the client, including ~~interests in minimizing the amount spent on the representation and in learning how the representation is progressing~~ <u>duties of undivided loyalty</u>, ~~lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's~~ independent professional judgment, ~~there is informed consent from~~ <u>competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has</u>	Model Rule, Comment [11] and the Commission's proposed Comment [1] cover much the same ground. However, the Commission's proposed draft eliminates discursive Model Rule language that does not explain the meaning or application of the Rule. The proposed draft also contains a more specific statement of the duties of lawyers, including references to pertinent portions of the basic conflict of interest Rule, proposed Rule 1.7. No substantive change is intended.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Payments Not From Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (~~prohibiting~~ concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).	
	[2] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.	Comment [2] clarifies the application of this Rule in a common situation that could prove confusing. Because a settlement agreement or court order obligating someone other than the client to pay the lawyer's fees would come at or near the end of the lawyer's representation of the client in the matter, the concerns addressed by this Rule either do not exist or are highly attenuated.
	[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See <i>San Diego Navy Federal Credit Union v. Cumis Insurance Society</i> (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under this Rule when appointed and paid by an insurer to represent an insured pursuant to	Comment [3] clarifies the application of this Rule in the insurance context when the insurer appoints counsel to represent an insured. Under a large and well-developed body of California case law, this Rule normally will not apply to the arrangement under which an insurance company compensates counsel for its insured. This Comment also clarifies that, although this Rule normally does not apply in the appointed counsel situation, there are circumstances in which the appointed counsel will have a potential or actual conflict of interest and, if so, the lawyer must comply with Rule 1.7. A similar comment can be found in the

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Payments Not From Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [37].	Discussion to current rule 3-310.
	[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule, such as when a lawyer is retained or paid by a family member on behalf of an incarcerated client. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.	As noted, the Commission has expanded paragraph (a) to include a timing requirement that states when a lawyer must obtain the client's written consent to the lawyer's fee arrangement with another person: either before the lawyer enters the fee arrangement or as soon thereafter as is reasonably practicable. Comment [4] provides a common example of when the lawyer might not be able to obtain client consent before entering the fee arrangement. Under those circumstances, the lawyer may obtain client consent "as soon thereafter as is reasonably practicable."

Rule 1.8.6 Payments Not From Client (Commission's Proposed Rule – Clean Version)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public;
- (b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).

Comment

- [1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A

lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

- [2] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.
- [3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under this Rule when

appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [37].

- [4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule, such as when a lawyer is retained or paid by a family member on behalf of an incarcerated client. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.6: Payments Not From Client

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.6 is highlighted)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase “former client” shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance “financial assistance which is reasonably necessary

to permit the client to institute or maintain the litigation or administrative proceeding.” Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client” that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship

existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar's investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer's advantage or the advantage of a third person” without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal

malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client’s consent be “in a writing signed by the client.” Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)’s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization. any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the

lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer's professional liability insurance ceases to be in effect.”

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer’s

inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York's counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer's partner, associate, paralegal, law clerk or other employee of the lawyer's firm, a lawyer acting ‘of counsel’ in the lawyer's firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client's rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client's disadvantage only if the client's consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client's ability to pay.” Finally, Oregon's rule governing sexual relations with clients contains a detailed description of “sexual relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

Pennsylvania: Rule 1.8(g) does not require that client consent be “confirmed in writing.”

Texas: Rule 1.08(c) provides that prior to the conclusion of “all aspects of the matter giving rise to the lawyer's employment,” a lawyer shall not make or negotiate an

agreement “with a client, prospective client, or former client” giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information “for the advantage of the lawyer or of a third person or to the disadvantage of the client.” Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is “an employee” of the client “as long as the client is independently represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.7 Aggregate Settlements

March 2009

(Draft rule to be considered for public comment)

INTRODUCTION:

ABA Model Rule 1.8(g) and proposed Rule 1.8.7 both treat as a potential conflict of interest a lawyer's representation of two or more clients in arranging a settlement of claims, whether civil or criminal. Proposed Rule 1.8.7 largely tracks the first sentence of Model Rule 1.8(g). The only substantive difference is the substitution of California's more client-protective "informed written consent" requirement. The Commission has slightly modified the second sentence of Model Rule 1.8(g) because it is an incomplete statement of the disclosure necessary to obtain informed client consent. In addition, the proposed comment expands upon Model Rule 1.8, cmt. [13] and includes a more robust discussion of the disclosure necessary under this Rule, increasing the likelihood of lawyer compliance with the Rule and enhancing client protection.

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.	~~(g)~~ A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an ~~aggregated~~ aggregate agreement as to guilty or <i>nolo contendere</i> pleas, unless each client gives informed ~~in a writing signed by the client~~ <u>written</u> consent. The lawyer's disclosure shall include, <u>among other things</u>, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.	<u>Changes to the Model Rule.</u> Proposed paragraph (a) is substantially the same as MR 1.8(g). For consistency, the term “aggregate” is used in relation to both civil and criminal matters throughout this Rule and its Comment. Instead of the Model Rule phrase “informed consent, in a writing signed by the client,” the Commission recommends retaining California’s more client-protective requirement of “informed written consent.” Unlike the Model Rule language, “informed written consent” requires by definition a written disclosure. It is noteworthy that the Restatement of Law of Aggregate Litigation § 3.17(a) (Tent. Draft No. 1 4/2008) requires that each claimant “be able to review the settlements of all other persons subject to the aggregate settlement,” indicating the predicate of a written disclosure to permit “review.” Moreover, current California rule 3-310(D), the counterpart to Model Rule 1.8(g), requires “the informed written consent of each client,” which under rule 3-310(A)(2) requires written disclosure. The Commission sees no reason to depart from the well-settled client protection rule currently in place. The statement of the lawyer’s disclosure duty in the second sentence of Model Rule 1.8(g) does not provide adequate client protection. Therefore, the phrase, “among other things” has been added to the sentence, and a more expansive explanation of disclosure under this Rule appears in the comment. See Comments [2] and [3]. <u>Approaches in Other Jurisdictions.</u> Several other jurisdictions have added other exceptions to the Model Rule. Some

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
		jurisdictions exclude settlements in class actions (Louisiana and N.D.) or, more broadly, any settlement that is approved by the court (N.Y. and Ohio) or that is in the court's written record (Maryland). Minnesota removes criminal matters from the Rule. Concerning the requirement of "informed consent," most jurisdictions follow the Model Rule consent language, but there are a number of jurisdictions that provide less client protection than does the Model Rule. Some of these jurisdictions do not require that the consent be in a writing signed by the client, and some even do not require that the consent be in any writing. For example, Illinois has "consents after disclosure" and N.J. requires "informed consent after consultation". N.D. retains the 1983 Model Rule language that the client "consents after consultation", as do Georgia, Mississippi, and Virginia (which have not yet revised its rules). Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer. Conn. requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client. Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer. Conn. requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client."

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
Model Rule 1.8, cmt. [13]. See below.	<u>[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule [1.2(a)] to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or <i>nolo contendere</i> plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.</u>	Comments [1], [2], and [3] substantially expand on the single Comment paragraph found in the Model Rule but are intended to be consistent with it. These three paragraphs supplement the discussion of what an aggregate settlement is and what information about the proposed settlement a lawyer is obligated to provide to the client. This fuller explanation should aid lawyer compliance and thus add to client protection.
Model Rule 1.8, cmt. [13]. See below.	<u>[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. [See Rule 1.4].</u>	

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
Comment * * * Aggregate Settlements [13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements	~~[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under~~<u>This</u> Rule ~~1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2~~<u>(permits a)</u> protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea <u>lawyer</u> in a <u>criminal case</u>. ~~The rule stated in this paragraph is a corollary of both these Rules and provides that, before any~~<u>civil matter to negotiate potential settlement offer or plea bargain is made or accepted</u><u>terms</u> on behalf of multiple clients, <u>but</u> the lawyer must ~~inform~~<u>obtain the informed written consent of each client as provided in this Rule to accept an opposing party's aggregate settlement offer or to make an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of<u>them about</u>~~the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written~~</u>	

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
designed to ensure adequate protection of the entire class.	<u>consent, the lawyer ordinarily must include</u> the material terms of the settlement, ~~including—~~what <u>each of the other lawyer's</u> clients ~~will~~<u>would</u> receive or pay if the settlement ~~or plea offer is~~<u>were</u> accepted, <u>and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.</u> The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also [Rule 1.0(e) (definition of informed consent)]. ~~Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.]~~	

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
[No corresponding provision]	<u>[4] This Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.</u>	Comment [4] is consistent with the Model Rule but expresses ideas that are not generally known. The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule itself does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement.

Rule 1.8.7 Aggregate Settlements (Commission's Proposed Rule – Clean Version)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

- [1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule [1.2(a)] to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.
- [2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. [See Rule 1.4].
- [3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule to accept an opposing party's aggregate settlement offer or to make an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If

the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also [Rule 1.0(e) (definition of informed consent).]

- [4] This Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

Rule 1.8.7: Aggregate Settlements

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew Perlman. The text relevant to proposed Rule 1.8.7 is highlighted)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary

to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship

existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar's investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer's advantage or the advantage of a third person” without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal

malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. **Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client’s consent be “in a writing signed by the client.”** Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)’s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer’s firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the

lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer’s professional liability insurance ceases to be in effect.”

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer’s advice and the lawyer nevertheless continues to represent the client at the client’s request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer’s responsibilities to the public entity would limit the lawyer’s ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer’s

inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York's counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer's partner, associate, paralegal, law clerk or other employee of the lawyer's firm, a lawyer acting ‘of counsel’ in the lawyer's firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client's rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client's disadvantage only if the client's consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client's ability to pay.” Finally, Oregon's rule governing sexual relations with clients contains a detailed description of “sexual relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

Pennsylvania: Rule 1.8(g) does not require that client consent be “confirmed in writing.”

Texas: Rule 1.08(c) provides that prior to the conclusion of “all aspects of the matter giving rise to the lawyer's employment,” a lawyer shall not make or negotiate an

agreement “with a client, prospective client, or former client” giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information “for the advantage of the lawyer or of a third person or to the disadvantage of the client.” Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is “an employee” of the client “as long as the client is independently represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons

April 2009

(Draft rule revised following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.15 is a complete rewrite of the general language of the ABA Model Rule to provide detailed standards for client protection and guidance of lawyers. Parts of the proposal also reject some ABA policies because they are inconsistent with statutes (Business & Professions Code §§ 6091.1 and 6210-6228), violate access to justice concepts, and would impair disciplinary enforcement.

1. The proposal satisfies the need for greater and specific regulation of lawyer conduct in handling entrusted funds and property: ABA Model Rule 1.15 states general principles regarding lawyer handling of other people's funds and property, often with reference to principles of other fiduciaries or accountants that do not apply in this context. California experimented with such general language from 1927-1974 with former Rule 9, California Rules of Professional Conduct. Because lawyer mismanagement of trust funds and property continued to be a substantial percentage of disciplinary investigations and prosecution, Rule 4-100, adopted in 1975 and 1989, rejected continuation of a general approach and added other more specific regulations and standards for record keeping.

2. Although the Mandatory Continuing Legal Education requirement, the State Bar's publication of the *Handbook on Client Trust Accounting for California Attorneys* and the State Bar Ethics Hotline program have assisted in preventing mismanagement of trust funds and property, handling of trust funds and property continues to be a significant disciplinary issue.

3. According to the State Bar of California Annual Discipline Report for 2007, 12% of all disciplinary complaints arose from allegations of mishandling of funds, and banks made 2617 reports pursuant to Business and Professions Code section 6091.1 of instances of insufficient funds presented against an attorney's client trust account, regardless of whether the instrument was honored.

4. Moreover, when the State Bar Office of Chief Trial Counsel processing of disciplinary complaints was reduced to almost nothing from June 1998 until the system commenced significant operations in early 1999, due to absence of funding and during its 1999 resumption of disciplinary enforcement, the trust account mismanagement spiked dramatically:

(a) The highest number of insufficient funded trust account checks was reported: 4260 in 1998 and 4417 in 1999 (more than 500 reports in the prior and succeeding years. (2000 State Bar of California Annual Discipline Report, at p. 9.)

(b) Moreover, complaints about handling entrusted funds rose to 15% of all disciplinary complaints in 1999 from an average of 10-12% of all disciplinary complaints in prior and succeeding years. (2000 State Bar of California Annual Discipline Report, at p. 11.)

