



# THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE,  
PLANNING, AND DEVELOPMENT

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**DATE:** September 4, 2009

**TO:** Members of the Board Committee on Regulation and Admissions 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 60-day public comment period. This agenda item also requests authorization to conduct a public hearing on the proposed amendments.

The proposed amendments are the fifth 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, the proposed rules are presented in comparison table format showing changes to comparable ABA Model Rules and providing specific explanations for each deviation from the ABA Model Rules.

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.<sup>1/</sup> The amendments adopted by the Board

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<sup>1/</sup> 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.<sup>2/</sup>

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 completely 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 the 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 is the clean version of the Commission's proposed rule and a summary of selected state variations. The main purpose of this format is to simplify identification of changes to the ABA Model Rules and to make plain the Commission's rationale whenever it deviates from the ABA.

### **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

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<sup>2/</sup> 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."

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 issued for 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 issued for 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.

In July of this year, the Commission distributed its fourth group of proposed rules. This fourth batch presented eight rules issued for a 90-day public comment period that is scheduled to end on October 23, 2009.

The Commission has now completed work on eleven 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. The Attachment to this memorandum provides the rule comparison table for each of the following proposed rules.<sup>3/</sup>

<a href="#">Rule 1.2</a>	Scope of Representation [N/A]
<a href="#">Rule 1.6</a>	Confidentiality of Information [3-100, B&P 6068(e)]
<a href="#">Rule 1.8.2</a>	Use of Confidential Information [3-100, 3-310]
<a href="#">Rule 1.8.13</a>	Imputation of Personal Conflicts [N/A]
<a href="#">Rule 1.9</a>	Duties to Former Clients [3-310]
<a href="#">Rule 1.10</a>	Imputation of Conflicts: General Rule [N/A]
<a href="#">Rule 1.12</a>	Former Judge, Arbitrator, Mediator [N/A]
<a href="#">Rule 1.14</a>	Client with Diminished Capacity [N/A]
<a href="#">Rule 2.1</a>	Advisor [N/A]
<a href="#">Rule 3.8</a>	Responsibilities of a Prosecutor [5-110]
<a href="#">Rule 8.5</a>	Choice of Law [1-100(D)]

This agenda item requests Board Committee authorization to publish the proposed rules for a 60-day public comment period. This agenda item also requests authorization to conduct a public hearing on the proposed amendments.

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<sup>3/</sup> Where applicable, the number of a current California Rule counterpart appears in brackets at the end of the rule title. (If you are viewing this memorandum online, the California Rules are found at: [http://www.calbar.ca.gov/calbar/pdfs/rules/Rules\\_Professional-Conduct.pdf](http://www.calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf) and the ABA Model Rules are found at: [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html) .)

### ***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 accounts for only a portion 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 and Admissions 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 and Admissions 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 its

**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**  
**Rule Comparison Tables**



# Proposed Rule 1.2 [n/a]

## “Scope of Representation and Allocation Of Authority Between Client and Lawyer”

(Draft #3, 8/31/09)

**Summary:** This rule states a requirement that a lawyer abide by a client's decisions concerning the objective of the representation and that a lawyer obtain client consent to any limited scope representation. It also provides that a lawyer's representation does not constitute an endorsement of the client's views or activities and prohibits a lawyer from counseling or assisting a client's criminal or fraudulent conduct.

### Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule

Rules 3.36 – 3.37 and 5.70 – 5.71 of the California Rules of Court

Statute

Bus. & Prof. Code § 6104

Case law

*Blanton v. Womancare Inc.* (1985) 38 Cal.App.3d 396

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No  
(See Introduction and Explanation of Changes for paragraph (a) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the Introduction and Explanation of Changes for paragraph (a) of the proposed Rule in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.2\* Scope Of Representation And Allocation Of Authority Between Client And Lawyer

September 2009

(Draft rule to be considered for public comment)

### *INTRODUCTION:*

Proposed Rule 1.2 largely tracks Model Rule 1.2. The only difference between the black letter of the Model Rule and the proposed Rule is found in paragraph (d), which has been divided into two subparagraphs for clarity, with subparagraph (d)(1) stating the general prohibition and subparagraph (d)(2) clarifying what a lawyer is permitted to do in providing counsel to the client.

The comments for paragraphs (a) through (c) (Comments [1]-[8]) closely follow the Model Rule comments, with citations to seminal California authority added. In particular, a reference has been added in Comment [8] to California Rules of Court, Rules 3.35-3.37 (limited scope representation rules applicable in civil matters generally), and 5.70-5.71 (limited scope representation rules applicable in family law matters), implemented to promote access to justice. The comments accompanying paragraph (d) (Comments [9]-[12]), which were prepared in conjunction with the Commission's consideration of proposed Rule 1.13 ("Organization as Client") have been substantially revised to provide better guidance to lawyers in providing counsel to clients.

*Minority.* A minority of the Commission objects on the ground that the Rule is not suitable as a disciplinary rule. See Explanation of Changes for paragraph (a).

*Variation in Other Jurisdictions.* Most jurisdictions have made minor changes to Model Rule 1.2. At least four states (Maine, Missouri, New Hampshire, and Wyoming) have enhanced MR 1.2(c), limiting the scope of representation, to encourage lawyers to provide such services, thereby promoting the access to justice. See "Selected State Variations," Model Rule 1.2, from Gillers, Simon & Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2009), attached.

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\* Proposed Rule 1.2, Draft 3 (8/31/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.</p>	<p>(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.</p>	<p>Paragraph (a) is identical to Model Rule 1.2(a).</p> <p><u>Minority.</u> A minority of the Commission objects to the Rule on the ground that, although it might be appropriate as a statement of hortatory principles, it is wrong as a disciplinary rule and will conflict with lawyers' duties to their clients, both constitutional and statutory. The minority identifies a fundamental problem in that there is no clear distinction between the "objectives" and the "means" of representation. For example, in a criminal case, the accused has a constitutional right to have the complaining witness cross-examined. If we characterize the decision about whether to cross-examine that witness as "means" and therefore within the dominion of the lawyer, we deprive the accused of a fundamental Constitutional right. Denial of cross-examination of a witness without a waiver by the client is ". . . a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." <i>Brookhart v. Janis</i>, 384 U.S. 1, 3 (1966). A rule of professional conduct should not deprive a client of a Constitutional right. The majority notes that the rule does not countenance such conduct by the lawyer. As explained in Comment [1], decisions concerning a client's "substantial rights" are within the province of the client. The rule does not require a lawyer to ignore the client's interests in making decisions about how to conduct a case; rather, it emphasizes that the lawyer must be sensitive to the client's rights and interests.</p> <p>The minority also suggests that, even if there were a valid distinction between "objectives" and "means," as to many "means,"</p>

\* Proposed Rule 1.2, Draft 3 (8/31/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>the client should be able to instruct the lawyer. Again, the rule provides for exactly that outcome. See Comment [1].</p> <p>Finally, the minority observes that, in some cases, a lawyer must be able to disagree with a client's decisions concerning the objectives of the representation and to refuse to "abide by" the client's decision as to a plea in a criminal case. The minority notes that if a lawyer believes there is a valid defense in a death penalty case, the lawyer is required to exercise independent judgment about whether to oppose the client's plea and to advocate against conviction or the death penalty. Penal Code section 1018, which states in part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." See, e.g., <i>People v. Massie</i>, 40 Cal. 3d 620 (1985); <i>People v. Alfaro</i> (2007) 41 Cal.4th 1277, cert. denied 128 S.Ct. 1476, 170 L.Ed.2d 300. The minority concludes that, if the Supreme Court approves Rule 1.2, so a lawyer who does not comply with a client's decision regarding a plea in a criminal case faces discipline, then the validity of Penal Code section 1018 is jeopardized.</p>
<p>(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.</p>	<p>(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.</p>	<p>Paragraph (b) is identical to Model Rule 1.2(b).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.</p>	<p>(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.</p>	<p>Paragraph (c) is identical to Model Rule 1.2(c).</p>
<p>(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.</p>	<p>(d) <u>(1)</u> A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, <del>or</del> fraudulent, <u>or a violation of any law, rule, or ruling of a tribunal.</u></p> <p><u>(2)</u> <u>Notwithstanding paragraph (d),</u> <del>but</del> a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of <del>the</del> <u>a law, rule, or ruling of a tribunal.</u></p>	<p>Paragraph (d) is based on Model Rule 1.2(d), retaining both its substance and language. The single Model Rule paragraph has been split into two subparagraphs for clarity: subparagraph (d)(1) sets forth the general prohibition and subparagraph (d)(2) clarifies what the lawyer is permitted to do.</p> <p>In addition, the phrase “violation of any law, rule or ruling of a tribunal” is added to the scope of the rule for greater protection of the public and the fair administration of justice.</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p><b>Allocation of Authority between Client and Lawyer</b></p> <p>[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.</p>	<p><b>Allocation of Authority between Client and Lawyer</b></p> <p>[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. <del>The</del> <a href="#">A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. <i>Blanton v. Womancare, Inc.</i> (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156]. Accordingly, the</a> decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule <del>[1.4(ac)(4)]</del> for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, <a href="#">provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.</a></p>	<p>Comment [1] is based on Model Rule 1.2, cmt. [1] but makes three changes to conform the comment to California law.</p> <p>First, its adds language and a citation to well-settled California authority concerning the allocation of authority between lawyer and client.</p> <p>Second, it substitutes a cross-reference to proposed Rule 1.4(c), which expressly sets forth a lawyer's communication duties concerning settlement offers. Rule 1.4(c) carries forward current rule 3-510, which itself conforms to legislative policy in Bus. &amp; Prof. Code § 6103.5.</p> <p>Finally, Comment [1] clarifies that acting with the client's implied authority does not include implied authority to disclose client confidential information protected by Bus. &amp; Prof. Code section 6068(e) or rule 1.6 of these rules. By clarifying that implied authorization does not include implied disclosure of confidential information, this provides greater protection to consumers of legal services and conforms the rule to current California law and proposed Rule 1.6.</p>
<p>[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their</p>	<p>[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their</p>	<p>Comment [2] is identical to Model Rule 1.2, cmt. [2], except that the specific reference to Model Rule 1.16(b)(4) has been deleted because the Commission recommends not adopting that subparagraph. Model Rule 1.16(b)(4) permits a lawyer to</p>

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).</p>	<p>lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)<del>(4)</del>. Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).</p>	<p>withdraw from representing a client if: "(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively." The Commission's recommended drafting of Rule 1.16 increases client protection by narrowing a lawyer's right to withdraw from a representation. Consequently, the Comment now generally points the lawyer to proposed Rule 1.16(b), which governs permissive withdrawal from the representation.</p>
<p>[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.</p>	<p>[3] At the outset of <u>or during</u> a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.</p>	<p>Comment [3] is identical to MR 1.2, cmt. [3], except that it clarifies that a client may authorize the lawyer to take specific action at any time during the representation.</p>

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.</p>	<p>[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.</p>	<p>Comment [4] is identical to MR 1.2, cmt. [3].</p>
<p><b>Independence from Client's Views or Activities</b></p> <p>[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.</p>	<p><b>Independence from Client's Views or Activities</b></p> <p>[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.</p>	<p>Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. &amp; Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."</p>
<p><b>Agreements Limiting Scope of Representation</b></p> <p>[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions</p>	<p><b>Agreements Limiting Scope of Representation</b></p> <p>[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions</p>	<p>Comment [6] is nearly identical to Model Rule 1.2, cmt. [6], the only change being the deletion of "repugnant," a term found in Model Rule 1.16(b)(4), a provision the Commission recommends not adopting. See Explanation of Changes, Comment [2], above.</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.</p>	<p>that the client thinks are too costly or that the lawyer regards as <del>repugnant or</del> imprudent.</p>	
<p>[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.</p>	<p>[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.</p>	<p>Comment [7] is identical to Model Rule 1.2, cmt. [7].</p>
<p>[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.</p>	<p>[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. <a href="#">See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).</a></p>	<p>Comment [8] is based on Model Rule 1.2, cmt. [8] and is identical, except that references to the California Rules of Court on limited scope representation have been added to apprise lawyers of these important provisions for access to justice.</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p><b>Criminal, Fraudulent and Prohibited Transactions</b></p> <p>[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.</p>	<p><b>Criminal, Fraudulent and Prohibited Transactions</b></p> <p>[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. <del>This prohibition or to violate any rule, however law, or ruling of a tribunal. However, this Rule</del> does not <del>preclude the prohibit a</del> lawyer from giving <del>an honest</del> a good faith opinion about the <del>actual</del> foreseeable consequences <del>that appear likely to result from of</del> a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.</p>	<p>Comment [9] is based on Model Rule 1.2, cmt. [9], but adds language primarily to conform to and explain the added scope of proposed paragraph (d).</p> <p>Sentence 1 adds the language of the expanded scope of proposed paragraph (d) by adding "or to violate any rule, law or ruling of a tribunal."</p> <p>Sentence 2 substitutes "prohibit" for "preclude" to clarify that the prohibition is mandatory. It substitutes "good faith" for "honest" to change from the subjective standard to an objective standard. The words "foreseeable consequences of a client's proposed conduct" have been substituted for "actual consequences that appear likely to result from a client's conduct" for the sake of clarification, brevity and to create an objective rather than subjective standard.</p>
<p>[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing</p>	<p>[10] <del>When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. The lawyer is required to avoid assisting the client, for For</del></p>	<p>Although the concepts contained in Model Rule 1.2, cmt. [10] have been retained, the comment has been redrafted to remove ambiguity and to create a brighter line for lawyer guidance and public protection.</p> <p>Sentence 1 of the Model Rule comment has been stricken</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.</p>	<p>example, <del>by drafting a lawyer may not draft or delivering deliver</del> documents that the lawyer knows are fraudulent <del>or by suggesting; nor may the lawyer counsel</del> how the wrongdoing might be concealed. <del>A</del> The lawyer may not continue assisting a client in conduct that the lawyer originally <del>supposed</del> believed was legally proper but <del>then</del> later discovers is criminal <del>or</del> fraudulent. <del>The lawyer must, therefore, withdraw from or the representation violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business &amp; Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client in, including counseling the matter. See Rule 1.16(a) client about possible corrective or remedial action.</del> In some cases, <del>withdrawal alone might be insufficient. It may be necessary for the lawyer</del> lawyer's response is limited to <del>give notice of the fact of withdrawal</del> lawyer's right and, where appropriate, duty to <del>disaffirm any opinion, document, affirmation resign or the like. See withdraw in accordance with Rule 4.1.16.</del></p>	<p>because it provides no guidance (i.e., telling a lawyer that a situation is delicate provides no guidance concerning conduct). Substituted sentence 1 provides guidance by clarifying that a lawyer must comply with subparagraph (d)(1) regardless of the temporal status of the client's conduct.</p> <p>Sentence 2 strikes language creating ambiguity and clarifies that a lawyer may not engage in the conduct described.</p> <p>Sentence 3 substitutes "believed" for "supposed" and "later" for "then" to removed ambiguity and to conform with the proposed black letter rule.</p> <p>Sentence 4 has been added to conform the Comment to statutory duties of confidentiality.</p> <p>Sentence 5 has been added to clarify that the lawyer's duties are consistent with California law.</p> <p>Sentence 6 retains the Model Rule Comment concept of withdrawal but clarifies that the option may be mandatory or permissive, depending upon the circumstances.</p> <p>The last sentence of the Model Rule Comment concerning disaffirmation of "any opinion, document, affirmation or the like," has been deleted to conform to California policies of confidentiality, which do not permit "noisy" withdrawals.</p>
<p>[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.</p>	<p><del>[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.</del></p>	<p>Model Rule 1.2, cmt. [11] has been stricken because it is ambiguous and may imply a relationship with beneficiaries that is not consistent with California law. For example, a lawyer</p>



<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).</p>	<p>[<del>13</del>12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by <del>the</del><a href="#">these</a> Rules <del>of Professional Conduct</del> or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See <a href="#">[Rule 1.4(a)(56)]</a>.</p>	<p>Comment [12] is based on Model Rule 1.2, cmt. [13]. The only changes are to conform to California rules style and and to correct a cross-reference.</p>

## Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(Commission's Proposed Rule – Clean Version)

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
- (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

### Comment

#### *Allocation of Authority between Client and Lawyer*

- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156]. Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule [1.4(c)] for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action

as is impliedly authorized to carry out the representation, provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.