5. These statistics suggest that disciplinary enforcement acts as a deterrent. Therefore, more detailed regulation than provided by the Model Rule is necessary to serve as guidance to lawyers, to protect the public from improper handling of trust funds and property and to increase public confidence in the legal profession's abilities in safekeeping property.

6. A number of other jurisdictions have reached the conclusion that more detailed regulation is needed than is provided by ABA Model Rule 1.15.

(a) The following jurisdictions have either created their own rule or have substantially revised the ABA Model Rule with amendments and additions: Delaware, District of Columbia, Florida, Massachusetts, Minnesota, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin, and Wyoming.

(b) Many other states have made some substantive amendments to ABA Model Rule 1.15 (Alabama, Connecticut, Indiana, Iowa, Louisiana, Maryland, Mississippi, Montana, Nevada, North Dakota, Oregon, and South Carolina.) Gillers, Simon & Perlman (2009) *Regulation of Lawyers: Statutes and Standards*, ABA Model Rules of Professional Conduct, Rule 1.15, Selected State Variations, pp. 189-192; ABA Center for Professional Responsibility, Charts Comparing Professional Conduct Rules at:

<http://www.abanet.org/cpr/jclr/charts.html>

Proposed Rule 1.15:

7. As is true with the corresponding Rules adopted by several other jurisdictions, proposed Rule 1.15 elaborates in some detail on, and gives more specific guidance than, the ABA statements of general principles about how to handle funds and property of others that have been entrusted to the lawyer. The proposed Rule does so by adding sufficient detail designed to instruct the lawyer as to the minimum standards at every phase of handling the funds and property.

8. Proposed Rule 1.15 also expands the scope of ABA Model Rule 1.15 by including:

- (a) standards concerning the handling of electronic financial transactions;
- (b) requirements with respect disciplinary audits; and
- (c) identification of alternatives to keeping disputed property in trust (when a third party and a client dispute distribution of funds or property and do not want the lawyer to maintain the funds) that are available to the lawyer, such as by the use of interpleader.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule</u>[*] Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.	(a) <u>Duty to deposit entrusted funds in trust account.</u> A lawyer shall ~~hold property of clients or third persons~~ <u>deposit all funds that is in the lawyer receives or holds for the benefit of a lawyer's possession client or other person</u> in connection with ~~a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent~~ <u>performance of the client's legal service or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept</u> <u>representation</u> by the lawyer ~~and shall be preserved, including an advance for a period of [five years] after termination of the representation~~ <u>costs and expenses, in one or more trust accounts in accordance with this Rule.</u>	In the Commission's opinion, Model Rule 1.15(a) does not provide sufficient guidance or specific regulation necessary for adequate protection of California residents because: Sentence 1: Although the Rule requires segregation of entrusted funds and property from property of the lawyer, it does not require that trust funds be placed in a labeled trust account which can be located by the owner of the funds, and it does not require that any depository be a state or federal regulated financial institution or be federally insured. (See proposed 1.15(a), (b), and (c). The Commission has retained the concepts of segregation in proposed 1.15(a), (f), and (k)(2)). Sentence 2: The Model Rule permits trust funds to be held in another jurisdiction with the permission of the client or a third party. This concept was not adopted because it is contrary to existing California legislative policy regarding (1) requiring IOLTA accounts to be established with the interest to be paid to the State Bar for legal services for the indigent pursuant to Business and Professions Code §§ 6210-6228 and (2) requiring banks to make reports to the State Bar of instances of insufficient funds presented against an attorney's client trust account pursuant to Business and Professions Code § 6091.1; and the difficulty for State Bar Office of Chief Trial Counsel to acquire records from out of state financial institutions where there is no subpoena authority. (See proposed 1.15(b).) However, the Commission proposes adding 1.15(l), discussed below.

^{*} Proposed Rule, Draft 15.3 (5/29/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
		Sentence 3: The Model Rule's standard that "other property shall be identified as such and appropriately safeguarded" is so general that it does not afford adequate public protection. This standard does not provide specific guidance to lawyers concerning what is "appropriate" safeguarding of other property (such as keeping other property in a safety deposit box which can be located in the event of the lawyer's death or disability) and it does not provide a minimal standard which prosecutors can enforce. (See proposed 1.15(k)(2) - (4).) Sentence 4: The Model Rule's standard of keeping complete records of all accounts and property provides no enforceable standard for disciplinary enforcement and no guidance for lawyers for preventive law purposes. The Commission also rejected the requirement that records be retained for a period of time after termination of the attorney client relationship. Since lawyers often terminate the attorney-client relationship while retaining client or other person's funds and property, the better public protection requires retention of all records for a period of time after the last funds or property are disbursed. (See 1.15(k).)

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.	~~(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.~~ (b) <u>Approved depositories for trust accounts. All trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California, except that a trust account may be established elsewhere as expressly ordered by a tribunal. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.</u>	The Commission retained the subject of Model Rule 1.15(b) in proposed 1.15(f)(1)) (regarding an exception to commingling by depositing personal funds to pay bank service charges but without the limit on amount). The Commission has recommended other exceptions which protect the public including making restitution for funds wrongfully removed and holding disputed attorneys fees and costs in trust until the dispute is resolved. (See proposed 1.15(f).)
	(c) <u>Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.</u>	Paragraph (c), which requires a lawyer to identify each trust account, is carried forward from current rule 4-100 and is intended to afford client protection.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(d) <u>Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:</u> (1) <u>subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and</u> (2) <u>if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.</u>	Added for public protection: The Commission rejected the concept of Model Rule 1.15(c), which requires that all advance fees be placed in a trust account until earned. Many lawyers can follow this principle as a matter of good risk management and to foster good client relations, but there are situations in which the requirement would create harm. For example, lawyers in certain fields of practice, such as criminal defense and family law lawyers, customarily utilize advance fee payments beginning when received and count on this in order to provide services to their clients. If their advance fees had to be deposited in a client trust account, the funds could be seized by client creditors or by law enforcement agencies, so the client would have no funds with which to pay for a defense. Adding the Model Rule's requirement would prevent some lawyers from representing clients, thereby limiting access to justice in those areas. In addition, there are situations in which the client could be harmed if advance fees were placed in the lawyer's trust account, such as when creditors attach or government agencies freeze client trust funds that otherwise would be held to pay legal fees and expenses (<i>S.E.C. v. Interlink Data Network of Los Angeles Inc.</i> (9th Cir. 1996) 77 F3d 1201). This, also, is a significant access to justice issue. Finally, our Supreme Court has historically refused to approve such a mandatory rule. The Commission believes these public protection issues are better addressed by a rule that regulates advanced fees and makes the standards for handling such fees explicit. (See Proposed Rule 1.15(d), above.)

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.	(~~ee~~) <u>Duties concerning maintenance and use of trust funds.</u> A lawyer shall <u>maintain inviolate all funds on deposit into</u> a ~~client~~ trust account ~~legal fees and expenses that have been paid in advance, all property entrusted to be withdrawn by the lawyer only as fees are earned for the benefit of a client or expenses incurred~~ <u>other person until distributed in accordance with this Rule.</u>	Accepted, with clarifying amendments. The Commission adopted the concept of depositing trust funds , including advanced costs, in proposed Rule 1.15(a), believing that for guidance, the duty to deposit should be the first part of the rule. The concept of the rule has been retained here, but clarified to add the duty not to misappropriate entrusted funds. Rejected mandatory advance fee deposit in trust account: The Commission rejected one concept of Model Rule 1.15(c), which requires that all advance fees be placed in a trust account until earned. Many lawyers can follow this principle as a matter of good risk management and to foster good client relations, but there are situations in which the requirement would create harm. For example, lawyers in certain fields of practice, such as criminal defense and family law lawyers, customarily utilize advance fee payments beginning when received and count on this in order to provide services to their clients. If their advance fees had to be deposited in a client trust account, the funds could be seized by client creditors or by law enforcement agencies, so the client would have funds with which to pay for a defense. Adding the MR's requirement would prevent some lawyers from representing clients, thereby limiting access to justice in those areas. In addition, there are situations in which the client could be harmed if advance fees were placed in the lawyer's trust account, such as when creditors attach or government agencies freeze client trust funds that otherwise would be held to pay legal fees and expenses (<i>S.E.C. v. Interlink Data Network of Los Angeles Inc.</i> (9th Cir. 1996) 77 F3d 1201). This, also, is a significant access to justice issue. Finally, our Supreme Court has historically refused to approve such a mandatory rule.

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		The Commission believes these public protection issues are better addressed by a rule that regulates advanced fees and makes the standards for handling such fees explicit. (See Proposed Rule 1.15(d), above.)
	(f) <u>Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:</u> (1) <u>funds reasonably sufficient to pay bank charges;</u> (2) <u>deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;</u> (3) <u>the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;</u> (4) <u>funds in which the lawyer claims an interest but which are disputed by the client or other person;</u> <u>or</u> (5) <u>funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.</u>	Added for public protection: Proposed paragraph (f) adds in mandatory form important details not found in Model Rule 1.5. The Commission believes these additions are needed to assure full compliance with the client-protective purpose of paragraph (a). Each of these requirements is consistent with the Model Rule 1.15, current California rule 4-100, and California case law.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule</u>[*] Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(g) <u>Duties when lawyer's entitlement to funds become fixed or the lawyer's entitlement is disputed. In the case of funds held in a trust account that belong in part to a client or other person and in part to a lawyer, the lawyer shall withdraw the portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:</u> (1) <u>the client or other person may still dispute that the lawyer has earned the funds;</u> (2) <u>when the right of a lawyer to receive a portion of entrusted funds is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not withdraw the disputed portion until either the dispute is finally resolved or the withdrawal is authorized by law or court order;</u> (3) <u>a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds in the circumstances of paragraph (g)(2); and</u> (4) <u>if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.</u>	Added for public protection: Because there continues to be much confusion about when a lawyer's entitlement to entrusted funds occurs [<i>Matter of Davis</i> (Review Dept. 2003) 4 Cal.State Bar Ct. Rptr. 576, 586-587 [withdrawal of disputed fees from trust account], this part of the rule has been expanded. It retains the concept of ABA Model Rule 1.15(d)(e) which was not clear concerning the application of the rule to lawyers' fees and cost.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(h) <u>Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved or the distribution is authorized by law or court order, except that the lawyer shall make any distribution required by paragraph (k)(7).</u>	Added for public protection: Consistent with current California case law, proposed paragraph (h) mandates that a lawyer not unilaterally determine entitlement to entrusted funds or property held by the lawyer when the entitlement is disputed by the client or a third party. Such a unilateral determination by a lawyer is an act of moral turpitude under Business & Professions Code § 6106. (<i>Matter of Davis</i> (Review Dept. 2003) 4 Cal.State Bar Ct. Rptr. 576, 589 [knowing an wilful withdrawal of disputed fees from trust account constituted moral turpitude].) Placing this requirement in Rule 1.15 makes the lawyer's obligation more apparent and therefore fosters compliance.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.	(di) ~~Upon receiving~~ <u>Duties when entitlement to funds or other property in which is disputed by third party.</u> <u>When the right of</u> a client or ~~third other~~ person ~~has an interest to receive~~ <u>a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the</u> lawyer shall ~~promptly notify~~ <u>not distribute</u> the ~~client disputed portion until the dispute is resolved or third person.~~ ~~Except as stated in this rule or otherwise permitted~~ <u>unless authorized</u> by law or ~~by agreement with court order.~~ <u>Nevertheless</u> the ~~client, a~~ lawyer shall ~~promptly deliver to the client or third person~~ <u>distribute</u> any <u>undisputed entrusted</u> funds or ~~other property that the client or third person is entitled to receive and, upon request as required by the client or third person, shall promptly render a full accounting regarding such property~~ <u>paragraph (k)(7).</u>	Sentence 1: The Model Rule's notification requirement does not adequately protect the public, because it does not require notification of the amount of funds or the identity or quantity of property received by a lawyer on behalf of another. Therefore, the Commission has retained the concept of notification upon receipt of funds and property but added a component requiring disclosure of what has been received on behalf of another. (See proposed 1.15(k)(1).) Sentence 2: This part of the Model Rule is confusing, and therefore more likely to cause non-compliance, because it mixes concepts of distribution of funds and property with accounting for the use of funds. The Commission has separated these important provisions in proposed 1.15(k)(4) and (7). Moreover, the requirement of rendering a "full accounting" does not provide sufficient public protection because the minimal components of a full accounting are not included in the Rule. The Commission has added such accounting features in proposed 1.15(k)(4) for entrusted funds and in proposed 1.15(d) and Comment [10].

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.	(e) ~~When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.~~	Sentence 1: This sentence inaccurately merges concepts of handling funds and property disputed between clients and third parties with disputes about the lawyer's fees and costs and requires that disputed funds be segregated until the dispute is resolved. As noted above, segregation is not adequate public protection. This concept does not adequately protect the public because it does not include within its scope court orders that lawyers hold funds or property, which commonly occurs in litigation or in family law matters. The Commission has separated the types of disputes for clarity of application and has included court orders (see proposed 1.15(h) and (i)). Moreover, maintenance in a trust fund may expose the funds to attachment by judgment creditors of one of the disputants or seizure by government agencies, thereby affording little protection to other disputants. Accordingly, the Commission has provided for interpleader as an alternative to holding funds or property in trust. Sentence 2: The Commission has retained this concept, as reworded to fit the context of proposed 1.15(h) and (i).

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(j) <u>Credit card, debit, or other electronically transferred payments.</u> A lawyer may establish a relationship with a merchant bank or electronic payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.	New concept, added for public protection and guidance: Model Rule 1.15 does not address electronically transferred payments, although they are increasingly common. Proposed paragraph (j) is consistent with current California law as explained in State Bar. Formal Opn. 2007-172 and likely is consistent with the Model Rule. Placing this requirement in Rule 1.15 makes the lawyer's obligation more apparent and therefore fosters compliance.
	(k) <u>Management, recordkeeping and accounting for funds and property held in trust.</u> A lawyer shall: (1) <u>promptly notify a client or other person of the receipt of funds, securities, or other properties in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;</u> (2) <u>identify and label securities and properties of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, and notify the client or other person of the location of the property;</u>	Concepts similar to Model Rule 1.15(d) but separated, added and clarified for the protection of the public. The Commission believes that proposed paragraph (k) is consistent with concepts in the Model Rule, but it expresses the Model Rule's general concepts in considerable detail in order to foster lawyer compliance. Greater specificity about the duties of the lawyer for each phase of the rule will give clear guidance about how to handle entrusted funds or property and will provide for easier charging of disciplinary violations. Subparagraph (k)(1) includes the concept of Model Rule 1.15(d) sentence 1, but adds the duty to disclose the amount of such funds or the identity or quantity of such property. Par. (k)(2) includes the concept of Model Rule 1.15(a) sentence 3, reworded slightly for conformity and adds a notification requirement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(3) <u>maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;</u> (4) <u>account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;</u> (5) <u>preserve records of all entrusted funds or property for a period of no less than five years after final appropriate distribution of such funds or property;</u>	Subparagraph (k)(3) restates the concept of Model Rule 1.15(a), sentence 4, first clause ["Complete records of such account funds and other property shall be kept by the lawyer . . ."]. The Commission has opted for the active voice consistent with the policy of the State Bar, following the Administrative Office of the Courts, to make all rules be in the active not passive voice unless there was a compelling reason. The Commission opted to retain the concept Subparagraph (k)(4) restates the concept of Model Rule 1.15(d), sentence 2, last clause [“. . .and, upon request by the client or third person, shall promptly render a full accounting regarding such property."] Although Bus. & Prof. C., §6091 creates a duty to provide an accounting upon request, <i>Matter of Brockway</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, suggests that the duty to account under present rule 4-100(B)(3) does not require a client's or other person's request. Because the latter provides greater public protection, the Commission adopted the latter. Subparagraph (k)(5) restates the concept of Model Rule 1.15(a), sentence 4, last clause ([trust account records] "shall be preserved for a period of [five years] after termination of the representation") but changes the trigger [distribution of funds or property] for when the five (5) years starts to run. Because lawyers can terminate representation, without making appropriate distributions of trust funds or property, the records can be destroyed before the client ever learns of any misconduct and before a disciplinary complaint is filed. Therefore, to provide maximum protection for the public, the Commission has recommended that the five years run from the appropriate distribution of trust funds or property.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(6) <u>comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and</u> (7) <u>promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.</u>	Subparagraph (k)(6) has been added to protect the public in disciplinary proceedings to require lawyers to comply with State Bar Court ordered audits. This concept does not exist in Model Rule 1.15 and is needed for greater public protection. Subparagraph (k)(7) restates Model Rule 1.15(d), sentence 2 ("Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. . .") The Commission has opted for a request of the client or other person as a trigger to the duty to distribute funds or property, because it is clearer and because it empowers the client or other person. The proposed rule has been clarified that only "undisputed" funds or property may be distributed by the lawyer.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[(l)] Scope and Application of Rule. This Rule does not apply to the following:</u> <u>(1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See [Rule 8.5(b)].</u> <u>(2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.</u> <u>(3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.]</u>	This paragraph clarifies application of this Rule to multijurisdictional practice.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(m) <u>Board of Governors' Standards. The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.</u>	The proposed rule includes a provision authorizing the Board of Governors to set standards for record keeping of entrusted property and funds. The lack of adequate record keeping is often the cause of trust account mismanagement and loss of entrusted funds. Standards for appropriate record keeping have reduced the incidence of such misfeasance.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.	~~[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.~~	Rejected entirely for lack of public protection and guidance: Sentence 1: Since there are many different standards of care for professional fiduciaries in California, this offers no guidance for lawyers who desire to handle funds properly or standards for discipline for the protection of the public. It also is inconsistent with legal duties that lawyers have under law, such as maintaining IOLTA trust accounts (Bus. & Prof. §§6210, et sec.) Sentence 2: This concept (with the added protection of requiring the labelling of securities as belonging to a particular person) has been incorporated into the proposed Rule as 1.15(k)(2). Placing these requirements in the Rule makes them enforceable in disciplinary proceedings for the protection of the public. Sentence 3: The concept of prohibiting commingling is set forth in the proposed Rule. Because this sentence neither clarifies what the duty is nor provides guidance or a disciplinary standard, it was deleted. Sentence 4: Rejected because it is incomplete and therefore may confuse. The concept is discussed more directly in the latter part of added Comment [2]. Sentences 5-6: These sentences are overbroad and provide little guidance. Moreover, they conflict with the record keeping standards which the Board has adopted to give specific guidance regarding the frequency, nature and extent of record keeping for the protection of the public.

* Proposed Rule, Draft 15.3 (5/29/09). Note that Proposed Rule 1.15 includes a "Definitions" sections which precedes the "Comments" section.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	[1] <u>As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.</u>	New comment [1]: Added to clarify for guidance and enforcement purposes the fundamental issues of what "property" and whose "property" are governed by the Rule.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.	~~[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.~~ [2] <u>As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. (Kelly v. State Bar (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. (See, e.g., Business and Professions Code section 6106.)</u>	Rejected entirely for redundancy: Sentence 1: This merely repeats the Rule and therefore is deleted as unnecessary. Sentence 2: This also merely repeats the Rule regarding record keeping and is deleted as unnecessary. New Comment [2]: Proposed for definition and clarification of another concept that is essential to the application of the Rule, which is that the Rule applies only when a lawyer acts "in connection with the performance of a legal service or representation". Other laws and regulations might apply to other fiduciary roles, such as when a lawyer acts as the personal representative of a probate estate. This clarification is for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.	~~[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.~~ [3] <u>As used in this Rule "client" means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.</u>	Rejected this language as a comment but incorporated the concepts into the proposed Rule. (See proposed Rule 1.15(d),(g) and (h).) Also, the concepts are clarified in added Comments [12], [13].) New Comment [3]: Proposed for definition of the essential term "client", for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.	~~[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.~~ <u>[4] As used in this Rule "entrusted funds" means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.</u>	Rejected this language as a comment but incorporated the concepts into the proposed Rule. (See proposed Rule 1.15(g) and (h).) New Comment [4]: Proposed for definition and clarification of another essential term, which is what "entrusted funds" are governed by the Rule itself, for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.	~~[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.~~ [5] <u>As used in this Rule, "advance for fees" means a payment or retainer intended by the client to be funds paid in advance for some or all of the services that the lawyer is expected to perform on the client's behalf.</u>	Adopted the concept but rejected its expression: Lawyers acting as escrow agents in a transaction involving a client owe fiduciary duties to the non-client, requiring application of this Rule. (See e.g., <i>Matter of Lilly</i> (Review Dept. 1992) 2 Cal.State Bar Ct. Rptr. 185) This provides important public protection. In order to prevent confusion, the concept has been rewritten as proposed Comment [2]. New Comment [5]: Proposed for definition and clarification of an essential term, for guidance and enforcement.
[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.	~~[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.~~ [6] <u>As used in this Rule, "bank charges" include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in connection with a merchant account that is attached to a trust account.</u>	Rejected entirely because the Client Security Fund is established independently of these Rules, and participation in it is not voluntary. (Bus. & Prof. Code §6140.5.) New Comment [6]: Proposed for definition and clarification of an essential term, for guidance and enforcement.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Application of Rule</u> <u>[7] Funds do not take on a fiduciary status merely because they are deposited into a trust account. A lawyer's misuse of a client trust account can result in discipline. In the Matter of McKiernan (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct.)</u>	Added for public protection and guidance: This Comment clarifies that a lawyer is subject to professional discipline for depositing the lawyer's own funds or for depositing non-client business operating funds in a trust account. The purpose of this prohibition is to protect client funds from attachment or execution by the lawyer's or non-client's creditors or other claimants.
	<u>Paragraph (a) - Application to true retainer fees</u> <u>[8] Because a true retainer fee, as defined in Rule 1.5(f), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. (Baranowski v. State Bar (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].)</u>	Added for public protection and guidance to clarify the prohibition against commingling as applied to true retainers.
	<u>[9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. (Baranowski v. State Bar (1979) 24 Cal.3d 153, 164, fn. 4 [154 Cal.Rptr. 752]; In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.) When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].</u>	Added for public protection: This Comment clarifies proper handling of a true retainer converted to an advance for fees. It also clarifies that a converted true retainer should be afforded the same accounting and other protections afforded an advance for fees.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Paragraph (d) - Advances for fees; accounting for advances for fees</u> [10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). (<i>In the Matter of Fonte</i> (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756-758.)	Added for public protection and guidance to lawyers: This Comment clarifies that a lawyer has a duty to account to the client for an advance for fees and provides guidance for the form of the accounting.
	<u>Paragraph (e) - Duty to hold funds inviolate</u> [11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and disbursements from a trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) are not intended to prohibit electronic transfers or to preclude a means of withdrawal that might be developed in the future, provided that the recipient of the payment is identified. When payment is made by check, the check should be payable to a specific person or entity.	Added for guidance and public protection by providing clarification about proper record keeping.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Paragraphs (g) - (i) - Disputed fees</u> [12] <u>Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.</u>	Added in place of Model Rule Comment [2] for clarification.
	[13] <u>A lawyer may not withhold the undisputed portion of a client's or other person's funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. (Friedman v. State Bar (1990) 50 Cal.3d 235, 240-241 [266 Cal.Rptr. 632].)</u>	Added for public protection: This Comment clarifies that undisputed funds must be disbursed to prevent loss of use of the money by the owner.
	[14] <u>A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.</u>	Added for public protection: This Comment clarifies that a lawyer may not unilaterally withdrawal entrusted funds.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Paragraph (k) - Duties to maintain records and account for receipt of trust funds or property</u> [15] <u>A lawyer who receives client funds in which an other person is known to have an interest (e.g., a medical provider lienholder), must also notify that person of the receipt. (In the Matter of Respondent P (Rev.Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632) Certain statutory liens may have statutory notice requirements applicable to lawyers. (See, e.g., Welfare and Institutions Code section 14124.79.)</u>	Added for public protection: This Comment clarifies important aspects of a lawyer's duty when holding entrusted funds in which someone other than the client claims an interest.
	[16] <u>With respect to the timing and frequency of a lawyer's accounting under paragraph (k)(4), see Business & Professions Code section 6091.</u>	Added for public protection: This Comment provides clarification by its cross-reference to a related statutory provision.
	<u>Other Guidance</u> [17] <u>Trust account practice assistance. For guidance concerning the management and administration of trust accounts under this Rule, see State Bar of California publication "Handbook on Trust Accounting for California Attorneys" and the "California Compendium on Professional Responsibility" Index.</u>	Added for public protection: Because of the wide range of factual situations that can arise under this Rule and its central role in client protection and lawyer discipline, this Comment refers lawyers to additional sources of guidance on the application of the Rule.