- [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

- [3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.
- [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### *Independence from Client's Views or Activities*

- [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

#### *Agreements Limiting Scope of Representation*

- [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation.

In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

- [7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.
- [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules

applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

#### *Criminal, Fraudulent and Prohibited Transactions*

- [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
- [10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068(e)(1).

When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See [Rule 1.4(a)(6)].

[11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted

## Rule 1.2: Scope of Representation

### 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.)

**Alaska:** Rule 1.2(a) adds: “In a criminal case the lawyer shall abide by the client's decision...whether to take an appeal.”

**California:** Rule 3-210 (Advising the Violation of Law) provides: “A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.” Business & Professions Code 6068(c) requires lawyers to “counselor maintain those actions, proceedings, or defenses only as appear to him or her legal or just” except in defending a criminal case. In addition, §283 of the California Code of Civil Procedure gives a lawyer express statutory authority to bind a client in certain situations.

**Colorado:** Rule 1.2(a) and (c) and the Comment to Rule 1.2 encourage “limited representation” of pro se clients. Rule 1.2(c) provides that a lawyer may limit the scope or objectives, “or both,” of the representation if the client consents after consultation, and a lawyer “may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).” The Comments to Colorado Rules 4.2 and 4.3 provide that a pro se party who is receiving “limited representation” is considered “unrepresented” for purposes of Rules 4.2 and 4.3.

**Connecticut:** Connecticut adds the following sentence to the end of Rule 1.2(a):

Subject to revocation by the client and to the terms of the contract, a client's decision to settle a matter shall be implied where the lawyer is retained to represent the 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.

In addition, Connecticut adds to Rule 1.2(c) that a client's informed consent to limit the scope of a representation “shall not be required when a client cannot be located despite reasonable efforts where the lawyer is retained to represent a client by a third party which is obligated by contract to provide the client with a defense.” An “Amendment Note” explains that these revisions “address the situation where an insured/client cannot be located despite diligent and good faith efforts by both the lawyer and the insurer.”

**District of Columbia:** D.C. Rule 1.2 generally tracks the ABA Model Rule, but adds a paragraph (d) providing that a “government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a)

and (c).” D.C. Rule 1.2(f) -- formerly 1.2(e) -- retains language that the ABA deleted in 2002.

**Florida** adds the words “or reasonably should know” in Rule 1.2(d). In addition, Florida’s Statement of Client’s Rights, which must be provided to every contingent fee client (see Florida Rule 4-1.5(f)) provides that “[y]ou, the client, have the right to make the final decision regarding settlement of a case....”

**Illinois** includes language from DR 7-102(A)-(B) as paragraphs (f)-(h), and adds the following paragraph (based on DR 7-105) as Rule 1.2(e): “A lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional disciplinary actions to obtain an advantage in a civil matter.”

**Massachusetts:** Rule 1.2(a) provides that a lawyer “does not violate this rule... by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.”

**Michigan** deletes Rule 1.2(b) and adds the following sentence to Rule 1.2(a): “In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.” Where the official ABA Comment to Rule 1.2 refers to “criminal or fraudulent conduct,” the Michigan Comment refers to “illegal or fraudulent conduct.” Michigan places the substance of Rule 1.2(b) in the Comment to Rule 1.2.

**Missouri:** In the rules effective July 1, 2008, Rule 1.2(c) permits the unbundling of legal services, providing as follows:

A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer’s limited role. Use of a written notice and consent form substantially similar to that contained in the comment to this Rule 4-1.2 creates the presumptions: (a) the representation is limited to the lawyer and the services described in the form, and (b) the lawyer does not represent the client generally or in any matters other than those identified in the form...”

Missouri also retains Rule 1.2(e) from the 1983 version of ABA Model Rule 1.2. (“When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.”)

**New Hampshire:** Rule 1.2(e) provides as follows:

(e) It is not inconsistent with the lawyer’s duty to seek the lawful objectives of a client through reasonably available means, for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, avoid the use of offensive or dilatory tactics, or treat opposing counsel or an opposing party with civility.

New Hampshire also adds Rule 1.2(f) to govern “limited representation to a client who is or may become involved in” litigation, and adds a detailed sample form for “Consent to Limited Representation” in a Rule 1.2(g).

**New York:** Compare ABA Model Rule 1.2(a) to New York DR 7-101(A)(1), which provides that (with limited exceptions) a lawyer shall not intentionally “[f]ail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules,” and to ECs 7-7 and 7-8, which provide as follows:

EC 7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer or whether to waive the right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise the client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal.

EC 7-8... The lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible position. In the final analysis, however, the lawyer should always remember that the decision whether to forgo legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer....

ABA Model Rule 1.2(b) is the same as the last sentence of New York's EC 2-36 (formerly EC 2-27). New York has no direct counterpart to Rule 1.2(c), but New York's DR 7-101(B)(1) permits a lawyer to (1) "exercise professional judgment to waive or fail to assert a right or position of the client," or (2) "[r]efuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal." Compare Rule 1.2(d) to New York's DR 7-102(A)(7), which provides that a lawyer shall not "[c]ounsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent."

**North Carolina:** Rule 1.2(a)(2) and (3) add language taken from DR 7-101(A)(1) and DR 7-101(B)(1) of the ABA

Model Code of Professional Responsibility, and Rule 1.2(c) omits the ABA requirement that the client give informed consent.

**Ohio:** Rule 1.2(c) provides:

A lawyer who undertakes representation of a client, other than by court appointment, shall confirm in writing, within a reasonable time, the nature and scope of the representation, unless the lawyer has regularly represented the client or the anticipated fee from the representation is \$500.00 or less. A lawyer may limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client in writing. Texas omits ABA Model Rule 1.2(b). See also Texas Rule 1.05 and the annotations following Rule 1.6 below.

**Texas** omits ABA Model Rule 1.2(b). See also Texas Rule 1.05 and the annotations following Rule 1.6 below.

**Virginia** has moved the language of Rule 1.2(b) to Comment 3, and Virginia's Comment 1 requires lawyers to "advise the client about the advantages, disadvantages and availability of dispute resolution processes that might be appropriate in pursuing" the client's objectives. Virginia Rule 1.2(d) provides that a "lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."

**Wisconsin** adds Rule 1.2(e) to clarify the obligations of counsel for an insurer.



# Proposed Rule 1.6 [RPC 3-100; B&P §6068(e)] “Confidentiality of Information”

(Draft #9, 8/30/09)

**Summary:** This amended rule refers to the duty of confidentiality encompassed by B&P §6068(e) and identifies limited exceptions, such as the permissive exception for revealing information to prevent a criminal act likely to result in death or substantial bodily harm.

## Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rule

RPC 3-100

Statute

Bus. & Prof. Code § 6068(e); Evid. Code §§950 et seq.

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

California's policy on client confidentiality has been historically and fundamentally different from the approach taken in the Model Rules. (See the introduction to the Model Rule comparison chart.)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority/Dissenting Position Included on Model Rule Comparison Chart:  Yes  No  
(See the introduction and the explanation of paragraphs (a), (b)(3), (b)(4), and (b)(5) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

See the introduction and the explanation of paragraphs (a), (b)(3), (b)(4), and (b)(5) in the Model Rule comparison chart.

Moderately Controversial – Explanation:

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.6\* Confidentiality of Information

September 2009

(Draft rule to be considered for public comment)

### *INTRODUCTION:*

1. Proposed Rule 1.6 is derived primarily from current California rule 3-100 and is only loosely based on Model Rule 1.6 for two principal reasons: First, there are inherent limitations on a Rule of Professional Conduct that addresses confidentiality because in California, the lawyer's duty of confidentiality is based on Business & Professions Code section 6068(e)(1). Rule 3-100 did not come into existence until July 2004, when the Legislature, as part of an enactment to create the first express exception to the statutory duty of confidentiality, engaged the Supreme Court and State Bar to draft and promulgate a rule of professional conduct to assist in the implementation of the amendment. Second, Model Rule 1.6 and its numerous exceptions are based on policy decisions that are inimical to California's traditional emphasis on client protection.
2. Accordingly, although proposed Rule 1.6 follows the basic Model Rule framework, the Commission recommends a Rule that more closely adheres to current rule 3-100, a rule that affords clients substantially more notice and protection than the Model rule. To the extent the Rule includes exceptions not currently found in rule 3-100, they are exceptions already recognized in California. What follows is a roadmap for consideration of the proposed Rule.

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\* Proposed Rule 1.6, Discussion Draft 9 (8/30/09).

*INTRODUCTION (Continued):*

3. *Genesis of current California rule 3-100 and its continuation in proposed Rule 1.6.* In 2003, the Legislature passed and the Governor signed into law Assembly Bill 1101, which amended Bus. & Prof. Code § 6068(e) to provide for an exception that permits but does not require a lawyer to reveal confidential information to prevent a criminal act likely to result in death or substantial bodily harm. AB1101 also provided in Section 3 of the Act for the appointment of a task force by the State Bar President in consultation with the Supreme Court “to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.” The Legislature also identified in Section 3 a series of issues for the Task Force to address, including whether a lawyer must inform a client or a prospective client about the attorney's ability to reveal the client's or prospective client's confidential information to prevent a criminal act likely to result in death or substantial bodily harm, and whether the lawyer must take steps to dissuade a client from committing a criminal act before revealing the client's confidential information. In conformance with its statutory mandate, the Task Force drafted and proposed rule 3-100, which was adopted by the State Bar and approved by the Supreme Court, effective July 1, 2004. Current rule 3-100 is thus limited in scope to providing guidance to lawyers seeking to conform their conduct to sections 6068(e)(1) and (2). The Commission has, for the most part, retained the black letter and discussion paragraphs of rule 3-100. See paragraphs (a), (b)(1), (c), (d) and (e) of the black letter rule, and Comments [2]-[3C], and [6]-[15], and the Explanation of Changes for each.
4. *Model Rule exceptions to confidentiality are inimical to California's strong policy favoring confidentiality.* Soon after the financial debacles involving Enron, Global Crossing and WorldCom early this decade, the ABA adopted by a close margin controversial exceptions to confidentiality that permit a lawyer to reveal a client's confidential information to prevent or rectify a criminal act reasonably certain to result in financial injury or property loss to a third party. These provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law. In addition, the Model Rule incorporates the concept of “implied authority,” a dangerous catchall that threatens to swallow the duty of confidentiality. Accordingly, the Commission recommends rejection of Model Rule 1.6(b)(2) and (3), as well as the Model Rule's concept that the lawyer has “implied authority” to disclose and use confidential client information, even without the client's consent.

*INTRODUCTION (Continued):*

5. *Minority.* A minority of the Commission objects to proposed Rule 1.6. The minority takes the position that the Legislature carved out in paragraph (e)(2) a narrow exception to (e)(1) that does not affect either the scope of paragraph (e)(1) or any of the exceptions listed in section (b) of the Commission's proposed Rule other than subsection (1). By encompassing the phrase "relating to the representation" in proposed section (a) and paragraphs (b)(2) to (b)(5) of the proposed Rule (due to the overriding wording of paragraph (b), which includes this phrase), the minority maintains that the majority has created a Rule that will lead to confusion and uncertainty as to whether, for example, the exceptions listed in paragraphs (b)(2) to (b)(5) only are operative when they relate "to the representation of a client," whereas in fact the legislature did not limit these exceptions in that regard nor should they be so limited. There is an easy fix that would avoid this confusion: to simply delete the phrase "relating to the representation" in the second sentence of paragraph (a) and in the introductory clause of paragraph (b) of the proposed Rule, and then add that phrase to subparagraph(1) of paragraph (b) before the word "to," so that the sentence reads: "when the information relates to the representation of a client, to prevent a criminal act ...." The minority maintains that subparagraph (b)(1), and only that subparagraph, is the narrow exception that the Legislature created in 6068(e) (2).
6. The majority disagrees that "confidential information relating to the representation" as used in section 6068(e)(2) and proposed Rule 1.6 is a narrow exception that the Legislature carved out of section 6068(e)(1). Section 6068(e)(1) is the basic statement of confidentiality in California. The minority does not dispute that. By defining "confidential information relating to the representation" as everything that is protected by section 6068(e)(1), (see proposed Rule 1.6(a)), there is nothing in section 6068(e)(1) that is not also protected under Rule 1.6. The majority continues to maintain there should be no confusion by the Commission's proposed draft nor a need for the minority's fix.