Rule 1.15 Handling Funds and Property of Clients and Other Persons
(Commission's Proposed Rule* – Clean Version)

- (a) Duty to deposit entrusted funds in trust account. A lawyer shall deposit all funds that the lawyer receives or holds for the benefit of a client or other person in connection with the performance of a legal service or representation by the lawyer, including an advance for costs and expenses, in one or more trust accounts in accordance with this Rule.
- (b) Approved depositories for trust accounts. All trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California, except that a trust account may be established elsewhere as expressly ordered by a tribunal. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.
- (c) Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.
- (d) Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:
 - (1) subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and
 - (2) if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.
- (e) Duties concerning maintenance and use of trust funds. A lawyer shall maintain inviolate all funds on deposit in a trust account and all property entrusted to the lawyer for the benefit of a client or other person until distributed in accordance with this Rule.
- (f) Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:
 - (1) funds reasonably sufficient to pay bank charges;
 - (2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;

* Proposed Rule, Draft 15.3 (5/29/09).

- (3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;
 - (4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or
 - (5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.
- (g) Duties when lawyer's entitlement to funds become fixed or the lawyer's entitlement is disputed. In the case of funds held in a trust account that belong in part to a client or other person and in part to a lawyer, the lawyer shall withdraw the portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:
 - (1) the client or other person may still dispute that the lawyer has earned the funds;
 - (2) when the right of a lawyer to receive a portion of entrusted funds is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not withdraw the disputed portion until either the dispute is finally resolved or the withdrawal is authorized by law or court order;
- (3) a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds in the circumstances of paragraph (g)(2); and
 - (4) if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.
- (h) Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved or the distribution is authorized by law or court order, except that the lawyer shall make any distribution required by paragraph (k)(7).
- (i) Duties when entitlement to funds or property is disputed by third party. When the right of a client or other person to receive a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the lawyer shall not distribute the disputed portion until the dispute is resolved or unless authorized by law or court order. Nevertheless the lawyer shall distribute any undisputed entrusted funds or property, as required by paragraph (k)(7).

- (j) Credit card, debit, or other electronically transferred payments. A lawyer may establish a relationship with a merchant bank or electronic payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.
 - (k) Management, recordkeeping and accounting for funds and property held in trust. A lawyer shall:
 - (1) promptly notify a client or other person of the receipt of funds, securities, or other properties in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;
 - (2) identify and label securities and properties of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, and notify the client or other person of the location of the property;
- (3) maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;
 - (4) account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;
 - (5) preserve records of all entrusted funds or property for a period of no less than five years after final appropriate distribution of such funds or property;
 - (6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and
 - (7) promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.

[(l) Scope and Application of Rule. This Rule does not apply to the following:

- (1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See [Rule 8.5(b)].
 - (2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.
 - (3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.]
- (m) Board of Governors' Standards. The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

Definitions

- [1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.
- [2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the

latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. (See, e.g., Business and Professions Code section 6106.)

- [3] As used in this Rule “client” means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.
- [4] As used in this Rule “entrusted funds” means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.
- [5] As used in this Rule, “advance for fees” means a payment or retainer intended by the client to be funds paid in advance for

some or all of the services that the lawyer is expected to perform on the client’s behalf.

- [6] As used in this Rule, “bank charges” include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in connection with a merchant account that is attached to a trust account.

Application of Rule

- [7] Funds do not take on a fiduciary status merely because they are deposited into a trust account. A lawyer’s misuse of a client trust account can result in discipline. *In the Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct.)

Paragraph (a) – Application to true retainer fees

- [8] Because a true retainer fee, as defined in Rule 1.5(f), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].)
- [9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164,

fn. 4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.) When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

Paragraph (d) – Advances for fees; accounting for advances for fees

- [10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). (*In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756–758.)

Paragraph (e) – Duty to hold funds inviolate

- [11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and disbursements from a trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) are not intended to prohibit electronic transfers or to preclude a means of withdrawal that might be developed in the future, provided that the recipient of the payment is identified. When payment is made by check, the check should be payable to a specific person or entity.

Paragraphs (g) – (i) – Disputed fees

- [12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.
- [13] A lawyer may not withhold the undisputed portion of a client's or other person's funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 240–241 [266 Cal.Rptr. 632].)
- [14] A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.

Paragraph (k) – Duties to maintain records and account for receipt of trust funds or property

- [15] A lawyer who receives client funds in which an other person is known to have an interest (e.g., a medical provider lienholder), must also notify that person of the receipt. (*In the Matter of Respondent P* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632) Certain statutory liens may have statutory notice requirements applicable to lawyers. (See, e.g., Welfare and Institutions Code section 14124.79.)

- [16] With respect to the timing and frequency of a lawyer's accounting under paragraph (k)(4), see Business & Professions Code section 6091.

Other Guidance

- [17] Trust account practice assistance. For guidance concerning the management and administration of trust accounts under this Rule, see State Bar of California publication "Handbook on Trust Accounting for California Attorneys" and the "California Compendium on Professional Responsibility" Index.

Rule 1.15: Handling Funds and Property of Clients and Other Persons

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

District of Columbia. The language of D.C. Rule 1.15 differs significantly from the ABA Model Rule, though the basic requirements are the same. D.C.'s version of Rule 1.17 deals with notification of trust account overdrafts.

Florida: Chapter 5 of Florida's Supreme Court Rules regulates lawyer trust accounts.

Georgia: Rule 1.15(I) generally tracks the 1983 version of ABA Model Rule 1.15, but Georgia adds Rule 1.15(II) to govern trust accounts and IOLTA accounts, and Rule 1.15(III) to govern trust account recordkeeping, overdraft notification and auditing by disciplinary authorities. Rule 1.15(111) requires that lawyers deposit trust funds in a financial institution that agrees "to report to the State Disciplinary Board whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored." The Comment to Rule 1.15(III) explains the overdraft agreement as follows:

[2] The overdraft agreement requires that all overdrafts be reported to the Office of General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust

account particularly in exchange for the institution's promise to delay or not to report an overdraft....

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

Illinois: Rule 1.15(g), a highly unusual provision adopted in 1998 at the urging of the real estate bar, provides as follows: "In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds," and (among other requirements) the lawyer deposits only "good funds," which include only seven specified forms of deposits, including "(a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision ... (c) a cashier's check, teller's check, bank money order, or official bank check ... (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the law of any state, ... [or] (f) a check

drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development" Rule 1.15(g) ends by stating: "Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected."

Massachusetts: Rule 1.15 has extensive provisions for deposit of client funds in IOLTA accounts, and contains provisions to ensure that disciplinary authorities are notified in the event a lawyer's check is dishonored.

Michigan: provides for IOLTA accounts in Rule 1.15(d).

Minnesota: Rule 1.15 differs significantly in structure and substance from ABA Model Rule 1.15.

New Jersey: Under Rule 1.15(a), funds must be deposited in New Jersey institutions, without exception. Rule 1.15(a) also incorporates the substance of ABA Model Rule 1.15(b), and requires lawyers to keep trust account records for seven years. New Jersey deletes ABA Model Rule 1.15(c), and New Jersey Rule 1.15(b) deletes the requirement in ABA Model Rule 1.15(d) that a lawyer promptly render a full accounting of property upon request. New Jersey adds 1.15(d), which refers lawyers to section 1:21-6 of the Court Rules on recordkeeping.

New York: New York's DR 9-102 addresses the same issues in extensive detail. New York imposes a seven-year record-keeping requirement for eight specified categories of documents, such as "records of all deposits in and withdrawals from" trust accounts, and copies of "all retainer and compensation agreements with clients," "all bills rendered to clients," and "all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed."

Ohio: Rule 1.15 differs significantly from ABA Model Rule 1.15. Among other things, Rule 1.15(f) provides as follows: "Upon dissolution of any law firm, the former partners, managing partners, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records" Rule 1.15(h) imposes strict requirements on every lawyer or law firm that "owns an interest in a business that provides a law-related service"

Pennsylvania: Effective September 20, 2008, Pennsylvania adopted substantial changes to Rule 1.15, along with companion changes to Supreme Court Rule 221 (governing overdraft notification). The Pennsylvania rules now include requirements and definitions that are far more detailed and nuanced than the Model Rule.

Virginia: Rule 1:15, which substantially incorporates provisions from Virginia's former Code of Professional Responsibility, differs significantly from ABA Model Rule 1.15. Virginia Rule 1.15(d) prescribes the responsibility of lawyers who receive funds or other property in which a client or third person has an interest.

Washington: Rule 1.15(e) provides that a lawyer "must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding funds."

Wisconsin: Rule 1.15 is so highly detailed and so long (about 16 pages) that it has its own table of contents. Rule 1.15(a) defines 10 separate terms (such as "Demand account," "Fiduciary property," and "Financial institution"). Rule 1.15(b)(4) provides: "Unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer.... Funds advanced by a client or 3rd party for payment

of costs shall be held in trust until the costs are incurred.” Particularly interesting is Rule 1.15(e)(4), which elaborates on a series of "Prohibited transactions," including:

a. **Cash.** No disbursement of cash shall be made from a trust account or from a deposit to a trust account, and no check shall be made payable to “Cash.”

b. **Telephone transfers.** No deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds. This section does not prohibit any of the following: (1) wire transfers, and (2) telephone transfers between separate, non-pooled demand and separate, non-pooled, non-demand trust accounts that a lawyer maintains for a particular client.

c. **Internet transactions.** A lawyer shall not make deposits to or disbursements from a trust account by way of an Internet transaction.

d. **Electronic transfers by 3rd parties.** A lawyer shall not authorize a 3rd party to electronically withdraw funds from a trust account. A lawyer shall not authorize a 3rd party to deposit funds into the lawyer’s trust account through a form of electronic deposit that allows the 3rd party making the deposit to withdraw the funds without the permission of the lawyer.

e. **Credit card transactions.** A lawyer shall not authorize transactions by way of credit card to or from a trust account. However, earned fees may be deposited by way of credit card to a lawyer's business account. ...

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.3 Candor to the Tribunal

April 2009

(Draft rule to be considered for public comment)

INTRODUCTION:

Proposed Rule 3.3 sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The proposed rule replaces current Rule 5-200 (Trial Conduct), which is less precise and narrower in scope than Model Rule 3.3. The proposed rule sets forth substantially the same special duties of lawyers, as officers of the court to avoid conduct that undermines the integrity of the adjudicative process, as the Model Rule with several significant differences. The differences between proposed Rule 3.3 and the Model Rule relate primarily to California's policy of strictly limiting disclosures of confidential client information. See, e.g., Explanation of Changes for paragraphs (a)(3), (b) and (c). Other changes in the comments include a more detailed discussion of a lawyer's obligations to cite controlling authority, (Comment [4]), a discussion of California authority governing a lawyer's conduct when representing a criminal defendant who chooses to testify (Comment [7]), and consideration of the more limited remedial measures available in light of California's confidentiality duty (Comments [9]-[11].)

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	Paragraph (a)(1) is identical to Model Rule (a)(1).
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or	(2) fail to disclose to the tribunal <u>controlling</u> legal authority ~~in the controlling jurisdiction~~ known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;~~or~~	Paragraph (a)(2) follows Model Rule (a)(2), except that it requires disclosure of "controlling legal authority" rather than legal authority in the "controlling jurisdiction." The obligation to disclose controlling legal authority is a recognized aspect of the lawyer's role as an officer of the court. Controlling legal authority in a particular case may include authority outside the jurisdiction, such as in patent law cases or in a class action. The concept of "controlling authority" derives from New York rule 3.3(a)(2). Under Model Rule 3.3(a)(2) the adverse authority must be from the controlling jurisdiction but it need not itself be controlling. <u>Minority.</u> A minority of the Commission believes that using "controlling authority" narrows the scope of paragraph (a)(2) and is contrary to the statement in <i>Batt v. City and County of San Francisco</i>, 155 Cal.App.4th 65, 82n. 9 (2007). Another minority view is that the requirement to disclose adverse authority that is not disclosed by opposing counsel where opposing counsel is present is contrary to California law, citing, <i>Schaefer v. State Bar</i>, 26 Cal.2d 739, 747-748 (1945).

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.	(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures , including, if necessary, disclosure to the tribunal, <u>unless disclosure is prohibited by Business and Professions Code section 6068(e)</u>. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false; <u>or</u>	Paragraph (a)(3) is similar to Model Rule 3.3(a)(3) except that it does not require disclosure of the false evidence to the tribunal if the disclosure is prohibited by Business and Professions Code § 6068(e). The paragraph reflects the rule in California that a lawyer's duty of candor to a tribunal is circumscribed by the lawyer's duty under section 6068(e) to preserve client confidential information.
	<u>(4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.</u>	Paragraph (a)(4) continues the prohibition in current California rule 5-200(D) against citing invalid authority. However, it goes beyond the current California rule in requiring a lawyer to correct an invalid citation previously made to the tribunal. There is no counterpart in Model Rule 3.3.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.	(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, ~~including, if necessary, disclosure to the tribunal.~~	Paragraph (b) imposes a special obligation on lawyers to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. See Comment [12]. Paragraph (b) follows Model Rule 3.3(b), except it deletes the phrase "if necessary, disclosure to the Tribunal" at the end of the paragraph. See the Explanation of Changes to paragraph (a)(3).
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.	(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, ~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~	Paragraph (c) tracks Model Rule 3.3(c), except that it deletes the clause "and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." See the Explanation of Changes to paragraph (a)(3). <u>Minority.</u> A minority of the Commission believes that obligations of paragraphs (a) and (c) should not continue after the lawyer has been terminated or has withdrawn. The minority believes that the lawyer lacks standing after termination of the lawyer's employment and that the lawyer should not have a duty to be involved in a time-consuming controversy after the lawyer has been discharged which could abrogate the lawyer's loyalty to a former client.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.	(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all ~~material~~ facts known to the lawyer that ~~will~~<u>the lawyer knows, or reasonably should know, are needed to</u> enable the tribunal to make an informed decision, whether or not the facts are adverse.	Paragraph (d) follows the ABA counterpart, except it does not limit the lawyer's obligation to disclose all "material" facts and extends the duty to facts that the lawyer knows, or reasonably should know, are needed to enable the tribunal to make an informed decision. <u>Minority.</u> A minority of the Commission believes there is insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that the paragraph is unclear and would subject lawyers to being second-guessed on what facts were "needed" to enable a tribunal to make an informed decision in a particular matter.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	Comment [1] is identical to the Model Rule counterpart. However, the Commission has not yet determined the definition of "tribunal."
[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.	[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently~~ However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not ~~allow the tribunal to be misled by~~ make false statements of law or fact or ~~present~~ evidence that the lawyer knows to be false.	The first two sentences in Comment [2] are identical to the Model Rule counterpart. The third sentence in Model Rule Comment [2] is deleted because the lawyer's duty of confidentiality under Business and Professions Code § 6068(e) is not qualified by the lawyer's duty of candor to the tribunal. The final sentence is the same as the ABA counterpart, except for several grammatical changes and to clarify that the lawyer's obligation is to not make false statements of law or fact or present evidence the lawyer knows to be false rather than ensuring that the tribunal will not be misled.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Representations by a Lawyer [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).	Representations by a Lawyer [3] ~~An advocate~~A lawyer is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of ~~matters~~the facts asserted therein, ~~for~~ because litigation documents ordinarily present assertions of fact by the client, or ~~by someone on the client's behalf~~a witness, and not ~~assertions~~ by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. (<i>Bryan v. Bank of America</i> (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].) There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. (<i>Di Sabatino v. State Bar</i> (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].) The obligation prescribed in Rule ~~4.2(d)~~1.2.1 not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule ~~4.2(d)~~1.2.1, see the Comment to that Rule. See also the Comment to Rule 8.4(b).	The first sentence in Comment [3] is similar to the ABA counterpart, except that "lawyer" is substituted for "advocate," since "advocate" is not the defined term in the rules. The sentence includes several grammatical changes to make the sentence more clear without changing its substance. The second, third, fourth and fifth sentences are similar to Model Rule Comment [3], except for several grammatical changes and the inclusion of a lawyer's declaration in addition to an affidavit. Citations to two applicable cases have been added and a reference to Rule 1.2.1 rather than Model Rule 1.2(d).

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Legal Argument [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.	Legal Argument [4] ~~Legal argument based on~~Although a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authoritiesargument based on a knowing false representation of law constitutes dishonesty toward the tribunal. Furthermore, as stated in paragraph A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2), an advocate has requires a dutylawyer to disclose directly adverse authority in theand controlling jurisdictionlegal authority that is known to the lawyer and that has not been disclosed by the opposing party. The underlying concept is that "Controlling legal argument is a discussion seeking to determineauthority" may include authority outside the legal premises properly applicablejurisdiction in which the tribunal sits. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the case tribunal.	The first sentence of Comment [4] is derived from the first sentence in Comment [4] of the comments to the New York Rules of Professional Conduct. The sentence, in effect, reverses the first and second sentences in the Model Rule comment without changing the meaning. The second sentence is new and helps explain the reason for the obligation to disclose applicable law. The third sentence derives from the second sentence of New York's Comment [4] which is similar to the third sentence in the ABA counterpart, except it refers to directly adverse and controlling legal authority rather than directly adverse authority in the controlling jurisdiction. The fourth and fifth sentences provide guidance on what constitutes "controlling legal authority." The final sentence is new and provides guidance of the lawyer's obligations under paragraph (a)(4) of the rule.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Offering Evidence [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	Offering Evidence [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. ~~This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.~~ A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	The first sentence in Comment [5] is identical to the Model Rule counterpart. The second sentence in the Model Rule Comment has been deleted. The final sentence in Comment [5] is identical to the Model Rule counterpart.
[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.	[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. <u>With respect to criminal defendants, see comment [7].</u> If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false <u>or base arguments to the trier of fact on evidence known to be false.</u>	The first and second sentences in Comment [6] are identical to the Model Rule counterpart. The third sentence has been added to point the reader to Comment [7], which provides relates to a lawyer's duties concerning testimony by a criminal defendant. The fourth sentence is identical to the Model Rule counterpart, except it provides additional guidance that a lawyer may not based arguments to the trier of fact on the evidence known to be false. Minority. A minority of the Commission believes that the clause, "or otherwise permit the witness to present testimony that the lawyer knows to be false," in the last sentence of Comment [6] lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. Because the lawyer was not offering the evidence for the purpose of establishing its falsity, see Comment [5], or was in a position to "prevent" or not "otherwise permit" the evidence

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		because of its unexpectedness, the lawyer could be subject to discipline merely by having called the witness. The majority, however, believes that reading the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) assuages the minority's concerns.
[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].	[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. ~~In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if criminal defense client insists on testifying, and the accused so desires, even if counsel~~lawyer knows that the testimony ~~or statement~~ will be false. ~~The obligation of the advocate under~~lawyer may offer the ~~Rules~~testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of ~~Professional Conduct is~~conduct and the lawyer has sought permission from the court to withdraw. (Business and Professions Code section 6068(d); <i>People v. Guzman</i> (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467]; <i>People v. Johnson</i> (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; <i>People v. Jennings</i> (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; <i>People v. Brown</i> (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to ~~such requirements. See also Comment [9]~~applicable constitutional provisions.	The first sentence in Comment [7] is identical to the Model Rule counterpart. The second sentence in the Model Rule Comment has been replaced because California and Ninth Circuit law permits defense counsel to ask a criminal defendant client to testify in the "narrative" fashion as explained in the second sentence and in the cases cited in the proposed comment. The third sentence provides adds a reference to the State Bar Act, which also regulates a lawyer's conduct before tribunals. The reference to Comment [9] has been deleted because the Commission recommends deletion of Model Rule 3.3, cmt. [9].

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	Comment [8] is identical to the Model Rule counterpart.
[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].	~~[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~	Model Rule Comment [9] has been deleted because it does not provide useful guidance and is not consistent with current California law.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Remedial Measures [10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or	Remedial Measures [409] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, ~~either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer.~~ In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. ~~In such situations, the advocate's~~ <u>The lawyer's</u> proper course is to remonstrate with the client confidentially, advise the client of the <u>consequences of providing perjured testimony and of the</u> lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the ~~advocate~~<u>lawyer</u> must take further remedial ~~action. If withdrawal from measures (see Comment [10]),¹ and may be required to seek permission to withdraw under Rule 1.16(b), depending on the~~ <u>representation is not permitted or will not undo the effect</u> <u>materiality</u> of the false evidence, ~~the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the~~	The first sentence in Comment [9] is identical to the first sentence in Model Rule Comment [10]. The second sentence is identical to its Model Rule counterpart, except that it does not include the duty to take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing counsel. The reason for the change is that the lawyer has not "offered" the evidence in that situation (See, e.g., Ev.Code §776). Imposing the requirement to take remedial measures to correct false testimony that the lawyer was careful not to elicit from the witness on direct examination but which was adduced by opposing counsel in cross-examining the witness unreasonably interferes with a lawyer's legitimate trial strategy. The third sentence is identical to the third sentence in Model Rule Comment [10]. The fourth sentence is derived from the fourth sentence in Model Rule Comment [10]. The proposed Comment replaces "advocate's" with "lawyer's", since advocate is not a defined term in the rules and expands on the remedial measures to be taken to include advising the client of the consequences of providing perjured testimony.

¹ Change "(See Comment [11A])" to "(See Comment [10])."

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
perhaps nothing.	~~lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.~~	The fifth sentence combines the fourth and fifth sentences in Model Rule Comment [10]. It changes “advocate” to “lawyer” and clarifies that remedial measures may require seeking permission to withdraw depending on the materiality of the false evidence. The sentence departs from the ABA counterpart which obligates a lawyer to reveal information that would otherwise be protected by the lawyer’s duty of confidentiality. Thus, the fifth and sixth sentences of the Model Rule Comment have been substantially revised.
[11] The disclosure of a client’s false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.	~~[11] The disclosure of a client’s false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~	Model Rule Comment [11] is not included because the State Bar Act and California case law obligate a lawyer to protect the client’s confidential information, which duty is not superseded by the lawyer’s obligation of candor toward a tribunal. See Business and Professions Code § 6068(e).

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2.1, 1.4, 1.16 and 8.4; Business and Professions Code Sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).</u>	Comment [10] has no Model Rule counterpart and is intended to provide guidance on what constitutes "reasonable remedial measures" under paragraphs (a)(3) and (b).
	<u>[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.</u>	Comment [11] has no Model Rule counterpart and is intended to clarify that the obligation to take "reasonable remedial measures" under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question and that the duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to investigate or represent a person concerning that person's conduct in the prior proceeding.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Preserving Integrity of Adjudicative Process [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Preserving Integrity of Adjudicative Process [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence <u>relating to the proceeding</u> or failing to disclose information to the tribunal when required by law to do so. <u>See Rule 3.4.</u> Thus, paragraph (b) requires a lawyer to take reasonable remedial measures; ~~including disclosure if necessary~~, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Comment [12] is identical to its Model Rule counterpart, except that it clarifies that "other evidence" referred to in the comment is evidence relating to the proceeding. It adds a cross-reference to Rule 3.4. The Comment deletes the phrase "including disclosure if necessary" for the reasons explained in the changes to paragraphs (a)(3) and (b).
Duration of Obligation [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.	Duration of Obligation [13] ~~A~~<u>Paragraph (c) establishes a</u> practical time limit on the obligation to rectify false evidence or false statements of law and fact ~~has to be established~~. The conclusion of the proceeding is a reasonably definite point for the termination of the ~~obligation~~<u>mandatory obligations under this Rule</u>. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. <u>There may</u>	The first sentence in Comment [13] derives from the Model Rule counterpart and no material change is intended. The second sentence departs from the Model Rule by referring to "mandatory" obligations under the rule. The third sentence is identical to the Model Rule. A fourth sentence has been added to clarify that there may be

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	be obligations that go beyond this Rule. See, e.g., Rule 3.8.	obligations that go beyond the rule, citing, for example, Rule 3.8 on duties of prosecutors.
Ex Parte Proceedings [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.	Ex Parte Proceedings ~~[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~	Model Rule 3.3, Comment [14] is not included in the comments to proposed Rule 3.3.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Withdrawal [15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.	Withdrawal [15] ~~Normally, a~~ lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's ~~disclosure~~ <u>taking reasonable remedial measures</u>. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in ~~such an extreme~~ <u>a</u> deterioration of the client-lawyer relationship <u>such</u> that the lawyer can no longer competently <u>and diligently</u> represent the client, <u>or where continued employment will result in a violation of these Rules</u>. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. ~~In connection This Rule does not modify the lawyer's obligations under [Rule 1.6] or Business and Professions Code section 6068(e) or the California Rules of Court with a~~ <u>respect to any</u> request ~~for~~ <u>permission</u> to withdraw that is premised on a client's misconduct, ~~a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.~~	The first sentence in comment [14] is similar to the first sentence in Model Rule Comment [15], except "disclosure" is replaced with "taking reasonable remedial measures" to make the comment consistent with the wording of the proposed Rule. The second sentence is also similar to the Model Rule counterpart except that it provides clearer guidance on when the deterioration of the client-lawyer relationship may require the lawyer to seek the tribunal's permission to withdraw. The third sentence duplicates the third sentence in the Model Rule Comment. The fourth sentence does not have a counterpart in Model Rule Comment [15] and has been added to clarify that the lawyer's obligations under this Rule are not superseded by the lawyer's obligations under the State Bar Act or the California Rules of Court in requesting permission to withdraw. The Comment departs from Model Rule [15] in that it does not permit the lawyer to reveal confidential client information to the extent reasonably necessary to comply with this rule or with Model Rule 1.6.