*INTRODUCTION (Continued):*

7. *Variation in Other Jurisdictions.* Model Rule 1.6 has arguably been subject to more variation among the jurisdictions that have adopted it than any other Model Rule, ranging from states that prohibit disclosures of any information except to prevent death or substantial bodily harm, to those that *permit* disclosure to prevent financial injury, or even some states that mandate disclosure to prevent death or substantial bodily harm, or even to prevent a criminal act likely to result in financial injury. See “Selected State Variations,” Model Rule 1.6, from Gillers, Simon & Perlman, *Regulation of Lawyers: Statutes and Standards* (2009), attached.

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).</p>	<p>(a) A lawyer shall not reveal information <del>relating to the representation of a client</del><u>protected from disclosure by Business and Professions Code section 6068(e)(1)</u> unless the client gives informed consent, <del>the disclosure is impliedly authorized in order to carry out the representation</del> or the disclosure is permitted by paragraph (b). <u>The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information relating to the representation" in this Rule.</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Paragraph (a) is based on both Model Rule 1.0(a) and Cal. rule 3-100(A).</p> <p>The first sentence is taken from Cal. rule 3-100(A), revised to conform to the syntax and structure of the Model Rule.</p> <p>The Model Rule's concept of "implied authorization" has been stricken. The Commission recommends its rejection because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality.</p> <p>The second sentence has been added because of an anomaly in the language of Bus. &amp; Prof. Code § 6068(e), from which rule 3-100 is derived, California being the only jurisdiction in which a lawyer's duty of confidentiality is set forth in a statute. Section 6068(e)(1) provides that it is the duty of every lawyer: "(e)(1) To maintain inviolate the <i>confidence</i>, and at every peril to himself or herself to preserve the <i>secrets</i>, of his or her client."</p> <p>However, subparagraph (2) of section 6068(e) provides an exception to the duty of confidentiality that permits a lawyer to "reveal <i>confidential information relating to the representation</i> of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." (Emphasis added). Although section</p>

\* Proposed Rule, Discussion Draft 9 (8/30/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>6068(e)(2) refers to “confidential information relating to the representation,” it has no counterpart in section 6068(e)(1). To resolve this anomaly, the Commission recommend that proposed Rule 1.6 expressly link the two concepts. “Confidential information relating to the representation” is then defined in Comment [3]. See below.</p> <p><u>Minority.</u> A substantial minority of the Commission objects to the use of the phrase “relating to the representation” as too limiting in its protection of the client’s information. See Introduction.</p>
<p>(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:</p>	<p>(b) A lawyer may, <u>but is not required to,</u> reveal <u>confidential</u> information relating to the representation of a client to the extent <u>that the lawyer reasonably believes the disclosure is</u> necessary:</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>The introductory clause of paragraph (b) is also based on both the introductory clause of Model Rule 1.6(b) and the first part of current rule 3-100(B). Because the duty of confidentiality is in a statute, section 6068(e)(1), any exceptions must also be in the statute, in this case, section 6068(e)(2). The language of current rule 3-100(B) copies section 6068(e)(2) verbatim, as does the introductory clause of proposed paragraph (b). The remainder of current rule 3-100(B) is found in subparagraph (b)(1).</p>
<p>(1) to prevent reasonably certain death or substantial bodily harm;</p>	<p>(1) to prevent <u>a criminal act that the lawyer reasonably <del>certain</del> believes is likely to result in</u> death <u>of, or</u> substantial bodily harm <u>to, an individual, as provided in paragraph (c);</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>See Explanation of Changes, introductory clause of proposed Rule 1.6(b), above. The language included in subparagraph (1) is taken verbatim from current rule 3-100, with the only change being the substitution of “lawyer” for “member.”</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;</p>	<p><del>(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> The Commission recommends rejection of Model Rule 1.6(b)(2) and (b)(3), two exceptions to confidentiality that the ABA adopted in 2003. Both sections, which would permit a lawyer to disclose client information relating to the representation to prevent or rectify fraud, are inimical to California's strong policy on lawyer-client confidentiality and, in the view of the Commission, misguided attempts to protect the public that ultimately are more harmful to the public.</p>
<p>(3) 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 a crime or fraud in furtherance of which the client has used the lawyer's services;</p>	<p><del>(3) 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 a crime or fraud in furtherance of which the client has used the lawyer's services;</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> See Explanation of Changes to Model Rule 1.6(b)(2).</p>
<p>(4) to secure legal advice about the lawyer's compliance with these Rules;</p>	<p><del>(4)</del> to secure legal advice about the lawyer's compliance with <del>these Rules</del> <u>the lawyer's professional obligations</u>;</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Proposed Rule 1.6(b)(2) is based on Model Rule 1.6(b)(4). The substitution of "the lawyer's professional obligations" for "these Rules" recognizes that, in California, a lawyer's duties to a client derive not only from the Rules of Professional Conduct, but also from statutes and case law.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or</p>	<p>(53) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; <del>relating to establish a defense to a criminal charge or civil claim against an issue of breach, by the lawyer based upon conduct in which by the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a duty arising out of the lawyer-client relationship;</del> or</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Proposed Rule 1.6(b)(3) is based on Model Rule 1.6(b)(5), which has been modified to track the language of Cal. Evidence Code § 958, which provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."</p> <p>The exception in the Evidence Code to the lawyer-client privilege for a breach of duty arising from the lawyer-client relationship is substantially narrower than the corresponding exception in Model Rule 1.6(b)(5), which would permit the lawyer to reveal confidential information not only in controversies between the lawyer and client, but also between the lawyer and a third person. The breadth of Model Rule 1.6(b)(5) runs counter to California confidentiality policy and the Commission recommends its rejection.</p> <p><u>Minority.</u> A minority of the Commission opposes the inclusion of paragraph (b)(3). Proposed paragraph (b)(3) is based on an exception to the lawyer-client privilege found in Evidence Code section 958. However, that exception applies only when a court makes that determination. The minority maintains that paragraph (b)(3) – uniquely among all of the statutory privilege exceptions – would strip the client of that impartial determination by allowing the lawyer to determine when to disclose information the lawyer is required to maintain under section 6068(e)(1).</p>

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<p>(6) to comply with other law or a court order.</p>	<p>(64) to comply with <del>other law or</del> a court order.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Although the Commission recommends adoption of that part of Model Rule 1.6(b)(6) that permits compliance with a court order, it does not recommend adoption of the “other law” part of that provision. That phrase is too indeterminate to provide guidance to lawyers about when they might be permitted to reveal confidential client information and risks the unjustified disclosure such information.</p> <p><u>Minority.</u> A minority of the Commission objects to the inclusion of subparagraph (b)(4) in the Rule. The minority believes a lawyer’s duty is to resist the court order (per Section 6068(e)(1)) “at every peril to himself or herself.”) A lawyer may not acquiesce in a court order). Rather, the lawyer is required to resist the order. That is what <i>People v. Kor</i>, cited at page 24 of the spreadsheet, says. “At every peril” does not merely require the lawyer to assert claims that the order is not authorized by other law or that the information is protected from disclosure. It requires the lawyer not to disclose, on pain of contempt. That duty is not cast aside as lightly as the proposed rule and Comment 18 suggest.</p>
	<p>(5) <a href="#">to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).</a></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>The Commission recommends adoption of proposed paragraph (b)(4), which refers lawyers to proposed Rule 1.14, which would permit a lawyer to reveal confidential information to the extent necessary to protect the interests of a client who has “significantly diminished capacity” and is “at risk of substantial physical, financial or other harm unless action is taken.”</p> <p><u>Minority.</u> A minority of the Commission objects to proposed Rule 1.14, and thus to the inclusion of subparagraph (b)(5) in the Rule.</p>

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	<p>(c) <u>Further obligations under paragraph (b)(1). Before revealing confidential information relating to the representation in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Proposed Rule 1.6(c) carries forward current rule 3-100(C), the only changes made to conform the rule to California rule style and substitute "lawyer" for "member."</p>
	<p>(1) <u>make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> See Explanation of changes for introductory clause to paragraph (c).</p>
	<p>(2) <u>inform the client, at an appropriate time, of the lawyer's ability or decision to reveal confidential information relating to the representation as provided in paragraph (b)(1).</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> See Explanation of changes for introductory clause to paragraph (c).</p>

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	<p>(d) <a href="#">In revealing confidential information relating to the representation as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the member at the time of the disclosure.</a></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Proposed Rule 1.6(d) carries forward current rule 3-100(D). In addition to including with paragraph (d)'s scope the additional exceptions in the proposed Rule (i.e., subparagraphs (b)(2), (b)(3) and (b)(4)), the only changes made to conform the rule to California rule style and substitute "lawyer" for "member."</p>
	<p>(e) <a href="#">A lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule.</a></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Proposed Rule 1.6(e) carries forward current rule 3-100(E), the only changes made to conform the rule to California rule style and substitute "lawyer" for "member."</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.</p>	<p>[1][M1] This Rule governs the disclosure by a lawyer of <u>confidential</u> information relating to the representation of a client during the lawyer's representation of the client. See [Rule 1.18] for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule [1.9(c)(2)] for the lawyer's duty not to reveal <u>confidential</u> information relating to the lawyer's prior representation of a former client, and [Rules <del>1.8(b)</del><u>1.8.2</u> and 1.9(c)(1)] for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [1] is based on MR 1.6, cmt. [2], the only changes being to conform the language to the defined term, "confidential information relating to the representation," that appears in Bus. &amp; Prof. Code § 6068(e)(2), (see Explanation of Changes for paragraph (a)), and to substitute "1.8.2" for "1.8(b)," which conforms the cross-reference to the Commission's numbering convention for the 1.8 series of rules.</p>
<p>[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to</p>	<p>[2][C1] <u>Policies furthered by the duty of confidentiality.</u> <del>A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0a lawyer's obligations under Business and Professions Code section 6068(e) for the definition(1), which provides</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [2] is based on current California rule 3-100, Discussion ¶. 1, which in turn is based on Model Rule 1.6, cmt. [1]. The changes made during the original drafting of rule 3-100 were intended to emphasize California's strong policy of protecting client confidentiality.</p>

<sup>1</sup> **Drafters' Note:** Rows that are not shaded contain comments that are derived from the comments to Model Rule 1.6. Rows that are shaded contain comments derived from the Discussion paragraphs to current Cal. rule 3-100. Therefore, the red-line comparisons in the non-shaded rows are to the Model Rule comment; the red-line comparisons in the shaded rows are to the Discussion paragraph from current rule 3-100.

However, Comment [2] carries forward Comment [1] to current rule 3-100, which in turn is based closely on MR 1.6, cmt. [2]. Therefore, redline comparisons for proposed Comment [2] are to BOTH the Model Rule comment and the California rule Discussion paragraph.

<sup>2</sup> Proposed Rule, Discussion Draft 9 (8/30/09).

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.</p>	<p><del>it is a duty of informed consent</del> <u>it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. This"</u> <del>A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information</del> <u>contributes to the trust that is the hallmark of the client-lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter</u> <del>detrimental subjects.</del> <u>The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal confidential information protected by Business and Professions Code section 6068(e)(1). (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)</u></p>	<p>In addition, the Commission has substituted "lawyer-client" for "client-lawyer" throughout the proposed Rules to conform the term to the usage in the Business &amp; Professions and Evidence Codes.</p> <p>Finally, the substitution of "detrimental subjects" for "legally damaging subject matter" conforms the language in this Comment to the definition of "confidential information relating to the representation" that appears in Comment [3], which in turn is based on long-standing California authority concerning the scope of the terms "confidence" and "secrets" in Bus. &amp; Prof. Code § 6068(e).</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100</b> <b>Confidentiality of Information</b> <b>Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule</b> <b>Rule 1.6 Confidentiality of Information</b> <b>Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>[1] <i>Duty of confidentiality.</i> Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)</p>	<p>[2][C1] <i>Duty Policies furthered by the duty of confidentiality.</i> Paragraph (Aa) relates to a <del>member's</del>lawyer's obligations under Business and Professions Code section 6068, <del>subdivision</del>(e)(1), which provides it is a duty of a <del>member</del>lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A <del>member's</del>lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In <del>Rere</del> Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the <del>client-lawyer-client</del> relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or <del>legally damaging subject matter</del>detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (Aa) thus recognizes a fundamental principle in the <del>client-lawyer-client</del> relationship, that, in the absence of the client's informed consent, a <del>member</del>lawyer must not reveal <del>confidential</del> information <del>relating to the</del></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> See Explanation of Changes in previous row.</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
	<p><del>representation</del>protected by Business and Professions Code section 6068(e)(1). (See, e.g., <i>Commercial Standard Title Co. v. Superior Court</i> (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)</p>	
<p>[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.</p>	<p><del>[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>The Commission has substituted new proposed Comments [3] to [3C], using as the starting point California rule 3-100, Discussion ¶. 2, which in turn is based on Model Rule 1.6, cmt. [3]. See Explanation of Changes for Comment [3], below.</p>
<p>[2] <i>Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.</i> The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters</p>	<p>[3] [ALT-C2] <del>Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality. The principle of client-lawyer confidentiality applies</del> <u>Confidential Information Relating to the Representation. As used in this</u></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>As noted, the Commission has substituted new proposed Comments [3] to [3C], using as the starting point California rule 3-100, Discussion ¶. 2, which in turn is based loosely on Model Rule 1.6, cmt. [3].</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.</p>	<p><u>Rule, "confidential information relating to the representation" consists of information gained by virtue of the representation of a client</u>, whatever its source, <del>and encompasses matters communicated in confidence by the client, and therefore</del> <u>that (a) is protected by the attorney-lawyer-client privilege, matters protected by (b) is likely to be embarrassing or detrimental to the work-product doctrine if disclosed, and matters protected under ethical standards or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality,</u> <del>all as established in law, rule and policy is broader than lawyer-client privilege.</del> (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].) <del>The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.</del></p>	<p>The purpose of Comments [3] to [3C] is to delimit the scope of a lawyer's duty of confidentiality, as well as provide a definition for "confidential information relating to the representation," a term the ABA has chosen not to define in the Model Rules. Because of California's strong policy of protecting client confidentiality and the anomaly in the language between sections (e)(1) and (e)(2) of Bus. &amp; Prof. Code § 6068(e), (see Explanation of Changes for proposed paragraph (a)), the Commission views the expansion of rule 3-100, Discussion ¶. 2, as critical to providing guidance to lawyers in this important area and protection to clients.</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100</b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule</b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
	<p><a href="#">[3A] <i>Scope of the Lawyer-Client Privilege.</i> The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.</a></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b>  See Explanation of Changes for proposed Comment [3].</p>
	<p><a href="#">[3B] <i>Scope of the Duty of Confidentiality.</i> A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's confidential information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Confidential information relating to the representation is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the</a></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b>  See Explanation of Changes for proposed Comment [3].</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
	<p><a href="#">lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client’s representative, even if a lawyer-client relationship does not result from the consultation. (See Rule 1.18.) Thus, a lawyer may not reveal confidential information relating to the representation except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act. See comment [M9].</a></p>	
	<p><a href="#">[3C] Relationship of Confidentiality to Lawyer Work Product. Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. However, “confidential information relating to the representation” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.</a></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> See Explanation of Changes for proposed Comment [3].</p>
<p>[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third</p>	<p>[4] [M4] Paragraph (a) prohibits a lawyer from revealing <a href="#">confidential</a> information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Comment [4] is identical to Model Rule 1.6, cmt. [4], except for the substitution of “confidential information relating to the representation,” a defined term, for the Model Rule’s “information relating to the representation.”</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.</p>	<p>by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.</p>	
<p><b>Authorized Disclosure</b></p> <p>[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.</p>	<p><b>Authorized Disclosure</b></p> <p>[5] <del>[M5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.</del> Lawyers in a firm may, in the course of the firm's practice, disclose to each other <u>confidential</u> information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [5] is based on Model Rule 1.6, cmt. [5]. The first two sentences of the Model Rule comment have been deleted because the Commission has rejected the ABA's theory of implied authority with respect to confidentiality because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality. See Explanation of Changes for proposed paragraph (a).</p>
<p><b>Disclosure Adverse to Client</b></p> <p>[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical</p>	<p><b>Disclosure Adverse to Client <u>as Permitted by Paragraph (b)(1)</u></b></p> <p><del>[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>In place of Model Rule 1.6, cmt. [1], which is the Model Rule comment intended to provide guidance to lawyers with respect to Model Rule 1.6(b)(1), the Commission has substituted proposed Comments [6] to [15], which are carried over largely unchanged from current rule 3-100, Discussion ¶¶. 3 to 12. See Explanation of Changes for proposed Comment [6].</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.</p>	<p><del>recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.</del></p>	
<p>[3] <i>Narrow exception to duty of confidentiality under this Rule.</i> Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business &amp; Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates</p>	<p>[6] [C3] <i>Narrow exception to duty of confidentiality under <del>this Rule</del> paragraph (b)(1).</i> Notwithstanding the important public policies promoted by <del>lawyers adhering to the core</del> duty of confidentiality, the overriding value of life permits <u>certain</u> disclosures otherwise prohibited under Business &amp; Professions Code section 6068(e);</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> As noted, the Commission has carried forward Discussion paragraphs 3 to 12 of current rule 3-100 largely unchanged. Assembly Bill 1101, which amended Bus. &amp; Prof. Code § 6068(e) to provide for an exception that would permit a lawyer to reveal confidential information to prevent a criminal act likely to result in death or substantial bodily harm, also provided in Section 3<sup>3</sup> for</p>