Rule 3.3 Candor Toward the Tribunal
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false; or
 - (4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows, or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

- [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. (Bryan v. Bank of America (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].) There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. (Di Sabatino v. State Bar (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].) The obligation prescribed in Rule [1.2.1] not to counsel a client to commit or assist the client in committing a fraud applies in

litigation. Regarding compliance with Rule [1.2.1], see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. "Controlling legal authority" may include authority outside the jurisdiction in which the tribunal sits. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defense client insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.
- [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

- [9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures (see Comment [10]), and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2.1, 1.4, 1.16 and 8.4; Business and Professions Code Sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).

[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

- [14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the client-lawyer relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under [Rule 1.6] or Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

Rule 3.3: Candor Toward the Tribunal

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. Rule 5-200 provides as follows:

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

In addition, California Business & Professions Code §6068(d) provides that it is the duty of an attorney to employ "those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." And §6128(a) makes an attorney guilty of a misdemeanor if the attorney engages in

"any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

District of Columbia: Rule 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, "unless correction would require disclosure of information that is prohibited by Rule 1.6." Rule 3.3(a)(2) is nearly identical to ABA Model Rule 1.2(d). D.C.'s equivalent to ABA Model Rule 3.3(a)(2) applies to undisclosed, directly adverse legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to be "dispositive of a question at issue."

D.C. Rule 3.3(a)(4) provides that a lawyer shall not knowingly offer evidence that the lawyer knows to be false, "except as provided in paragraph (b)." D.C. Rule 3.3(b) adopts the so-called "narrative method" for presenting false testimony by providing as follows:

When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to

withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.

Rule 3.3(c) provides simply: "The duties stated in paragraph (a) continue to the conclusion of the proceeding." D.C. omits both the second sentence of ABA Model Rule 3.3(a)(3) ("If a lawyer ... has offered material evidence and the lawyer comes to know of its falsity .."), and all of ABA Model Rule 3.3(b) ("A lawyer ... who knows that a person ... has engaged in criminal or fraudulent conduct relating to the proceeding ...") but covers both situations by adding Rule 3.3(d), which provides as follows: "(d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d)." (The relevant part of D.C. Rule 1.6(d)(2) provides that when a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets to the extent reasonably necessary to "prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted

from the client's commission of the crime or fraud.") Finally, D.C. omits ABA Model Rule 3.3(d) (regarding ex parte proceedings).

Florida: Rule 3.3 provides that a lawyer shall not

(a)(4) Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer

testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Florida Rule 3.3(b) provides that "the duties stated in Rule 3.3(a) continue beyond the conclusion of the proceeding." Florida has not adopted any equivalent to ABA Model Rule 3.3(b). Florida Rule 3.3(c) provides only that a lawyer "may refuse to offer evidence that the lawyer reasonably believes is false."

Illinois: Rule 3.3(a)(1) provides that a lawyer shall not make a statement of material fact or law to a tribunal which the lawyer knows "or reasonably should know" is false. The Illinois version of Rule 3.3(a) adds that a lawyer shall not:

(5) participate in the creation or preservation of evidence when the lawyer knows or reasonably should know the evidence is false; ...

(8) fail to disclose the identities of the clients represented and of the persons who employed the lawyer unless such information is privileged or irrelevant; ...

(12) fail to use reasonable efforts to restrain and to prevent clients from doing those things that the lawyer ought not to do; [or]

(13) suppress any evidence that the lawyer or client has a legal obligation to reveal or produce; ...

In addition, Illinois Rules 1.2(g)-(h) are similar to ABA Model Rules 3.3(a)(3) and (b).

Maryland: adds the following Rule 3.3(e): "[A] lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused."

Massachusetts: Rule 3.3(b) states that the conclusion of the proceedings includes "all appeals." Rule 3.3(e) permits a lawyer representing a criminal defendant to elicit false testimony in narrative fashion if withdrawal is not otherwise possible without prejudicing the defendant. However, "the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals." A lawyer who is unable to withdraw when he or she knows that a criminal defendant will testify falsely "may not prevent the client from testifying" but must not "examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false."

New Jersey: adheres closely to the pre-2002 version of ABA Model Rule 3.3 but adds, in a new Rule 3.3(a)(5), that a lawyer shall not fail to disclose to the tribunal a material fact "knowing that the omission is reasonably certain to mislead the tribunal." Also, New Jersey Rule 1.6(b)(2) requires a lawyer to reveal confidences to prevent a client from committing "a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal."

New York: Regarding false statements or testimony, DR 7-102(A) provides that a lawyer representing a client shall not

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact....

In addition, DR 4-101(C)(3) permits a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." Regarding adverse authority, DR 7-106(B) provides that a lawyer presenting a matter to a tribunal shall disclose "[c]ontrolling legal authority" known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Regarding remedial measures, DR 7-102(B) provides:

(B) A lawyer who receives information clearly establishing that:

(1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

(2) A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

New York's Disciplinary Rules have no counterpart to Rule 3.3(d).

North Dakota: Rule 3.3(a)(3) provides that if a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, then:

the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless the evidence was contained in

testimony of the lawyer's client. If the evidence was contained in testimony of the lawyer's client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules. The lawyer may not use or argue the client's false testimony.

Ohio: Rule 3.3(c) provides that the duties stated in Rules 3.3(a) and (b) continue "until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination...."

Oregon: provides that the duties in Rule 3.3(a) and (b) are suspended if "compliance requires disclosure of information otherwise protected by Rule 1.6."

Pennsylvania: adds that it applies if a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence "before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition"

South Carolina: Rule 3.3(c) states that the duties stated in Rule 3.3(a) and (b) apply when the lawyer is representing a client before a tribunal "as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition."

Texas: Rule 3.03(b) and (e) provides:

(b) If a lawyer has offered material evidence and comes to know or its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are

unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Virginia: Rule 3.3(a)(2) provides that a lawyer shall not knowingly "fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6." Virginia Rule 3.3(a)(3) requires disclosure only of "controlling" legal authority and omits the word "directly" before "adverse." (The Comment explains that "directly" was deleted because "the limiting effect of that term could seriously dilute the paragraph's meaning.") Virginia Rule 3.3(a)(4) and Rule 3.3(b) are identical to the pre-2002 version of ABA Model Rule 3.3(a)(4) and Rule 3.3(c). Virginia omits ABA Model Rules 3.3(b) and (c) and adds a new paragraph taken verbatim from DR 7-102(B)(2) of the ABA Model Code of Professional Responsibility that provides: "A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

Washington: omits ABA Model Rule 3.3(b), but adds a new Rule 3.3(a)(2), which provides that a lawyer shall not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6." Washington breaks up ABA Model Rule 3.3(a)(3) into several paragraphs, starting with Washington Rule 3.3(a)(4), which provides only that a lawyer shall not "offer evidence that the lawyer knows to be false." Rules 3.3(c) through (e) elaborate by providing:

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly

disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Amendments in 2006 deleted former Washington Rule 3.3(g), which had provided that "[c]onstitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule."

Wisconsin: Rule 3.3(c) deletes the phrase "the conclusion of the proceeding."

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.6 Trial Publicity

February 2009

(Draft rule to be considered for public comment)

INTRODUCTION:

Current Rule 5-120 is the California counterpart to Model Rule 3.6. When adopted in 1995, Rule 5-120 adopted the language in Model Rule 3.6 verbatim; however, the Discussion to the rule differed from the Model Rule. The ABA modified Model Rule 3.6 in 2000.

Proposed Rule 3.6 adopts the revised Model Rule with minor changes to assist in the construction of the Rule and to assure that the Rule does not supersede a lawyer's duty to maintain a client's confidential information. The proposed Rule retains some of the Discussion to current rule 5-120 and retains most of the Model Rule Comments. However, the proposed Rule contains a revised Comment [1], which incorporates concepts in Comments [1] and [3] to the Model Rule and in Comment [1] to the version of the Model Rule adopted by Washington D.C.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity	<u>Commission's Proposed Rule*</u> Rule 3.6 Trial Publicity	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.	(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will <u>(i)</u> be disseminated by means of public communication and ~~will~~ <u>(ii)</u> have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.	In the course of the Commission's deliberations, there was some confusion over whether the "knows or reasonably should know" standard applied to both the means of dissemination and the likelihood of material prejudice or only to the means of dissemination. Comment [3] to the Model Rule states that the knowledge standard applies to both, but the language in the paragraph is not as clear as the Comment. To assure that the Rule would not be misread and clarify that the knowledge standard applies to both, the Commission voted to add the roman numerals.
(b) Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary	(b) Notwithstanding paragraph (a), <u>and to the extent permitted by [Rule 1.6],</u> a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining	A number of states have adopted revisions to Model Rule 3.6. The Commission reviewed all of the variations. One such variation is in the Ohio version of the rule, which added the words in the beginning of paragraph (b) "and if permitted by Rule 1.6..." The Commission adopted a variation of the Ohio language in order to assure that paragraph (b) would not be considered an exception to a lawyer's overriding duty to maintain a client's confidential information. The Commission felt that adding this language was particularly necessary because some of the subparagraphs of paragraph (b) refer to categories of information that could constitute client confidential information.

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity	<u>Commission's Proposed Rule*</u> Rule 3.6 Trial Publicity	<u>Explanation of Changes to the ABA Model Rule</u>
thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.	evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.	

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity	<u>Commission's Proposed Rule*</u> Rule 3.6 Trial Publicity	<u>Explanation of Changes to the ABA Model Rule</u>
(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.	(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.	
(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).	(d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).	The Commission changed the reference from "firm" to "law firm" to conform the terminology the Commission has proposed for use throughout the Rules. The purpose of the change here is to distinguish between lawyers engaged in the practice of law in a law firm from lawyers engaged in business associations that do not entail the practice of law, where application of the Rule would be inappropriate.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.	[1] ~~This Rule prohibits a lawyer who is difficult participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. Preserving~~ On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated ~~about a party~~ prior to trial, particularly where trial by jury is involved. ~~If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right~~Rule applies only to know about threats to its safety and measures aimed at assuring its security.	Rule 3.6 reflects a balancing of concerns that the practitioner needs to understand in order to apply the Rule. That balancing of policies needs to be addressed succinctly in the introduction to the Comment. The Commission concluded that Comment [1] to the Model Rule is too theoretical and does not spell out the balance clearly. The Commission found that the D.C. Comment did a much better job of framing the considerations that underlie the Rule; however, the Commission felt that the D.C. Comment did not pick up concepts in Comment [3] to the Model Rule that also are pertinent. The proposed Comment is intended to put all of the governing concepts together in one place. It does this by combining the elements of Comment [1] as adopted by the Washington D.C. Bar and Comments [1] and [3] to the Model Rule. The first sentence is derived from the first sentence of Comment [3] to the Model Rule. The second sentence is based on Comment [1] to the Model Rule and Comment [1] to the Washington D.C. rule. The third sentence is a modified version from the Washington D.C. rule. The only difference is that the D.C. comment states that publicity should not be allowed to “influence the fair administration of justice.” The proposed Comment changes that reference to “adversely affect the fair administration of justice,” which the Commission concluded more closely tracks the intent of the Rule. The fourth sentence is taken from the D.C. Comment. The fifth sentence is based on the D.C. Comment. The sixth and seventh sentences are taken from Comment [3] to the Model Rule.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	~~It also has a legitimate interest~~lawyers who are, or who have been involved in the ~~conduct~~investigation or litigation of ~~judicial proceedings~~a case, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and ~~deliberation over questions of public policy~~their associates.	
[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.	~~{2} Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.~~ [2] Paragraph (a) applies to statements made by or on behalf of the lawyer.	Comment [2] to the Model Rule was moved to Comment [8]. The Commission concluded that the Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it. Proposed Comment [2] is the first paragraph of the Discussion to current rule 5-120. It does not appear in the Model Rule. The Commission concluded that the proposed Comment is important to assure that lawyers do not attempt to do indirectly what they cannot do directly under the proposed Rule. Comment [2] closes what is a potential loophole under the Model Rule.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.	~~[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.~~	Comment [3] is incorporated into Comment [1]
[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or [Rule 3.3]; and (3) the timing of the statement.	Comment [4] is a modified version of the second paragraph of the Discussion to current Rule 5-120. It is proposed in place of Comment [5] to the Model Rule. The Discussion to the current rule includes a fourth factor which states, "whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings)." The Commission deleted this factor, because the subject matter is now covered by proposed Rule 3.4.
[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:	~~[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:~~	Model Rule Comment [5] was not included in current California rule 5-120, when it was originally proposed to the Supreme Court. The Commission unanimously decided not to include the Comment in proposed Rule 3.6. Comment [5] is problematic in that it refers to subjects that "are more likely to have a material prejudicial effect on a proceeding;" however, the statements would be permissible under the proposed Rule in some circumstances. The Comment does not address when the subjects would not prejudice a proceeding. It does not give the practitioner any guidance regarding when it would be permissible to discuss the subjects. As a result, the Comment tends to chill speech in situations where the Model Rule would not prohibit it. The Commission believes that Comment [4] better addresses the issues by providing simple criteria for determining when the proposed Rule applies, while, at the same time, recognizing that there may be other factors.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement; (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or	~~(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;~~ ~~(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~ ~~(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~ ~~(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;~~ ~~(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or~~	

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.	~~(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.~~	
[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.	[65] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.	

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.	[7] ~~Finally~~ <u>Under paragraph (c)</u>, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may ~~have the salutary effect of lessening~~ <u>lessen</u> any resulting adverse impact on the adjudicative proceeding. Such responsive statements ~~should~~ <u>must</u> be limited to ~~contain only such information as is necessary~~ to mitigate undue prejudice created by ~~the statements made by~~ <u>of</u> others.	These changes were made to conform the Comment to the proposed Rule. The reference to paragraph (c) is intended to orient the reader to the portion of the proposed Rule to which it pertains. It conforms to the form the Commission has adopted for other Rules. The Commission deleted the words "have the salutary effect of lessening" and replace them with the word "lessen." The Commission concluded that the deleted language could be read as promoting responsive statements and that a less supportive tone was more appropriate. The word "must" was substituted for the word "should" to conform to the text of paragraph (c) of the proposed Rule. The Model Rule Comment is inconsistent with paragraph (c). Since the text of the Rule governs over the Comment, the Commission concluded that the Comment language should be revised in order to avoid misleading lawyers who rely on the Comment, without realizing that it is inconsistent with the proposed Rule.
[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.	[8] See Rule <u>[3.8(f)]</u> for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.	
	[8] <u>Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.</u>	This Comment is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.

Proposed Rule 3.6 Trial Publicity
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), and to the extent permitted by [Rule 1.6], a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

- [1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a

fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

- [2] Paragraph (a) applies to statements made by or on behalf of the lawyer.
- [3] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).
- [4] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate

Business and Professions Code section 6068(d) or [Rule 3.3]; and (3) the timing of the statement.

- [5] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.
- [6] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.
- [7] See Rule [3.8(f)] for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.
- [8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

Rule 3.6: Trial Publicity

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Alabama. In the rules effective June 2008, Rule 3.8(a) provides as follows:

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Alabama Rule 3.8(b) provides that a statement referred to in Rule 3.8(a) ordinarily is likely to have a materially prejudicial effect if it refers to "a civil matter triable to a jury, 'a criminal matter, or any other proceeding that could result in incarceration" and the statement relates to one of the subjects listed in Comment 5 to ABA Model Rule 3.6 (which Alabama moves to the text of the rule). Alabama omits Rule 3.6(d).

California: Rule 5-120 tracks the pre-2002 version of ABA Model Rule 3.6 nearly verbatim, except that California omits subparagraph (d).

District of Columbia: Rule 3.6 consists of only one sentence: "A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a

serious and imminent threat of material prejudice to the proceeding."

Florida: Rule 3.6(a) omits the ABA phrase "who is participating or has participated in the investigation or litigation of a matter" and provides that a lawyer shall not make an extrajudicial statement that a "reasonable person" would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding "due to its creation of an imminent and substantial detrimental effect on that proceeding." Florida deletes ABA Model Rule 3.6(b), (c), and (d), and substitutes the following Rule 3.6(b):

Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

Georgia: Rule 3.6(a), (c), and (d) tracks the pre-2002 version of ABA Model Rule 3.6 verbatim, but Georgia has relegated Rule 3.6(b) to a new paragraph 5B of the Comment, which notes that there are "certain subjects which are more

likely than not to have no material prejudicial effect on a proceeding." The Comment then lists all of the items in ABA Model Rule 3.6(b) as examples of things that a lawyer may "usually" state.

Illinois: Rule 3.6(a) prohibits an extrajudicial statement if the lawyer "knows or reasonably should know that it would pose a serious and imminent threat to the fairness of an adjudicative proceeding." The remainder of the rule then borrows heavily from both DR 7-107 of the ABA Model Code of Professional Responsibility and ABA Model Rule 3.6(b)-(d), but Illinois adds some language found in neither DR 7-107 nor ABA Model Rule 3.6.

Iowa: In Rule 3.6, Iowa adds a paragraph (e) that provides: "Any communication made under paragraph (b) that includes information that a defendant will be or has been charged with a crime must also include a statement explaining that a criminal charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty."

Michigan: places the text of Rule 3.6(b) in the Comment and omits the balance of the rule.

Minnesota: shortens Rule 3.6(a) and deletes ABA Model Rule 3.6(b)-(d) entirely.

New Jersey: deletes ABA Model Rule 3.6(d).

New York: DR 7-107(A) provides that a lawyer participating in "or associated with a criminal or civil matter, or associated in a law firm or government agency with a lawyer participating in or associated with a criminal or civil matter," shall not make an extrajudicial statement that a "reasonable person" would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing

an adjudicative proceeding in that matter. New York also incorporates Rule 3.6(c) nearly verbatim into DR 7-107(A), but deletes the word "undue" before "prejudicial effect."

DR 7-107(B) then provides that a statement "ordinarily is likely to prejudice materially an adjudicative proceeding" when it relates to any of the six enumerated items set forth in Comment 5 to ABA Model Rule 3.6, which DR 7-107(B)(l)-(6) tracks verbatim.

DR 7-107(C) provides that if a statement complies with DR 7-107(A), a lawyer "involved with the investigation or litigation of a matter" may state "without elaboration" the items enumerated in ABA Model Rule 3.6(b), which New York tracks verbatim, except that DR 7-107(C)(l) refers only to "the general nature of the claim or defense" DR 7-107(C)(7)(a) adds the word "age," and DR 7-107(C)(7)(c) permits a lawyer to state not only the "fact, time and place of arrest" but also "resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission, or statement." New York omits Rule 3.6(d).

North Carolina: adds a new Rule 3.6(e), which provides that Rule 3.6 does not "preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies."

Ohio: Rule 3.6(b) makes clear that a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6.

Oklahoma: subordinates Rule 3.6(b) to a Comment and replaces ABA Model Rule 3.6(a) with the following paragraph:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an

extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

Oregon: Rule 3.6(c) provides that notwithstanding paragraph (a), a lawyer may: "(1) reply to charges of misconduct publicly made against the lawyer; or (2) participate in the proceedings of legislative, administrative or other investigative bodies." Oregon also adds a new Rule 3.6(e) requiring a lawyer to "exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule."

Texas: Rule 3.07(a) begins "[i]n the course of representing a client" in place of the ABA phrase "[a] lawyer who is participating or has participated in the investigation or litigation of a matter," then tracks ABA Model Rule 3.6(a) verbatim, but Texas, at the end of Rule 3.07(a), adds that a lawyer "shall not counsel or assist another person to make such a statement."

Texas Rule 3.07(b) provides that a lawyer "ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent," by making an extrajudicial statement described in Rule 3.07(a) if the statement refers to five specified categories of information, which track verbatim the items listed in Comment 5 to ABA Model Rule 3.6-except that Texas omits from this list "(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty."

Texas Rule 3.07(c) generally tracks ABA Model Rule 3.6(b), with slight variations. Texas omits ABA Model Rule 3.6(c) and (d).

Virginia: Rule 3.6 provides as follows:

(a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows or should know will have a substantial likelihood of interfering with the fairness of the trial by a jury.

(b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.

Washington: adds an Appendix to the Rules of Professional Conduct that adds "Guidelines" for applying Rule 3.6.

Wisconsin: puts the statements that will "ordinarily" violate paragraph (a) in the body of Rule 3.6 rather than in Comment 5.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.7 Lawyer as a Witness

March 2009

(Draft rule revised following consideration of public comment)

INTRODUCTION:

1. The Commission has recommended much of the substance and language of ABA Model Rule 3.7(a). However, with the substitution of the more client-protective provision in current California rule 5-210(C) for Model Rule 3.7(a)(3), the Commission is recommending continued adherence to the more limited scope of the California rule.
2. Specifically, Model Rule 3.7(a)(3) was deleted because it refers to principles of disqualification for substantial hardship to the client. Because authority over disqualification does not reside with the State Bar but rather with the courts, a disciplinary rule should not limit the right of judiciary to protect the fair administration of justice nor improperly intrude on the judicial function.
3. For public protection of the consumer of legal services, proposed Rule 3.6(a)(3) was added to require full disclosure to the client and written consent. This principle is not part of the ABA Model Rule.
4. For the most part, the Commission recommends rejecting the ABA Model Rule comments, which reflect the broader scope of the ABA Rule and thus are not pertinent to the proposed Rule, or relate to disqualification issues. (See below).
5. There are two separate minority views. One group has urged retention of the current California rule in its entirety, in particular its application only to jury trials. The other group prefers following the Model Rule approach with an emphasis on protecting and ensuring the integrity of the judicial process. These views are expanded upon in the Explanation of Changes, below.

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:	(a) A lawyer shall not act as <u>an</u> advocate at a trial in which the lawyer is likely to ~~be a necessary witness~~ <u>testify</u> unless:	Adopted the substance and language of the ABA Model Rule with this revision: Substituted “testify” for “be a necessary witness” for public protection to create a bright line for disciplinary enforcement. The word “necessary” creates more difficulties of proof. Minority. One minority group of Commissioners would retain current California rule 5-210, whose application is limited to <i>jury</i> trials. This group notes that any threat to of the trier of fact being confused by a lawyer’s dual role as advocate and witness is substantially diminished in a bench trial. As a sophisticated evaluator of testimony and evidence, a bench officer would not be expected to be confused by the lawyer’s dual role.
(1) the testimony relates to an uncontested issue;	(1) the testimony relates to an uncontested ~~issue~~ <u>matter</u>;	Adopted the ABA Model Rule with addition: Added “matter” instead of “issue” for public protection. Issue is too narrow and might not include a lawyers’ uncontested testimony about a different or related legal case or transaction.
(2) the testimony relates to the nature and value of legal services rendered in the case; or	(2) the testimony relates to the nature and value of legal services rendered in the case; or	Adopted the ABA Model Rule.

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
(3) disqualification of the lawyer would work substantial hardship on the client.	~~(3) disqualification of the lawyer would work substantial hardship on the client.~~ <u>(3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.</u>	Rejected the ABA Model Rule to increase public protection and retained the provision in current California rule 5-210(C): Disqualification is not relevant to discipline. California courts have the inherent authority to disqualify an advocate/witness irrespective of compliance with the rule. See <i>Smith, Smith & Kring v. Superior Court (Oliver)</i> (App. 4 Dist. 1997) 60 Cal.App.4th 573, 581, 70 Cal.Rptr.2d 507. In place of Model Rule 3.7(a)(3), the Commission has substituted current California rule 5-210(C). If the role of advocate/witness creates conflicts of interest, for public protection reasons, the client should be fully informed in writing of those conflicts, the facts and circumstances necessary to make an informed and intelligent decision and consent in writing, as is required in the first sentence of the Commission's proposed paragraph (a)(3). A substantial hardship alone should not be the determinative issue without client consent. The second sentence of proposed paragraph (a)(3) identifies the required source of consent in a governmental entity context. Minority. A second minority group of Commission members takes the position that the one of the purposes of the Rules in general and this Rule in particular is to protect the judicial process and the administration of justice. Permitting a lawyer to be both advocate and witness based only on the consent of a client who could likely be benefited by any confusion caused by the lawyer's dual role, poses a threat to the fair administration of justice. This minority believes that Model Rule 3.7(a)(3) provides the appropriate balancing of interests by permitting a lawyer to engage in such

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
		dual roles when the court has determined the client would otherwise suffer a hardship if the lawyer were disqualified.
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.	(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by [Rule 1.7] or [Rule 1.9].	Adopted the ABA Model Rule. Brackets have been placed around "Rule 1.7" and "Rule 1.9" pending the Commission's final recommendation concerning these rules.