<sup>3</sup> In its entirety, section 3 of AB 1101 provided:

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100</b> <b>Confidentiality of Information</b> <b>Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule</b> <b>Rule 1.6 Confidentiality of Information</b> <b>Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life</p>	<p><del>subdivision</del>(1). Paragraph <del>(B)</del>, <del>which</del>(1) restates Business and Professions Code section 6068, <del>subdivision</del>(e)(2), <del>identifies</del><u>which narrowly permits a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary</u><del>to prevent a criminal act that the member reasonably believes is likely</del><u>disclose confidential information relating to result in the death of, or substantial bodily harm to an individual</u><del>representation even without client consent</del>. Evidence Code section 956.5, which relates to the evidentiary <del>attorney</del><u>lawyer</u>-client privilege, sets forth a similar express exception.</p>	<p>the appointment of a task force "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act."</p> <p>The legislature also identified in Section 3 a series of issues for the Task Force to address:</p> <p>"(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death</p>

(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

(c) Members of the task force shall include the following:

(1) Civil and criminal law practitioners, including criminal defense practitioners.

(2) Representatives from the judicial, executive, and legislative branches.

(3) Representatives from the State Bar Commission for the Revision of the Rules of Professional Conduct and from the State Bar Committee on Professional Responsibility and Conduct.

(4) Public members.

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.</p>	<p>Although a <a href="#">memberlawyer</a> is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.</p>	<p>of, or substantial bodily harm to, an individual.</p> <p>(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.</p> <p>(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.</p> <p>(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.”</p> <p>After reviewing rule 3-100, Discussion ¶¶. 3-12, the Commission determined first, that the Model Rule comment inadequately addressed the issues the Legislature had identified; (2) did not provide the guidance to lawyers found in the rule 3-100 Discussion; and (3) that few changes, other than those to conform to California rule style and numbering, were warranted. Consequently, the Discussion to current rule 3-100 remains largely intact.</p>
<p>[4] <i>Member not subject to discipline for revealing confidential information as permitted under this Rule.</i> Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to</p>	<p>[7][C4] <i>MemberLawyer not subject to discipline for revealing confidential information as permitted under <a href="#">this Rule paragraph (b)(1)</a>.</i> Rule <del>3-100, which restates Business and Professions Code section 6068, subdivision 1.6(eb)(21)</del>; reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a <a href="#">memberlawyer</a> reasonably believes is likely to result</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comment [6].</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>an individual. A member who reveals information as permitted under this rule is not subject to discipline.</p>	<p>in death or substantial bodily harm to an individual. A <del>member</del>lawyer who reveals confidential information as permitted under <del>this rule</del>paragraph (b)(1) is not subject to discipline.</p>	
<p>[5] <i>No duty to reveal confidential information.</i> Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.</p>	<p>[8] [C5] <i>No duty to reveal confidential information.</i> Neither Business and Professions Code section 6068, <del>subdivision</del>(e)(2) nor <del>this rule</del>paragraph (b)(1) imposes an affirmative obligation on a <del>member</del>lawyer to reveal confidential information in order to prevent harm. <del>(See rule 1-100(A).)</del>A member lawyer may decide not to reveal confidential information. Whether a <del>member</del>lawyer chooses to reveal confidential information as permitted under this rule is a matter for the individual <del>member</del>lawyer to decide, based on all the facts and circumstances, such as those discussed in <del>paragraph</del>comment [C6] of this <del>discussion</del>Rule.</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> See Explanation of Changes for proposed Comment [6].</p>
<p>[6] <i>Deciding to reveal confidential information as permitted under paragraph (B).</i> Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose</p>	<p>[9] [C6] <i>Deciding to reveal confidential information as permitted under paragraph (B)(1).</i> Disclosure permitted under paragraph (B)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing confidential information as permitted under paragraph (B)(1), the <del>member</del>lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> See Explanation of Changes for proposed Comment [6].</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>confidential information are the following:</p> <p>(1) the amount of time that the member has to make a decision about disclosure;</p> <p>(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;</p> <p>(3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;</p> <p>(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;</p> <p>(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and</p> <p>(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.</p>	<p>considered in determining whether to disclose confidential information are the following:</p> <p>(1) the amount of time that the <del>member</del><u>lawyer</u> has to make a decision about disclosure;</p> <p>(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;</p> <p>(3) whether the <del>member</del><u>lawyer</u> believes the <del>member's</del><u>lawyer's</u> efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;</p> <p>(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the <del>member</del><u>lawyer</u>;</p> <p>(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the <del>member</del><u>lawyer</u>; and</p>	

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.</p>	<p>(6) the nature and extent of <u>confidential</u> information that must be disclosed to prevent the criminal act or threatened harm.</p> <p>A <u>memberlawyer</u> may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a <u>memberlawyer</u> may disclose the <u>confidential</u> information without waiting until immediately before the harm is likely to occur.</p>	
<p>[7] <i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i> Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for</p>	<p>[10][C7] <i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i> <del>Subparagraph</del>Paragraph (C)(1) provides that, before a <u>memberlawyer</u> may reveal confidential information, the <u>memberlawyer</u> must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, <u>including persuading the client to take action to prevent a third person from committing or continuing a criminal act.</u> If necessary, <u>the client may be persuaded to</u> do both. The interests protected by such counseling <del>is</del><u>are</u> the client's <del>interest</del><u>interests</u> in limiting disclosure of confidential information and in taking responsible action to deal</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comment [6].</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.</p>	<p>with situations attributable to the client. If a client, whether in response to the <del>member's</del>lawyer's counseling or otherwise, takes corrective action – such as by ceasing the <u>client's own criminal act or by dissuading a third person from committing or continuing a</u> criminal act before harm is caused – the option for permissive disclosure by the <del>member</del>lawyer would cease <del>as</del>because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the <del>member</del>lawyer who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the <del>member</del>lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the <del>member</del>lawyer should, if reasonable under the circumstances, first advise the client of the <del>member's</del>lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the <del>member</del>lawyer should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the <del>member</del>lawyer has concluded that paragraph (B)(1) does not permit the <del>member</del>lawyer to reveal confidential information, the <del>member</del>lawyer nevertheless is permitted to counsel the client as to why it <del>may</del>might be in the client's best interest to consent to the <del>attorney's</del>lawyer's disclosure of that information.</p>	

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>[9] <i>Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).</i> A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:</p> <p>(1) whether the client is an experienced user of legal services;</p> <p>(2) the frequency of the member's contact</p>	<p>[11][C9] <i>Informing client of <del>member's</del>lawyer's ability or decision to reveal confidential information under <del>subparagraph</del>paragraph (C)(2).</i> A <del>member</del>lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule <del>3-500</del>1.4; Business and Professions Code, section 6068, <del>subdivision</del>(m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the <del>member's</del>lawyer's ability or decision to reveal confidential information under paragraph (B)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the <del>member</del>lawyer or the <del>member's</del>lawyer's family or associates. Therefore, paragraph (C)(2) requires a <del>member</del>lawyer to inform the client of the <del>member's</del>lawyer's ability or decision to reveal confidential information as provided in paragraph (B)(1) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the <del>member</del>lawyer to inform the client may vary depending upon the circumstances. (See <del>paragraph comment [C10] of this discussion.</del>) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:</p> <p>(1) whether the client is an experienced user of legal services;</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comment [6].</p> <p>Note also that the Commission has reversed the order of current rule 3-100, Discussion ¶¶. 8 and 9 to better track the order of the Rule paragraphs.</p>

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<p>with the client;</p> <p>(3) the nature and length of the professional relationship with the client;</p> <p>(4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;</p> <p>(5) the likelihood that the client's matter will involve information within paragraph (B);</p> <p>(6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and</p> <p>(7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.</p>	<p>(2) the frequency of the <del>member's</del>lawyer's contact with the client;</p> <p>(3) the nature and length of the professional relationship with the client;</p> <p>(4) whether the <del>member</del>lawyer and client have discussed the <del>member's</del>lawyer's duty of confidentiality or any exceptions to that duty;</p> <p>(5) the likelihood that the client's matter will involve information within paragraph (B)(1);</p> <p>(6) the <del>member's</del>lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and</p> <p>(7) the <del>member's</del>lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.</p>	
<p>[8] <i>Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.</i> Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential</p>	<p>[12] [C8] <i>Disclosure of confidential information as permitted by paragraph (b)(1) must be no more than is reasonably necessary to prevent the criminal act.</i> Paragraph (d) requires that disclosure of confidential information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comments [6] and [11].</p>

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<p>information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.</p>	<p>prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.</p>	
<p>[10] <i>Avoiding a chilling effect on the lawyer-client relationship.</i> The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client</p>	<p>[13] [C10] <i>Avoiding a chilling effect on the lawyer-client relationship.</i> The foregoing flexible approach to <del>the member's</del> <u>a lawyer</u> informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See <del>Discussion paragraph</del> <u>comment [C1]</u>.) To avoid that chilling effect, one <del>member</del> <u>lawyer</u> may choose to inform the client of the <del>member's</del> <u>lawyer's</u> ability to reveal <u>confidential</u> information as early as the outset of the representation, while another <del>member</del> <u>lawyer</u> may choose to inform a client only at a point when that client has imparted information that <del>may fall under</del> <u>comes within</u> paragraph (B)(1), or even choose</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b>  See Explanation of Changes for proposed Comment [6].</p>

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<p>as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.</p>	<p>not to inform a client until <del>such time as</del> the <del>member</del>lawyer attempts to counsel the client <del>as contemplated in Discussion paragraph</del>under <del>Comment [C]7</del>. In each situation, the <del>member</del>lawyer will have <del>discharged properly</del>satisfied the <del>requirement lawyer's obligation</del> under <del>subparagraph</del>paragraph <del>(C)2</del>(2), and will not be subject to discipline.</p>	
<p>[11] <i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i> When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.</p>	<p>[14] [C]11] <i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i> When a <del>member</del>lawyer has revealed confidential information under paragraph <del>(B)</del>(1), in all but extraordinary cases the relationship between <del>member</del>lawyer and client <del>that is based in mutual trust and confidence</del> will have deteriorated so as to make the <del>member's</del>lawyer's representation of the client impossible. Therefore, <del>when</del> the <del>member</del>relationship <del>has deteriorated because of the lawyer's disclosure,</del> <del>the lawyer</del> is required to seek to withdraw from the representation (see <del>rule</del>Rule 1.16 [3-700(B)]), unless the <del>member is able to obtain the client's</del>client has <del>given his or her</del> informed consent to the <del>member's</del>lawyer's continued representation. The <del>member</del>lawyer normally must inform the client of the fact of the <del>member's</del>lawyer's disclosure <del>unless</del>. <del>If</del> the <del>member</del>lawyer has a compelling <del>interest in</del>reason for not informing the client, such as to protect the <del>member</del>lawyer, the <del>member's</del>lawyer's family or a third person from the risk of death or substantial bodily harm, <del>the lawyer must withdraw from the representation.</del> [See Rule 1.16].</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> See Explanation of Changes for proposed Comment [6].</p>

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<p>[12] <i>Other consequences of the member's disclosure.</i> Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).</p>	<p>[15] [C12] <i>Other consequences of the member's lawyer's disclosure.</i> Depending upon the circumstances of a member's lawyer's disclosure of confidential information, there may be other important issues that a member lawyer must address. For example, if a member will be called as a witness lawyer who is likely to testify in the client's matter, then rule 5-210 should be considered involving the client must comply with Rule [3.7]. Similarly, the member should lawyer must also consider his or her duties the lawyer's duty of loyalty competence (Rule 1.1) and competency whether the lawyer has a conflict of interest in continuing to represent the client (rule 3-110 Rule 1.7(d)).</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> See Explanation of Changes for proposed Comment [6].</p>
<p>[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the</p>	<p><del>[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Because the Commission has recommended that Model Rule 1.6(b)(2) be stricken because it is inimical to California's strong policy on lawyer-client confidentiality, the Commission also recommends deletion of Model Rule 1.6, cmt. [7]. See Explanation of Changes for Model Rule 1.6(b)(2).</p>

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<p>lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.</p>	<p><del>lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.</del></p>	
<p>[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.</p>	<p><del>[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.</del></p>	<p><b><u>COMPARISON TO MODEL RULE 1.6</u></b> Because the Commission has recommended that Model Rule 1.6(b)(3) be stricken because it is inimical to California's strong policy on lawyer-client confidentiality, the Commission also recommends deletion of Model Rule 1.6, cmt. [8]. See Explanation of Changes for Model Rule 1.6(b)(2).</p>

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<p>[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.</p>	<p><u><a href="#">Disclosure as Permitted by Paragraphs (b)(2) through (b)(4).</a></u></p> <p><del>[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>The Commission recommends that Model Rule 1.6, cmt. [9] be stricken for the same reasons it has recommended the deletion of the first two sentences of Model Rule 1.6, cmt. [5]. See Explanation of Changes for proposed Comment [5].</p>
<p>[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does</p>	<p><u><a href="#">[16] [M10] Where</a></u> if a legal claim <u><a href="#">by a client or disciplinary charge</a></u> the client's representative alleges <u><a href="#">complicity of a breach by</a></u> the lawyer <u><a href="#">in a client's conduct involving representation of the client or other a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges</a></u> misconduct of the lawyer involving representation of the client, <u><a href="#">paragraph (b)(3) permits</a></u> the lawyer <del>may</del>to respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving <del>the</del> conduct or representation of a former client. <del>Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [16] is based on Model Rule 1.6, cmt. [10]. The Model Rule comment has been revised to conform the comment to the more limited scope of proposed paragraph (b)(3), which is based on the limited exception in Evidence Code § 958. See Explanation of Changes for proposed paragraph (b)(3).</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.</p>	<p><del>third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.</del></p>	
<p>[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.</p>	<p>[17] [M11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the <del>rule</del>Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b>  Comment [17] is identical to Model Rule 1.6, cmt. [11], except that "(b)(3)" has been substituted for the cross reference to "(b)(5)," and "Rule" substituted for "rule" to conform to California rule style.</p>
<p>[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.</p>	<p><del>[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b>  Because the Commission has recommended striking that part of Model Rule 1.6(b)(6) that permits disclosure if permitted by other law, see Explanation of Changes for paragraph (b)(6), it recommends the deletion of MR 1.6, cmt. [12].</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100</b> <b>Confidentiality of Information</b> <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b>Commission’s Proposed Rule</b> <b>Rule 1.6 Confidentiality of Information</b> <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court’s order.</p>	<p>[18] [M13] A lawyer may be ordered to reveal <u>confidential</u> information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer <del>should</del><u>must</u> assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the <del>attorney</del><u>lawyer</u>-client privilege or other applicable law. <u>See, e.g., People v. Kor (1954) 129 Cal. App. 2d 436.</u> In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(<del>6</del><u>4</u>) permits the lawyer to comply with the court’s order.</p>	<p><b><u>COMPARISON TO MODEL RULE 1.6</u></b></p> <p>Comment [18] is based on Model Rule 1.6, cmt. [13]. The phrase “must” has been substituted for “should” to emphasize the lawyer’s duty under this Rule to protect the client’s confidential information.</p> <p>The citation to People v. Kor, a seminal California Supreme Court case on the lawyer’s duty of confidentiality to the client, has been added to provided guidance.</p>
<p>[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a</p>	<p>[19] [M14] Paragraph (<del>b</del><u>d</u>) permits disclosure <u>as permitted by paragraphs (b)(2) through (b)(5)</u> only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in</p>	<p><b><u>COMPARISON TO MODEL RULE 1.6</u></b></p> <p>Comment [19] is based on Model Rule 1.6, cmt. [14]. The clause, “as permitted by paragraphs (b)(2) through (b)(5)” has been added to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [12], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100</b> <b>Confidentiality of Information</b> <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule</b> <b>Rule 1.6 Confidentiality of Information</b> <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.</p>	<p>connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the <u>confidential</u> information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.</p>	
<p>[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).</p>	<p>[20] [M15] Paragraph (b) permits but does not require the disclosure of <u>confidential</u> information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). <del>In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [20] is based on Model Rule 1.6, cmt. [15]. The phrase, "(b)(2) through (b)(5)" has been substituted for "(b)(1) through (b)(6)" to conform to the structure of the proposed Rule and to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [8], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.</p> <p>The remainder of the Model Rule comment has been deleted because the points made are better presented in the Discussion paragraphs of current rule 3-100 that have been carried forward.</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p><b>Acting Competently to Preserve Confidentiality</b></p> <p>[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.</p>	<p><b>Acting Competently to Preserve Confidentiality</b></p> <p>[21] [M16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.</p>	<p><b><u>COMPARISON TO MODEL RULE 1.6</u></b></p> <p>Comment [21] is identical to Model Rule 1.6, cmt. [16].</p>
<p>[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.</p>	<p>[22] [M17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.</p>	<p><b><u>COMPARISON TO MODEL RULE 1.6</u></b></p> <p>Comment [22] is identical to Model Rule 1.6, cmt. [17].</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100</b> <b>Confidentiality of Information</b> <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule</b> <b>Rule 1.6 Confidentiality of Information</b> <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[13] <i>Other exceptions to confidentiality under California law.</i> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)</p>	<p><del>[13] <i>Other exceptions to confidentiality under California law.</i> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)</del></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> Discussion ¶. [13] to current rule 3-100 has been deleted as superfluous, as proposed Rule 1.6 is a comprehensive statement of the exceptions to confidentiality in California.</p>
<p><b>Former Client</b></p> <p>[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.</p>	<p><b>Former Client</b></p> <p>[22] [M18] The duty of confidentiality continues after the <del>client</del>-lawyer-<u>client</u> relationship has terminated. See [Rule 1.9(c)(2)]. See [Rule 1.9(c)(1)] for the prohibition against using such information to the [<u>disadvantage</u>] of the former client.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Comment [22] is nearly identical to Model Rule 1.6, cmt. [18], the only change being to change "client-lawyer" to "lawyer-client" to conform with the convention used in the Bus. &amp; Prof. and Evid. Codes.</p>

## Rule 1.6 Confidentiality of Information

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information relating to the representation” in this Rule.
- (b) A lawyer may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the lawyer reasonably believes the disclosure is necessary:
  - (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);
  - (2) to secure legal advice about the lawyer’s compliance with the lawyer’s professional obligations;
  - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;
  - (4) to comply with a court order; or
  - (5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).
- (c) *Further obligations under paragraph (b)(1).* Before revealing confidential information relating to the representation in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:
  - (1) make a good faith effort to persuade the client:
    - (i) not to commit or to continue the criminal act or
    - (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the lawyer’s ability or decision to reveal confidential information relating to the representation as provided in paragraph (b)(1).
- (d) In revealing confidential information relating to the representation as permitted by paragraph (b), the lawyer’s disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the member at the time of the disclosure.

- (e) A lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule.

### Comment

- [1] This Rule governs the disclosure by a lawyer of confidential information relating to the representation of a client during the lawyer's representation of the client. See [Rule 1.18] for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule [1.9(c)(2)] for the lawyer's duty not to reveal confidential information relating to the lawyer's prior representation of a former client, and [Rules 1.8.2 and 1.9(c)(1)] for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

#### *Policies Furthered by the Duty of Confidentiality*

- [2] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to

communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal confidential information protected by Business & Professions Code section 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

#### *Confidential Information Relating to the Representation.*

- [3] As used in this Rule, "confidential information relating to the representation" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality is broader than lawyer-client privilege. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].)

### *Scope of the Lawyer-Client Privilege*

- [4] The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.

### *Scope of the Duty of Confidentiality*

- [5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's confidential information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Confidential information relating to the representation is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is

protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. (See Rule 1.18.) Thus, a lawyer may not reveal confidential information relating to the representation except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

### *Relationship of Confidentiality to Lawyer Work Product*

- [6] Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. However, "confidential information relating to the representation" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
- [7] Paragraph (a) prohibits a lawyer from revealing confidential information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

### *Authorized Disclosure*

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other confidential information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

### *Disclosure Adverse to Client as Permitted by Paragraph (b)(1)*

[9] Narrow exception to duty of confidentiality under paragraph (b)(1). Notwithstanding the important public policies promoted by the duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under Business & Professions Code section 6068(e)(1). Paragraph (b)(1) restates Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose confidential information relating to the representation even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

### *Lawyer Not Subject to Discipline for Revealing Confidential Information as Permitted Under Paragraph (b)(1)*

[10] Rule 1.6(b)(1) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual. A lawyer who reveals confidential information as permitted under paragraph (b)(1) is not subject to discipline.

### *No Duty to Reveal Confidential Information*

[11] Neither Business and Professions Code section 6068(e)(2) nor paragraph (b)(1) imposes an affirmative obligation on a lawyer to reveal confidential information in order to prevent harm. A lawyer may decide not to reveal confidential information. Whether a lawyer chooses to reveal confidential information as permitted under this rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in comment [12] of this Rule.

### *Deciding to Reveal Confidential Information as Permitted Under Paragraph (b)(1)*

[12] Disclosure permitted under paragraph (b)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing confidential information as permitted under paragraph (b)(1), the lawyer must, if

reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the lawyer believes the lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of confidential information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the confidential information without waiting until immediately before the harm is likely to occur.

*Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm*

[13] Paragraph (c)(1) provides that, before a lawyer may reveal confidential information, the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action – such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused – the option for permissive disclosure by the lawyer

would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b)(1) does not permit the lawyer to reveal confidential information, the lawyer nevertheless is permitted to counsel the client as to why it might be in the client's best interest to consent to the lawyer's disclosure of that information.

*Informing Client of Lawyer's Ability or Decision to Reveal Confidential Information Under Paragraph (c)(2)*

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4; Business and Professions Code, section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the

lawyer's ability or decision to reveal confidential information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal confidential information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See comment [16].) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b)(1);

- (6) the lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
- (7) the lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

*Disclosure of Confidential Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act*

[15] Paragraph (d) requires that disclosure of confidential information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

*Avoiding a Chilling Effect on the Lawyer-Client Relationship*

[16] The foregoing flexible approach to a lawyer informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See comment [2].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal confidential information as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b)(1), or even choose not to inform a client until the lawyer attempts to counsel the client under Comment [13]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

*Informing Client that Disclosure Has Been Made; Termination of the Lawyer-Client Relationship*

[17] When a lawyer has revealed confidential information under paragraph (b)(1), in all but extraordinary cases the relationship between lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to

seek to withdraw from the representation (see Rule 1.16 [3-700]), unless the client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. [See Rule 1.16].

#### *Other Consequences of the Lawyer's Disclosure*

[18] Depending on the circumstances of a lawyer's disclosure of confidential information, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify in a matter involving the client must comply with Rule [3.7]. Similarly, the lawyer must also consider the lawyer's duty of competence (Rule 1.1) and whether the lawyer has a conflict of interest in continuing to represent the client (Rule 1.7(d)).

#### *Disclosure as Permitted by Paragraphs (b)(2) Through (b)(4)*

[19] If a legal claim by a client or the client's representative alleges a breach by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving representation of the client, paragraph (b)(3) permits the lawyer to respond to

the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.

[20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[21] A lawyer may be ordered to reveal confidential information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes

specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the confidential information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[23] Paragraph (b) permits but does not require the disclosure of confidential information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

[24] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[25] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a

reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

#### *Former Client*

[26] The duty of confidentiality continues after the lawyer-client relationship has terminated. See [Rule 1.9(c)(2)]. See [Rule 1.9(c)(1)] for the prohibition against using such information to the [disadvantage] of the former client.

## Rule 1.6: Confidentiality of Information

### 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.)

**Alaska, Arkansas, Connecticut, Maryland, New Hampshire, New Mexico, North-Dakota, Pennsylvania, and Utah** permit a lawyer to reveal information necessary to prevent the client from committing a criminal act “likely to result in substantial injury to the financial interest or property of another” (or words to that effect). Of these, Arkansas, Connecticut, Maryland, North Dakota, and Utah also permit revelation when the client’s act is only fraudulent, but not criminal. See also the Arkansas entry below.

**Arizona, Arkansas, Colorado, Idaho, Illinois, Kansas, Michigan, North Carolina, Ohio, Oregon, South Carolina, Washington, and Wyoming** essentially retain the formulation of DR 4-101(C)(3) of the ABA Model Code of Professional Responsibility—they all permit a lawyer to reveal “the intention of a client to commit a crime” (or words to that effect).

**Arizona, Connecticut, Illinois, Nevada, North Dakota, and Texas** mandate disclosure of information to prevent the client from committing serious violent crimes. However, mandatory disclosure applies in North Dakota only if the harm is “imminent.”

**Arizona:** Rule 1.6(d)(5) applies only to “other law or a final order of a court or tribunal of competent jurisdiction directing

the lawyer to disclose such information.” Arizona also has an unusual statute governing the attorney-client privilege for corporations and other entities—see the Arizona entry in the Selected State Variations following ABA Model Rule 1.13.

**Arkansas:** Rule 1.6(c) contains a noisy withdrawal provision, which states as follows: “Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.”

**California:** California Business & Professions Code § 6068 (e)(1) provides that it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” However, §6068(e)(2) provides that an attorney “may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.” In addition, Rule 3-100 of the California Rules of Professional Conduct provides as follows:

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

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

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

**District of Columbia:** Rule 1.6 combines language from the ABA Model Code and the ABA Model Rules plus other language unique to D.C. Rule 1.6(c)(2) permits a lawyer to reveal client confidences “to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes” such acts will likely occur without revelation. Rule 1.6(d) is substantially the same as Model Rule 1.6(b)(2) and (3), although differently phrased. Rule 1.6(h) applies the obligations of the Rule “to (confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer.”

**Florida:** Rule 1.6 provides that a lawyer “shall reveal” information the lawyer believes “necessary (1) to prevent a client from committing a crime or (2) to prevent a death or substantial bodily harm to another.” In addition, Florida Rule 1.6(c) permits a lawyer to reveal information necessary “(1) to serve the clients interest unless it is information the client specifically requires not to be disclosed . . . or (5) to comply with the Rules of Professional Conduct.” Florida also adds Rule 1.6(d): “When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.” Finally, Florida adds Rule 1.6(e), which provides that “[w]hen disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.”

**Georgia:** Rule 1.6(a) combines language from ABA Model Rule 1.6 and DR 4-101(A) of the ABA Model Code of Professional Responsibility, as follows:

(a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court.

Georgia's Rule 1.6(b)(1) permits a lawyer to reveal protected information which the lawyer reasonably believes necessary "(i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law" or "(ii) to prevent serious injury or death not otherwise covered" by subparagraph (i). Georgia adds the following Rules 1.6(b)(2)-(3) and (c), (d), and (e):

(2) In a situation described in Subsection (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

(3) Before using or disclosing information pursuant to Subsection (1), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

(c) The lawyer may, where the law does not otherwise require, reveal information to which the duty

of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.

(d) The lawyer shall reveal information under paragraph (b) as the applicable law requires.

(e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

**Massachusetts:** Rule 1.6(b) provides as follows:

A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b) or Rule 8.3 must reveal, such information:

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another; . . . or

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3 (e) . . .

**Michigan** essentially retains the language of DR 4-101 of the ABA Model Code of Professional Responsibility but deletes the self-defense exception in DR 4-101(C)(4). Michigan also adds Rule 1.6(c)(3), which allows a lawyer to reveal "confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used."

**Minnesota:** Rule 1.6 (b) provides, in relevant part, as follows:

(b) A lawyer may reveal information relating to the representation of a client if:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation; . . .

(10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3.

**Missouri:** Missouri omits ABA Model Rules 1.6(b)(2) and (b)(3).

**New Hampshire:** In the rules effective January 1, 2008, Rule 1.6(b)(1) also permit disclosure to prevent the client from committing "a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of

another," without any requirement that the client is using or has used the lawyer's services. New Hampshire omits ABA Model Rule 1.6(b)(3).

**New Jersey:** Rule 1.6(b) requires a lawyer to reveal confidential information "to the proper authorities . . . to prevent the client or another person (1) from committing a criminal, illegal or fraudulent act . . . likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another" or "(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal." Rule 1.6(c) permits a lawyer to reveal information as well "to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss."

**New Mexico** uses the word "should" to describe a lawyer's authority to reveal "a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

**New York:** DR 4-101 is the same as DR 4-101 of the ABA Model Code of Professional Responsibility, except that New York adds a special exception to confidentiality in DR 4-101(C)(5) permitting a lawyer to reveal confidences and secrets "to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." New York DR 7-102(B) tracks the ABA Model Code except that DR 7-

102(B)(1) exempts disclosure “when the information is protected as a confidence or secret.”<sup>1</sup>

**North Carolina** combines modified language from ABA Model Rule 1.6 with language from DR 4-101 of the old ABA Model Code of Professional Responsibility. For example, North Carolina's equivalent to ABA Model Rules 1.6(b)(2) and (b)(3) provides simply that a lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary “to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyers services were used.” North Carolina also adds a Rule 1.6(c), which provides that the duty of confidentiality “encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered.”

**Ohio:** Rule 1.6(b) permits a lawyer “to reveal the intention of the client or other person to commit a crime and the information necessary to prevent the crime,” or to reveal confidential information “to mitigate substantial injury to the financial interests or property of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services.” Ohio omits ABA Model Rule 1.6(b)(2).

**Oklahoma:** Rule 1.6(b)(2) permits revelation only if “the lawyer has first made reasonable efforts to contact the client so that the client can rectify such criminal or fraudulent act, but

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<sup>1</sup> New York revised its rules effective 4/1/09 and the new rules no longer include this variation.

the lawyer has been unable to do so, or the lawyer has contacted the client and called upon the client to rectify such criminal or fraudulent act and the client has refused or has been unable to do so.”

**Oregon:** Rule 1.0(f) defines “information relating to the representation” as denoting “both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” In addition, Oregon permits a lawyer to disclose “the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.” Also, Oregon Rule 1.6(b)(6) permits disclosure of specified information in discussions preliminary to the sale of a law practice under Rule 1.17, but states: “A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.”

**Pennsylvania** adds a Rule 1.6(d) that states: “The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.” In addition, a lawyer may reveal information relating to the representation of a client that the lawyer reasonably believes necessary to “effectuate the sale of a law practice consistent with Rule 1.17.”

**Tennessee:** Rule 1.6(b)(1) permits a lawyer to reveal client confidences “to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or

property of another,” unless Rule 3.3 forbids revelation. Rule 1.6(c) provides that a lawyer “shall” reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or

(3) to comply with Rules 3.3, 4.1, or other law.

**Texas:** Rules 1.02(d) and (e) provide:

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

Texas Rule 1.05 divides “confidential information” into two categories “privileged information,” which means information protected by the attorney-client privilege, and “unprivileged client information,” which “means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer in the course of or by reason of the representation of the client.” A lawyer “may reveal confidential information” in eight instances, including when “the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act,” and to “the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.” Rules 1.05(c)(7) and (8).

**Virginia:** Rule 1.6(a) contains the Code's definitions of “confidence” and “secret” without using these terms. A lawyer may reveal a client confidence “which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.” Rule 1.6(b)(3). The lawyer must “promptly” reveal “the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime,” but if feasible must first give the client the opportunity to desist and must advise the client of the lawyer's obligation. If “the crime involves perjury by the client,” the lawyer must advise the client that he or she “shall seek to withdraw as counsel.” Rule 1.6(c)(1). Rule 1.6(c)(2) also requires the lawyer to promptly reveal “information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal.” Information is clearly established when “the client acknowledges to the attorney that the client has perpetrated a fraud.”



# Proposed Rule 1.8.2 [RPC 3-100 and 3-310] “Use of Confidential Information”

(Draft #2.1, 4/11/09)

**Summary:** This proposed rule restricts a lawyer’s use of a current client’s information to that client’s disadvantage. It complements other related rules that generally prohibit disclosure of client information and conflicting representations of other clients.

## Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rule

RPC 3-100; 3-310

Statute

Bus. & Prof. Code §6068(e)

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Massachusetts; Virginia; Oregon; and Illinois

- Other Primary Factor(s)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No  
(See introduction and rule explanation in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See introduction and rule explanation in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.8.2\* Use of Current Client's Information Relating to the Representation

September 2009

(Draft rule prepared for circulation for public comment)

### *INTRODUCTION:*

Proposed Rule 1.8.2, which governs a lawyer's *use* of a current client's information to the client's disadvantage, complements proposed Rules 1.6 (*disclosure* of a current client's information) and 1.7 (lawyer accepting or continuing *representations* adverse to a current client). Together, these Rules provide critical guidance to lawyers concerning their important duties of loyalty and confidentiality. Proposed Rule 1.8.2 largely tracks the language of Model Rule 1.8(b). The differences between proposed Rule 1.8.2 and the Model Rule relate primarily to California well-settled policy of imposing on lawyers a more uniform and consistent duty of confidentiality. Other changes are intended to clarify the centrality of client loyalty to the Rule's rationale. Finally, there are some housekeeping revisions related to proposed Rule 1.8.2 being a standalone Rule. See Explanation of Rule Changes, ¶. 2.

The Commission's comment modifies the comparable Model Rule language by clarifying that use of a client's information is governed by this Rule whether or not the information is confidential. The comment also tracks the Commission's addition of the requirement for written consent.

*Minority.* A minority of the Commission believes that this Rule should not require the more stringent "informed *written* consent" standard for obtaining the client's consent to the lawyer's use of information relating to the representation to the client's disadvantage. See Explanation of Changes to the Rule, below.

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\* Proposed Rule 1.8.2, Draft 2.1 (4/12/09).

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.8.2 Use of Current Client's Information Relating to the Representation</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.</p>	<p>(b) A lawyer shall not use [information relating to representation] of a client to the disadvantage of the client unless the client gives informed <u>written</u> consent, except as permitted <del>or required</del> by these Rules <u>or the State Bar Act</u>.</p>	<p>Rule 1.8.2 is substantially similar to Model Rule 1.8(b).</p> <p>The letter designation of the Model Rule paragraph has been deleted because, unlike Model Rule 1.8, which gathers together many divergent concepts in separate paragraphs in a single rule, the Commission has made each paragraph a separate, standalone rule.</p> <p>The phrase “information relating to the representation” is placed in brackets because the Commission is still considering whether to use that language as the operative term for describing client information.</p> <p>The phrase, “or required,” has been deleted because there are no provisions in the Rules or the State Bar Act that <i>require</i> a lawyer to violate his or her duty of confidentiality.</p> <p>As the Commission has throughout its proposed rules, a reference to the State Bar Act, which is also part of the regulatory landscape in California, has been added.</p> <p><u>Minority: “Informed <i>Written Consent</i>”</u>. A minority of the Commission notes that current rule 3-100 requires only the client's informed consent to <i>disclose</i> the client's confidential information relating to the representation. The minority notes that the heightened written disclosure requirements for waiving conflicts of interest are appropriate in the conflicts context, because the adverse effects of a lawyer's conflicted representation are not necessarily apparent to a person who is not experienced in the use of legal services. That is not true of the use of the client's information to the client's disadvantage, where the potential</p>

\* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.2 Use of Current Client's Information Relating to the Representation</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>adverse consequences will be readily apparent to the client.</p> <p>A majority of the Commission favors requiring that the client give informed <i>written</i> consent to the lawyer's use of information relating to the representation to the client's disadvantage. The majority position is that requiring informed <i>written</i> consent, which requires that the lawyer's disclosure be provided to the client in writing, provides an extra layer of protection by adding the formality of a writing. For example, current California rule 3-310 requires a client's informed written consent before a client is deemed to have waived a conflict of interest.</p> <p><b><u>Solicitation of Public Comment.</u></b> The Commission seeks public comment on whether the more stringent "informed written consent" standard should be used in this Rule. See discussion, above.</p> <p><b><u>Approaches in Other Jurisdictions.</u></b> There is little divergence from the Model Rule in other jurisdictions. Some jurisdictions, e.g., Massachusetts and Virginia, retain the ABA Model Code's prohibition on the use of client information to the advantage of the lawyer or a third person. Oregon permits use to the client's disadvantage only if the client's informed consent is "confirmed in writing." The current, pre-Ethics2000 Illinois Rules do not include Model Rule 1.8(b), but the Illinois State Bar has recommended its adoption.</p>

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule*</u></b></p> <p align="center"><b>Rule 1.8.2 Use of Current Client's Information Relating to the Representation</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.</p>	<p>[<del>5</del>1] Use of information relating to the representation, <u>whether or not confidential</u>, to the disadvantage of the client violates the lawyer's duty of loyalty. <del>Paragraph (b)</del><u>This Rule</u> applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, <u>to the disadvantage of the client</u>. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. <del>Paragraph (b)</del><u>This Rule</u> prohibits disadvantageous use of client information unless the client gives informed <u>written</u> consent, except as permitted <del>or required</del> by these Rules <u>or the State Bar Act</u>. See Rules <del>1.2(d), 1.6, 1.9(c), 3.3, and 4.1(b), 8.1 and 8.3.</del></p>	<p>The Comment to proposed Rule 1.8.2 is substantially similar to Model Rule 1.8(b), comment [5].</p> <p>Aside from necessary housekeeping revisions such as renumbering the comment and substituting "this Rule" for "paragraph (b)," the first sentence has been modified to emphasize that regardless of whether the client information in which a lawyer traffics is confidential, the lawyer will still violate his duty of loyalty and thus this rule if the information is used to the client's disadvantage.</p> <p>The clause, "to the disadvantage of the client," has been added to emphasize that the Rule prohibits the disadvantageous use of client information.</p> <p>The more stringent "informed <b>written</b> consent" standard has been added in keeping with California practice. See Explanation of Changes to the Rule.</p> <p>The phrase "or required" has been deleted to conform to the Rule.</p> <p>The comment cross-references the three rules the Commission currently contemplates will permit use or disclosure client information that might disadvantage a client: Rules 1.6, 1.9(c), and 4.1(b). They are bracketed pending the Commission's completion of those Rules. The other rules referenced in the Model Rule comment do not comport with California policy on confidentiality. The Commission has rejected them to the extent they permit or require a lawyer to violate the duty of confidentiality.</p>

\* Redline/strikeout showing changes to the ABA Model Rule

## **Rule 1.8.2 Use of Current Client's Information Relating to the Representation**

(Commission's Proposed Rule – Clean Version)

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act.

### **Comment**

[1] Use of information relating to the representation, whether or not confidential, to the disadvantage of the client violates the lawyer's duty of loyalty. This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. This Rule prohibits disadvantageous use of client information unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act. See Rules [1.6], 1.9(c), and [4.1(b)].

## Rule 1.8.2: Use of Confidential Information

### 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 1.8.2 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 one 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 legal liability 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.



# Proposed Rule 1.8.13 [n/a]

## “Imputation of Prohibition Under Rules 1.8.1 through 1.8.9, and 1.8.12”

(Draft #2, 6/27/09)

**Summary:** This new rule addresses the imputation of a lawyer’s conduct prohibited by rules in the 1.8 series of specific prohibitions (such as the prohibition against a lawyer entering into a business transaction with a client) to other lawyers associated with the prohibited lawyer.

### Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule	RPC 3-310(B) and 3-320
Statute	
Case law	

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial – Explanation:

There are no anticipated policy issues or concerns with the adoption of this proposed new rule.

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.8.13\* Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12

September 2009

(Draft rule to be considered for public comment.)

### *INTRODUCTION:*

Proposed Rule 1.8.13, which governs the imputation of conduct prohibited in the 1.8 series of Rules to lawyers associated in law firms, is based on Model Rule 1.8(k). Changes to the language in Model Rule 1.8(k) are primarily intended to conform the Rule to the Commission's numbering convention for the proposed rule counterparts to Model Rule 1.8. Rather than follow the ABA in placing a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

One substantive difference between Model Rule 1.8(k) and proposed Rule 1.8.13 concerns the imputation of personal relationship conflicts. Under the Model Rule scheme, all relationship conflicts, whether business, professional, or of a close personal nature, including those involving the opposing party's lawyers, are governed by Rule 1.7(a)(2), and thus imputation of such conflicts in a law firm is governed by Model Rule 1.10. However, even though Rule 1.7(a)(2) covers all types of relationship conflicts, only such conflicts that "present a significant risk of materially limiting the representation of the client" are imputed to other lawyers in the law firm under Model Rule 1.10.

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\* Proposed Rule, Draft 2 (6/27/09).

*INTRODUCTION (Continued):*

The Commission, on the other hand, recommends that in the limited situation where there is a lawyer in a firm who has a family or close personal relationship conflict involving the lawyer of another person in a firm matter be governed under Rule 1.8.11 (“Relationship With Other Person’s Lawyer”), which provides:

A lawyer shall not represent a client in a matter if the lawyer knows that the lawyer representing another person involved in the matter, or a lawyer who is associated with that lawyer in a law firm, is the lawyer’s spouse, parent, child, or sibling, lives with the lawyer, or has an intimate personal relationship with the lawyer, unless the lawyer informs the client in writing of the relationship.

Under proposed Rule 1.8.13, conflicts arising from such relationships would not be imputed to other members in the firm. Nor would such conflicts be imputed under proposed Rule 1.10, which does not govern imputation under the 1.8 series of rules. This approach comports with current California law. There is no evidence that the public has been harmed by this approach. Other relationship conflicts, for example those involving business and professional relationships, as well as other personal relationships not involving a lawyer participating in the matter, are addressed in proposed Rule 1.7 and may be subject to imputation under Rule 1.10.

<p align="center"><u>ABA Model Rule</u></p> <p><b>Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p><b>Rule 1.8.13—<del>Conflict Imputation of Interest: Current Clients: Specific Prohibitions Under</del> Rules <u>1.8.1 through 1.8.9, and 1.8.12</u></b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.</p>	<p><del>(k)</del> While lawyers are associated in a <u>law</u> firm, a prohibition in <del>the foregoing paragraphs</del> <del>(a)</del><u>Rules 1.8.1</u> through <del>(i)</del><u>Rule 1.8.9, and 1.8.12</u> that applies to any one of them shall apply to all of them.</p>	<p>Rule 1.8.13 is based on Model Rule 1.8(k). The changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.</p>

\* Proposed Rule, Draft 2 (6/27/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.8.13 <del>Conflict Imputation of Interest: Current Clients: Specific Prohibitions Under</del> Rules <u>1.8.1 through 1.8.9, and 1.8.12</u></b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.</p>	<p>[201] <del>Under paragraph (k), a</del> prohibition on conduct by an individual lawyer in <del>paragraphs (a) Rules 1.8.1 through (i) 1.8.9, and 1.8.12</del> also applies to all lawyers associated in a <u>law</u> firm with the personally prohibited lawyer. For example, one lawyer in a <u>law</u> firm may not enter into a business transaction with a client of another <del>member of lawyer</del> <u>associated in the law</u> firm without complying with <del>paragraph (a) Rule 1.8.1,</del> even if the first lawyer is not personally involved in the representation of the client. <del>The</del> <u>This Rule does not apply to Rules 1.8.10 and 1.8.11 since the</u> prohibition <del>set forth in paragraph (j) those Rules</del> is personal and is not applied to associated lawyers.</p>	<p>Comment [1] to proposed Rule 1.8.13 is based on Model Rule 1.8, Comment [20]. As with the Rule itself, the changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.</p>

\* Proposed Rule, Draft 2 (6/27/09). Redline/strikeout showing changes to the ABA Model Rule

### **Rule 1.8.13 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12**

(Commission's Proposed Rule – Clean Version)

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through Rule 1.8.9, and 1.8.12 that applies to any one of them shall apply to all of them.

#### **Comment**

[1] A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9, and 1.8.12 also applies to all lawyers associated in a law firm with the personally prohibited lawyer. For example, one lawyer in a law firm may not enter into a business transaction with a client of another lawyer associated in the law firm without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rules 1.8.10 and 1.8.11 since the prohibition in those Rules is personal and is not applied to associated lawyers.

## Rule 1.8.13: Imputation of Personal Conflicts

### 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 1.8.13 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 one 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 legal liability 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)<sup>1</sup>**, 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

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<sup>1</sup> **New York revised its rules effective 4/1/09 and the new rules no longer include this variation.**

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.

# Proposed Rule 1.9 [RPC 3-310(E)] “Duties to Former Clients”

(Draft #5.1, 8/30/09 )

**Summary:** This amended rule addresses conflicts of interest that arise when a lawyer’s current representation is adverse to a client that the lawyer or the lawyer’s firm (while the lawyer was still at the firm) formerly represented in the same or a substantially related matter.

## Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rule

RPC 3-310(E)

Statute

Bus. & Prof. Code §6068(e)

Case law

*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

New Jersey Rule 1.9.

- Other Primary Factor(s)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No  
(See the introduction and the explanation of paragraph (b) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and the explanation of paragraph (b) of the proposed rule in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.9\* Duties to Former Clients

September 2009

(Draft rule to be considered for public comment.)

### *INTRODUCTION:*

Proposed Rule 1.9, which governs a lawyer's duty to former clients, is substantially the same as Model Rule 1.9. The minor changes to the language in Model Rule 1.9 are for clarity and to include the same reference to the California State Bar Act that has been made in a number of other Rules. The Comments contain substantive additions and deletions to the Model Rule counterparts that, in part, explain relevant California case law and elaborate on the meaning of the phrase "substantially related" as used in the rule.

*Minority.* A minority of the Commission takes the position that the Commission's proposed Rule 1.7(d) (concerning current client conflicts of interests) does not require the informed written consent of the current client and, therefore, the formulation of Rule 1.9, which requires the informed written consent of a former client, incongruously gives more protection to a former client than to a current client. Second, the minority believes that Rule 1.9(b)(2) is inadequate because it references the Commission's proposed Rule 1.6 which, according to the minority, limits the scope of confidential information to only "information related to the representation." The minority thus maintains that Rule 1.6 is narrower than Business and Professions Code section 6068(e)(1), and by referencing only Rule 1.6, Rule 1.9(b)(2) provides inadequate protection to the client. (See also, the minority position on the Rule 1.6 Model Rule comparison chart.)

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\* Proposed Rule 1.9, Draft 5.3 (9/1/09).

<p align="center"><b>ABA Model Rule</b> <b>Rule 1.9 Duties to Former Clients</b></p>	<p align="center"><b>Commission's Proposed Rule*</b> <b>Rule 1.9 Duties to Former Clients</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.</p>	<p>(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed <u>written</u> consent, <del>confirmed in writing</del>.</p>	<p>The Commission proposes the adoption of Model Rule paragraph (a) except for the substitution of the more client-protective requirement that the lawyer obtain the client's <i>written</i> consent to the lawyer's adverse representation. This change affords more client protection and is consistent with California's requirement of <i>written</i> consent in other conflict situations.</p>
<p>(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client</p> <p>(1) whose interests are materially adverse to that person; and</p> <p>(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;</p> <p>unless the former client gives informed consent, confirmed in writing.</p>	<p>(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client</p> <p>(1) whose interests are materially adverse to that person; and</p> <p>(2) about whom the lawyer, <u>while at the former law firm</u>, had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;</p> <p>unless the former client gives informed <u>written</u> consent, <del>confirmed in writing</del>.</p>	<p>Proposed paragraph (b) is substantially the same as the corresponding Model Rule paragraph. The first change in (b)(2) is non-substantive; it clarifies that paragraph (b) applies when a lawyer learned information about a former client while in an earlier law firm association. The purpose of paragraph (b) is to describe the application of Rule 1.9 when the lawyer has departed that earlier law firm; the additional phrase in subparagraph (2) clarifies this connection. Proposed paragraph (b) also substitutes the requirement of <i>written</i> consent in place of the MR's laxer "confirmed in writing" standard.</p> <p><u>Minority</u>. A minority of the Commission believes the reference to Rule 1.6 can be misconstrued as narrowing the duty of confidentiality and would substitute a reference to Business and Professions Code section 6068(e)(1). (See above introduction to this Rule and the minority position in the Rule 1.6 Model Rule comparison chart.</p>

\* Rule 1.9, Draft 5.3 (9/1/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:</p>	<p>(c) A lawyer who <del>has</del> formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter.</p>	<p>Proposed paragraph (c) is identical to the Model Rule paragraph, except for the elimination of one unnecessary word.</p>
<p>(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or</p>	<p>(1) use information relating to the representation to the disadvantage of the former client except as these Rules <u>or the State Bar Act</u> would permit <del>or require</del> with respect to a <u>current</u> client, or when the information has become generally known; or</p>	<p>This paragraph adds a reference to the State Bar Act. It also has one substantive change, which is the removal of the concept that a lawyer might be required to disclose a client's confidential information. That might be possible under MR 1.6, but there is no such requirement either in the California Rules or in the State Bar Act. Finally, this adds the clarifying adjective "current". The Model Rules apparently only once refer to a current client as "current client", but they otherwise use the unmodified word "client" to refer to a current client. Because this Rule is concerned with duties owed to former client, the Commission recommends adding "current" in all places in the rule that the reference is to a "current client.". The Commission believes this should avoid misunderstanding by making immediately clear the meaning of provisions that otherwise might be more difficult to read.</p>
<p>(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.</p>	<p>(2) reveal information relating to the representation except as these Rules <u>or the State Bar Act</u> would permit <del>or require</del> with respect to a <u>current</u> client.</p>	<p>The proposed changes in (b)(2) track those proposed for (b)(1).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.</p>	<p>[1] After termination of a lawyer-client relationship, the lawyer <del>has certain continuing</del> <u>owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (<i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide information to the lawyer that will be protected as required by Rule 1.6 without fear that any such information later will be used against the client.</u></p> <p>[42] Paragraph (a) addresses both of these duties. <u>It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client</u> with respect to <del>confidentiality and conflicts of interest and thus may not represent another client except a matter in conformity with this Rule</del> <u>which the lawyer represented the former client. Under this Rule, for</u> <del>For</del> <u>example, a lawyer could not properly seek to</u></p>	<p>Proposed Comments [1] and [2] materially revise Model Rule Comment [1] in order to more fully explain how and why Rule 1.9 protects former clients, and to avoid any suggestion that proposed Rule 1.9 modifies long-standing California authority regarding a lawyer's duties to former clients. The Supreme Court's opinion in <i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564 (cited in proposed Comment [1]) and other authority such as <i>People ex rel. Deukmejian v. Brown</i> (1981) 29 Cal.3d 159, emphasize that a lawyer has two duties to former clients. Both of these duties are described and explained in these proposed Comment paragraphs. The Commission believes that it is essential to preserve this case law, and it further believes that Model Rule 1.9 is consistent with these California principles. However, adopting the Model Rule Comment risked obscuring these points and thus causing misunderstanding of the Rule's extremely important restrictions on lawyer conduct.</p>

\* Proposed Rule 1.9, Draft 5.3 (9/1/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>rescind on behalf of a new client a contract <a href="#">the lawyer</a> drafted on behalf of the former client. <del>So also</del> a <a href="#">A</a> lawyer who has prosecuted an accused person could not <del>properly</del> represent the accused in a subsequent civil action against the government concerning the same <del>transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9].</del> Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.</p>	
<p>[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The</p>	<p><del>{2} The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The</del></p>	<p>Because proposed Comments [1] and [2] replace Model Rule Comments [1], the balance of the proposed Comment is renumbered.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.</p>	<p><del>underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.</del></p>	
<p>[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are</p>	<p>[3] <del>Matters are "substantially related" for purposes of this Rule if they involve</del> Paragraph (a) also addresses the same transaction or legal dispute or <del>if</del> second of the two duties owed to a former client. It applies when there <del>otherwise</del> is a substantial risk that <del>confidential factual</del> information as would normally have been protected by Rule 1.6 that was obtained in the prior representation would materially advance the client's position <del>be used or disclosed in the</del> a subsequent matter <del>representation in a manner that is contrary to the former client's interests and without the former client's informed written consent.</del> For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person <u>ordinarily</u> may not <del>then</del> later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in <del>securing</del> connection with the environmental <del>permits</del> review associated with the land use <del>approvals</del> to build a shopping center <u>ordinarily</u> would be precluded from <del>later</del> representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations <u>that existed when the lawyer represented the client</u>; however, <del>the lawyer</del> paragraph (a) would not <del>be precluded</del>.</p>	<p>The Model Rule Comment discusses in its paragraphs [2] and [3] the vital question of when a lawyer's retention is "substantially related" to a former matter as to which the lawyer owes continuing duties to the former client under this Rule. Proposed Comments [3], [4], [5], and [6] substantially expand on the Model Rule discussion in order to provide a fuller explanation and context for this topic. Also, proposed Comment [3] revises the Model Rule Comment's reference to "environmental permits" in order to conform the terminology to California law.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.</p>	<p><del>on apply if the grounds of substantial relationship, from defending lawyer later defends</del> a tenant of the completed shopping center in resisting eviction for nonpayment of rent. <del>Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client if there is not required to reveal the confidential information learned by the lawyer in order to establish a no substantial risk that relationship between the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client zoning and information that would in ordinary practice be learned by a lawyer providing such services eviction matters.</del></p>	
	<p><a href="#">[4] Paragraph (a) applies when the lawyer's representation is the same matter as, or in a matter substantially related to, the lawyer's representation</a></p>	<p>Proposed Comment [4] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is. Also, it includes a reminder of the important concept</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation) and Rule 1.7, Comment [15].</a></p>	<p>that a lawyer sometimes can avoid the violation of duties owed to a former client, just as a lawyer sometimes can avoid the violation of duties owed to a current client, by limiting the scope of a new representation. This reminder includes cross-references to Rule 1.2(c) (limiting the scope of a representation) and to Rule 1.7, Comment [15] (discussing the same point in the context of a lawyer's duties to a current client).</p>
	<p><a href="#">[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. (H.F. Ahmanson &amp; Co. v. Salomon Brothers, Inc. (1991) 229 Cal.App.3d 1445, 1454) This disqualification application exists, at least in part, to protect the former client by avoiding an</a></p>	<p>Proposed Comment [5] has no direct corollary in the Model Rule Comment. It also is part of the expanded explanation of what a "matter" is and includes citations to pertinent California appellate opinions.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See <i>In re Complex Asbestos Litigation</i>, (1991) 232 Cal.App.3d at p. 592; <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes might not be necessary because the lawyer can provide evidence concerning the information actually received in the prior representation.</a></p>	
	<p><a href="#">[6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.</a></p>	<p>Proposed Comment [6] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is and is intended to underline that the concept of a "matter" should be understood within the context of the purposes of Rule 1.9 as they are explained in Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term "materially adverse" should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by Rule 1.6 and Business and Professions Code section 6068(e) that the former client would not want disclosed or in a manner that would be to the disadvantage to the former client.</a></p>	<p>Proposed Comment [7] has no direct corollary in the Model Rule Comment. It supplements proposed Comment [6].</p>
<p><b>Lawyers Moving Between Firms</b></p> <p>[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the</p>	<p><b>Lawyers Moving Between Firms</b></p> <p><del>[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the</del></p>	<p>The Commission proposes to remove all of Model Rule Comment [4] as being discursive and not helpful to understanding the Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.</p>	<p><del>rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.</del></p>	
<p>[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.</p>	<p>[58] Paragraph (b) <del>operates</del> <u>addresses a lawyer's duties to disqualify a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest</u> only when the lawyer <del>involved</del> has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.</p>	<p>Proposed Comment [8] is substantially the same as Model Rule Comment [5]. The wording change is intended to avoid a possible misreading of Rule 1.9(b), which as written might be seen as referring only to former clients of a lawyer's former firm, while it should also include current clients of a lawyer's former firm. Rather than attempting to revise paragraph (b), which would have caused considerable drafting difficulties, the Commission chose to clarify through this Comment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.</p>	<p>[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.</p>	<p>Proposed Comment [9] is identical to Model Rule Comment [6].</p>
<p>[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).</p>	<p>[7] <del>Independent of the question of disqualification of a firm, a</del> lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).</p>	<p>Proposed Comment [10] is substantially the same as Model Rule Comment [7]. However, the proposed Comment removes the reference to lawyer disqualification. Although the Commission understands that Rule 1.9 will be cited when disqualification issues are raised, it has written the Rule primarily for disciplinary purposes and does not want to suggest that it presumes to dictate to courts how to exercise their authority, for example, under C.C.P. § 128(a)(5).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.</p>	<p>[811] Paragraph (c) provides that <u>confidential</u> information acquired by <del>the</del> lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the <u>former</u> client. <del>However, See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information.</del> The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.</p>	<p>Proposed Comment [11] is substantially the same as Model Rule Comment [8]. The changes clarify that it (and Rule 1.9) speak only of confidential information that is protected by Rule 1.6, not to non-confidential information that a lawyer might have learned in the course of representing a former client.</p>
<p>[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.</p>	<p><u>Client Consent</u></p> <p>[912] The provisions of this Rule are for the protection of former clients and can be waived if the <u>former</u> client gives informed <u>written</u> consent, <del>which consent must be confirmed in writing under paragraphs (a) and (b).</del> See Rule 1.0(e). With regard to the effectiveness of an advance <del>waiver</del> <u>consent</u>, see Comment [22] to Rule 1.7. With regard to <del>disqualification</del> <u>the application of a lawyer's conflict to</u> a firm with which a lawyer is or was formerly associated, see Rule 1.10.</p>	<p>Proposed Comment [12] is much the same as Model Rule Comment [9]. There are two substantive changes. First, the proposed Comment substitutes California's more client-protective requirement of "informed written consent" in place of the Model Rule's requirement of "consent confirmed in writing" (this change can be seen in paragraphs (a) and (b) of the proposed Rule, and is consistent with the same change made in other proposed conflicts Rules). Second, as explained with respect to Comment [10], this removes the reference to disqualification.</p>

## Rule 1.9 Duties To Former Clients

(Commission's Proposed Rule – Clean Version)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer, while at the former law firm, had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.

(c) A lawyer who formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules or the State Bar Act would permit

with respect to a current client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules or the State Bar Act would permit with respect to a current client.

### Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide information to the lawyer that will be protected as required by Rule 1.6 without fear that any such information later will be used against the client. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has prosecuted an accused person could not represent the accused in a subsequent civil action against the government concerning the same matter.

[3] Paragraph (a) also addresses the second of the two duties owed to a former client. It applies when there is a substantial risk that information protected by Rule 1.6 that was obtained in the prior representation would be used or disclosed in a subsequent representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person ordinarily may not later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental

considerations that existed when the lawyer represented the client; however, paragraph (a) would not apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the zoning and eviction matters.

[4] Paragraph (a) applies when the lawyer's representation is the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation) and Rule 1.7, Comment [15].

[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the

adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454) This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See *In re Complex Asbestos Litigation*, (1991) 232 Cal.App.3d at p. 592; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes might not be necessary because the lawyer can provide evidence concerning the information actually received in the prior representation.

- [6] Two matters are “the same or substantially related” for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Rule 1.6, and the lawyer would be expected to use or disclose

that information in the subsequent representation because it is material to the subsequent representation.

- [7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term “materially adverse” should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by Rule 1.6 and Business and Professions Code section 6068(e) that the former client would not want disclosed or in a manner that would be to the disadvantage to the former client.

### **Lawyers Moving Between Firms**

- [8] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular

client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[10] A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

#### **Client Consent**

[12] The provisions of this Rule are for the protection of former clients and can be waived if the former client gives informed written consent. See Rule 1.0(e). With regard to the effectiveness of an advance consent, see Comment [22] to Rule 1.7. With regard to the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.

## Rule 1.9: Duties to Former Clients

### 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 3-310(E) forbids representation adverse to a client or former client if a lawyer “by reason of the representation of the client or former client . . . has obtained confidential information material to the employment.”

**District of Columbia:** Rule 1.9 contains only the language of ABA Model Rule 1.9(a) but does not require that consent be in writing or confirmed in writing. D.C.’s version of Rule 1.9(b), which appears in Rule 1.10(b), is substantially similar to 1.9(b) but provides an exception when “the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.”

**Massachusetts:** Rule 1.9(c), which draws on DR 4-101(B)(3) of the ABA Model Code of Professional Responsibility, adds that a lawyer may not use confidential information “to the lawyer’s advantage, or to the advantage of a third person” unless permitted or required by other rules, without the client’s consent.

**Nebraska** adds Rules 1.9(d)-(f) to govern conflicts arising from the past work of law clerks, paralegals, secretaries, messengers, and any other “support person.” Notably, Rule 1.9(d) parallels ABA Model Rule 1.9(b), but Nebraska Rule 1.9(e) does not impute support person conflicts to other lawyers at the firm if the former client consents or the conflicted support person is screened to protect the former client’s confidential information.

**New York:** DR 5-108(A) and (B) are essentially the same as ABA Model Rule 1.9 except that no writing is required to confirm consent, and a lawyer for a former client is forbidden to “use” the former client’s confidences except when DR 4-101 would permit or the information “has become generally known.”

**Pennsylvania:** Rule 1.9 tracks ABA Model Rule 1.9, except Pennsylvania Rule 1.9(a) and Rule 1.9(b)(2) do not require that client consent be “confirmed in writing.”

**Texas:** Rule 1.09(a) provides that without prior consent, a lawyer who “personally” has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer’s services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05 [the Texas confidentiality rule]; or

(3) if it is the same or a substantially related matter.

**Virginia:** Rule 1.9(a) requires the consent of both the present and former client.

# Proposed Rule 1.10 [n/a]

## “Imputation of Conflicts: General Rule”

(Draft #4, 8/30/09)

**Summary:** This new rule addresses situations where an individual lawyer’s conflict of interest may prohibit other associated lawyers from undertaking or continuing the conflicting representation.

### Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule

RPC 3-310

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

See the introduction in the Model Rule comparison chart.

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No  
(See explanation of Comments [1] and [4] in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and the explanation of Comments [1] and [4] of the proposed rule in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.10\* Imputation of Conflicts: General Rule

September 2009

(Draft rule to be considered for public comment)

### *INTRODUCTION:*

Proposed Rule 1.10 is a new Rule that addresses situations where an individual lawyer's conflict of interest may prohibit other associated lawyers from undertaking or continuing the conflicting representation. Although there is currently no rule counterpart in California, the doctrine of imputation of conflicts is well-settled in California decisional law. The proposed Rule is based on Model Rule 1.10 but differs from the Model Rule in one significant respect: the proposed Rule does not permit, over a client's objection, the implementation in a private firm of an ethical screen to avoid the the imputation of a lawyer's conflict. The Commission largely agrees that a broadly-permissive screening provision similar to the one in the Model Rule should not be adopted in California. Under the Model Rule, a private firm can avoid imputation of a migrating lawyer's conflict even if the moving lawyer had played a substantial role in the matter that is the subject of the conflict and can be assumed to have acquired material confidential information. See Explanation of Changes for paragraph (a)(2).

However, the Commission is equally divided on the issue of permitting screening in limited situations to facilitate the mobility of lawyers who were only peripherally involved in the matter. See Explanation of Changes for paragraph (a)(2). The Commission is interested in receiving input from the public and the profession on this issue and will specifically solicit public comment on whether California should sanction any kind of non-consensual ethical screening.

The Comment to the Rule is based on the Comment to Model Rule 1.10, but the Commission made some substantive additions and deletions. The additions, in part, identify California's emphasis on the duty of confidentiality as it relates to imputation of conflicts. The deletions, in part, implement the Commission's view that the rule is intended as a disciplinary rule rather than a rule that establishes a standard of civil disqualification. See Explanation of Changes to the comments.

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\* Proposed Rule 1.10, Draft 4 (8/30/09).

<p align="center"><u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless</p>	<p>(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless</p>	<p>The first part of paragraph (a) is identical to Model Rule 1.10(a).</p>
<p>(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or</p>	<p><del>(1)</del> the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of <del>materially limiting</del> <u>having a material adverse effect on</u> the representation of the client by the remaining lawyers in the firm. <del>or</del></p>	<p>The second half of paragraph (a) is nearly identical to Model Rule 1.10(a)(1), except that it substitutes a “material adverse effect” standard for the Model Rule’s “materially limiting” standard. The Commission has not recommended the adoption of the “material limitation” standard in Model Rule 1.7(a)(2)). To include it here would create inconsistencies with proposed Rule 1.7(d).</p>
<p>(2) the prohibition is based upon Rule 1.9(a), or (b) and</p>	<p><del>(2) the prohibition is based upon Rule 1.9(a), or (b) and</del></p>	<p>The Commission does not recommend adoption of Model Rule 1.10(a)(2) or its subparagraphs. This provision, adopted by the ABA in February 2009, broadly permit screening of lawyers who move from one private firm to another. By “broadly permits screening,” we mean that the jurisdiction’s provision permits screening of any lawyer who has acquired (or is presumed to have acquired) confidential information of the former client, regardless of the degree of involvement of that lawyer in the former client’s representation. In effect, this is equivalent to the “substantial responsibility” standard in MR 1.11 and thus would place private lawyers more or less on equal footing with government lawyers. Model Rule 1.10, as revised in 2009, is one such provision. There</p>

\* Proposed Rule 1.10, Draft 4 (8/30/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>are 13 jurisdictions that have adopted broad screening provisions, although no jurisdiction to date has exactly adopted the ABA approach. Jurisdictions that broadly permit screening are: Delaware, Illinois (both current and proposed), Kentucky, Maryland, Michigan (both current and proposed), Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee (proposed revision), Utah and Washington.</p> <p>Although there was little support for a broad screening provision, the Commission is equally divided on the issue of permitting screening in limited situations to facilitate the mobility of lawyers who were only peripherally involved in the matter. "Permits screening in limited situations" means that a jurisdiction's provision permits screening only of a lawyer who did not "substantially participate," or was not "substantially involved," did not have a "substantial role," did not have "primary responsibility," etc., in the former client's matter, or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or "is not likely to be significant" (e.g., Minn.) Jurisdictions that permit screening in limited situations are: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee (current rule only); and Wisconsin.</p>
<p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;</p>	<p>(i) <del>the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;</del></p>	<p>See Explanation of Changes for paragraph (a)(2).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and</p>	<p><del>(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and</del></p>	<p>See Explanation of Changes for paragraph (a)(2).</p>
<p>(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.</p>	<p><del>(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.</del></p>	<p>See Explanation of Changes for paragraph (a)(2).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless</p>	<p>(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:</p>	<p>Paragraph (b) is identical to Model Rule 1.10(b), which is consistent with California law. See <i>Goldberg v. Warner-Chappell</i> (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116. See also <i>Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.</i>, 607 F.2d 186 (7th Cir. 1979).</p>
<p>(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and</p>	<p>(1) the matter is the same <u>as</u> or substantially related to that in which the formerly associated lawyer represented the client; and</p>	<p>Subparagraph (a)(1) is identical to Model Rule 1.10(a)(1), except for the addition of the word "as." No change in meaning is intended.</p>
<p>(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.</p>	<p>(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.</p>	<p>Subparagraph (a)(2) is identical to Model Rule 1.10(a)(2).</p>
<p>(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.</p>	<p>(c) A <del>disqualification prescribed by</del> <u>prohibition under this rule</u> may be waived by <del>the</del> <u>each</u> affected client under the conditions stated in Rule 1.7.</p>	<p>Paragraph (c) is identical to Model Rule 1.10(c), except that the phrase "prohibition under" has been substituted for "disqualification prescribed by" because the Rule is intended as a disciplinary rule, not as a civil standard.</p> <p>The word "each" has been substituted for "the" to make clear that both affected clients of the firm must waive any prohibitions under the Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.</p>	<p>(<del>e</del>) The <del>disqualification</del> <u>imputation</u> of <u>a conflict of interest to</u> lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.</p>	<p>Paragraph (d) is identical to Model Rule 1.10(d), except that the phrase "imputation of a conflict of interest to" has been substituted for "disqualification of" because the Rule is intended as a disciplinary rule, not as a civil standard.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest:</b></p> <p align="center"><b>General Rule</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest:</b></p> <p align="center"><b>General Rule</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Definition of "Firm"</b></p> <p>[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] – [4].</p>	<p><b>Definition of "Firm"</b></p> <p>[1] <del>For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c).</del> Whether two or more lawyers constitute a firm <del>within</del><u>for purposes of this definition</u>Rule can depend on the specific facts. See Rule <del>1.0</del><u>1.0.1(c)</u>, Comments [2] - [4].]</p>	<p>Comment [1] is based on Model Rule 1.10, cmt. [1]. The deleted language is redundant because it already appears in the global definition of "firm" or "law firm," which the Commission intends to include in the global definition section.</p> <p>The phrase "for purposes of this Rule" has been substituted for "within this definition" for clarity, the predicate for this sentence – the definition of law firm in the first sentence – having been deleted.</p> <p><u>Minority.</u> A minority of the Commission believes there is insufficient reason for proposed Comment [1] to diverge from the Model Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Principles of Imputed Disqualification</b></p> <p>[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).</p>	<p><b>Principles of Imputed <del>Disqualification</del>Conflicts of Interest</b></p> <p>[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the <del>principle</del><u>duties</u> of loyalty <u>and