<u>ABA Model Rule</u> Rule Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.	~~[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.~~	Rejected ABA Model Rule 3.7. Comment [1], because the comment's overbreadth is not a meaningful explanation of the Rule. As noted in the Rule Explanation, California's rule is more limited in scope than the Model Rule. There have been no published California cases criticizing the rule as being prejudicial. There have not been significant disciplinary complaints or legal malpractice cases concerning the current California rule. The California policy has worked well and should be continued. Minority. The same minority group of Commission members that opposes the substitution of current California rule 5-210(C) for Model Rule 3.7(a)(3) because of its potentially deleterious effect on the fair administration of justice, see Explanation of Changes for paragraph (a)(3), objects to the deletion of MR 3.7, cmts. [1]-[3]. The minority notes that these comments contain important statements of the policies that underlie the Rule, regardless of whether Model Rule 3.7(a)(3) is rejected.
Advocate-Witness Rule [2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or	~~Advocate-Witness Rule~~ ~~[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or~~	Rejected ABA Model Rule 3.7, Comment [2] because the issues addressed do not relate to enforcing a disciplinary rule but rather to a judge's consideration of principles in furtherance of the fair administration of justice, including disqualification, limitation of witness testimony, and the use of judicial instruction. In California, the principles for the guidance of judges are set forth in more detail in case law. (See e.g., <i>See, e.g. for civil cases: Smith, Smith & Kring v. Superior Court (Oliver)</i> (App. 4 Dist. 1997) 60 Cal.App.4th 573, 579-582, 70 Cal.Rptr.2d 507 and for criminal cases: <i>People v. Dunkle</i> (2005), 36 Cal.4th 861, 32 Cal.Rptr.3d 23, rehearing denied, certiorari denied 126 S.Ct. 1884, 547 U.S. 1100, 164 L.Ed.2d 571; <i>People v. Donaldson</i>

<u>ABA Model Rule</u> Rule Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
as an analysis of the proof	~~as an analysis of the proof~~	(App. 5 Dist. 2001) 113 Cal.Rptr.2d 548, 93 Cal.App.4th 916. Minority. See Explanation of Changes, Comment [1].
[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.	~~[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.~~	The Commission recommends omitting ABA Model Rule 3.7, Comment [3]. It is inconsistent with the Rule the Commission recommends and would usurp the judiciary's own authority and role to control the proceedings before it in its duty to the fair administration of justice. These aspects, as set forth above, are the subject of case law unrelated to disciplinary proceedings and are therefore inappropriate for a disciplinary rule. Minority. See Explanation of Changes, Comment [1].
[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the	~~[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the~~	Rejected ABA Model Rule comment [4], which is an explanation for ABA Model Rule 3.7(a)(3), which in turn was rejected because it addresses disqualification. As already noted in the Rule Explanation for paragraph (a)(3), disqualification is an inappropriate subject for disciplinary purposes, because it concerns the reasons and factors relating to a court's inherent power to disqualify a lawyer.

<u>ABA Model Rule</u> Rule Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.	~~lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.~~	
[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.	~~[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.~~	Rejected ABA Model Rule 3.7, Comment [5] because the comment merely suggests the reason for paragraph (b), rather than provide guidance in its application.
Conflict of Interest [6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even	~~Conflict of Interest~~ ~~[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even~~	Rejected ABA Model Rule comment [6] because the concepts discussed are already addressed in the Commission's proposed paragraph (a)(3). The concept of compliance with conflict of interest rules has been adopted as part of the informed written consent of the client contained in paragraph (a)(3). Moreover, because the Commission's proposed Rule 1.7 does not include "material limitations" conflicts, the reference to it would be inappropriate because the scope is limited to conflicts among concurrent clients.

<u>ABA Model Rule</u> Rule Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."	~~though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."~~	
[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.	~~[7]~~ Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by [Rule 1.7] or [Rule 1.9] from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by [Rule 1.10] unless the client gives informed consent under the conditions stated in [Rule 1.7].	Adopted ABA Model Rule, Comment [7], with Rules 1.7, 1.9, and 1.10 bracketed, pending the Commission's final recommendation concerning.

<u>ABA Model Rule</u> Rule Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] This Rule is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body.	Proposed Comment [2] has been added to clarify that the Rule is not applicable in legislative proceedings. This comment is carried over from current rule 5-210, Discussion ¶. 1.

Proposed Rule 3.7 Lawyer as a Witness
(Commission's Proposed Rule – Clean Version)

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to testify unless:

- (1) the testimony relates to an uncontested matter;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

services organization, the profession's involvement in such organizations would be severely curtailed.

- [2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

Comment

- [1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal

Rule 3.7: Lawyer as Witness

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. Rule 5-210 provides as follows:

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter;
or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

(C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

District of Columbia: Rule 3.7(b) provides that a lawyer may not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness "if the other lawyer would be precluded from acting as advocate in the trial by Rule 1.7 or Rule 1.9," D.C. also adds that the provisions of Rule 3.7(b) "do not apply if the lawyer who is appearing as an advocate is employed by, and appears on behalf of, a government agency."

Florida: Rule 3.7(a) applies when a lawyer is likely to be a necessary witness "on behalf of the client" and creates an exception when "the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony." Florida adopts ABA Model Rule 3.7(b) verbatim.

Illinois: Rule 3.7 distinguishes between a witness on behalf of a client and a witness not on behalf of a client, Illinois Rule 3.7(a) essentially tracks DR 5-101(B) of the ABA Model Code of Professional Responsibility, and Illinois Rule 3.7(b) essentially tracks DR 5-102(B).

New Mexico: deletes the "substantial hardship" exception in subparagraph (a)(3).

New York: DR 5-102 provides as follows.

(A) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:

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

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.

(4) As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.

(B) Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

(C) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal, except that the lawyer may continue as an advocate on issues of fact and may testify in the circumstances enumerated in DR 5-102(a)(1) through (4).

(D) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the

lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

Ohio: Adds a new Rule 3.7(c), which provides as follows: "A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law."

Texas: Rule 3.08(a) disqualifies a lawyer if the lawyer knows or believes that the lawyer is or may be a witness "necessary to establish an essential fact on behalf of the lawyer's client," unless specified exceptions apply. The exceptions are substantially identical to DR 5-101(B)(1)-(3) of the ABA Model Code of Professional Responsibility, but Texas adds an exception if "(4) the lawyer is a party to the action and is appearing pro se," and Texas applies the "substantial hardship" exception only if "the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter...." Texas Rules 3.08(b) and (c) provide as follows:

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Virginia: In Rule 3.7(a), Virginia substitutes "adversarial proceeding" for "trial." In Rule 3.7(b), Virginia incorporates language from DR 5-102(B) of the ABA Model Code of Professional Responsibility to deal with situations in which a lawyer learns that he or she may be called as a witness "other than on behalf of the client" after accepting the representation.

Washington: Washington adds a new Rule 3.7(a)(4), which creates an exception where "the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate." A new Comment 8 explains that when a lawyer is called to testify as a witness by the adverse party, "there is a risk that Rule 3.7 is being inappropriately used as a tactic to obtain disqualification of the lawyer. Paragraph (a)(4) is intended to confer discretion on the tribunal in determining whether disqualification is truly warranted in such circumstances."

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.3 Membership in Legal Services Organization

April 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 6.3 is essentially unchanged from Model Rule 6.3. However, the Commission recommends adding to the Rule a reference to California's statutory duty of confidentiality in order to emphasize that a lawyer's membership in a legal services organization is subject both to the lawyer's duty to avoid conflicts of interest and the duty to protect confidential client information.

<u>ABA Model Rule</u> Rule 6.3 Membership in Legal Services Organization	<u>Commission's Proposed Rule</u> Rule 6.3 Membership in Legal Services Organization	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:	A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:	
(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or	(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 <u>or Business and Professions Code § 6068(e)(1)</u>; or	The reference to B & P Code § 6068(e)(1) has been added to emphasize the importance of maintaining client confidences and secrets.
(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.	(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.	

<u>ABA Model Rule</u> Rule 6.3 Membership in Legal Services Organization Comment	<u>Commissions Proposed Rule</u> Rule 6.3 Membership in Legal Services Organization Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.	[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.	
[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.	[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances, <u>including assurances that confidential client information will be protected.</u>	The added phraseology is intended to emphasize, in the Comment, the importance of maintaining client confidences and secrets.

Rule 6.3 Membership in Legal Services Organization (Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 or Business and Professions Code § 6068(e)(1); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

- [1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.
- [2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

Rule 6.3: Membership in Legal Services Organizations

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. has no equivalent provision in its Rules of Professional Conduct.

Georgia: adds that there is “no disciplinary penalty for a violation of this Rule.”

Illinois: Rule 6.3 applies to a “not-for-profit” legal services organization.

Michigan: Rule 6.3 adds extensive rules governing lawyer participation in “not-for-profit referral, service[s] that recommend legal services to the public.”

New Jersey: Rule 6.3 requires that the organization comply with Rule 5.4 and states the limitation in (b) to include adverse effect on the interest of “a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.”

New York: DR 5-110 tracks the language of Rule 6.3.

Ohio: omits ABA Model Rule 6.3 because the Supreme Court of Ohio believes the substance of Rule 6.3 is addressed by other rules governing conflicts of interest, including Rule 1.7(a).

Texas: Rule 1.13 (entitled “Conflicts: Public Interest Activities”) is similar to ABA Model Rule 6.3, but the Texas rule also governs a lawyer's activities in a “civic, charitable or law reform organization.” Texas Rule 1.13 omits the clause “notwithstanding that the organization serves persons having interests adverse to a client of the lawyer”

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.4 Law Reform Activities Affecting Client Interests

April 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 6.4 is essentially unchanged from Model Rule 6.4. The Commission recommends adding the phrase “or adversely affected” to the rule to require disclosure to the organization of both the benefits and the adverse effects on a client of a decision by the organization in which the lawyer participates. A similar change is proposed in the Comment. A reference to the lawyer’s duty of confidentiality (Rule 1.6 and Business and Professions Code § 6068(e)(1)) was also added.

<u>ABA Model Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests	<u>Commission's Proposed Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.	A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted <u>or adversely affected</u> by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.	The Rule has been amended by adding the phrase “or adversely affected,” requiring disclosure of both benefits and adverse effects on the affected lawyer’s client.

<u>ABA Model Rule</u>	<u>Commission's Proposed Rule</u>	<u>Explanation of Changes to the ABA Model Rule</u>
Rule 6.4 Law Reform Activities Affecting Client Interests Comment	Rule 6.4 Law Reform Activities Affecting Client Interests Comment	
[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.	[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer must comply with the lawyer's obligations to clients under other Rules and statutes, particularly Rules 1.6 and 1.7, and Business and Professions Code § 6068(e)(1). A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted or adversely affected.	The Model Rule's phrase, "a lawyer should be mindful," was viewed as not sufficiently forceful. Instead, the mandatory "a lawyer must comply with the lawyer's obligations" has been substituted to emphasize the lawyer's important obligations, particularly those involving loyalty (Rule 1.7) and confidentiality (Rule 1.6), which has been added. The same change as was made to paragraph (b) concerning disclosure has been made to the Comment.

Rule 6.4 Law Reform Activities Affecting Client Interests (Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

- [1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer must comply with the lawyer's obligations to clients under other Rules and statutes, particularly Rules 1.6 and 1.7, and Business and Professions Code § 6068(e)(1). A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted or adversely affected.

Rule 6.4: Law Reform Activities Affecting Client Interests

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. has no comparable provision.

District of Columbia: Rule 6.4 adds the following paragraph (a): "A lawyer should assist in improving the administration of justice. A lawyer may discharge this requirement by rendering services in activities for improving the law, the legal system, or the legal profession."

Florida: replaces "materially benefited" with "materially affected" in the second sentence of Rule 6.4.

Georgia: adds that "[t]here is no disciplinary penalty for a violation of this Rule."

Illinois: Rule 6.4 applies when the "actions" of the organization may affect a client's interests, rather than when the "reform" may affect the client's interests.

New Hampshire: New Hampshire substitutes the word "affected" for the word "benefitted" in the second sentence of Rule 6.4. A special New Hampshire Comment explains the reasoning: "Since situations may arise in which law reform activities may materially impinge on a client's interest in an adverse, as well as beneficial manner, the change was made to reflect that possibility."

New York: has no direct equivalent to ABA Model Rule 6.4.

Ohio: omits ABA Model Rule 6.4 because the Supreme Court of Ohio believes that the "substance of Model Rule 6.4 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest."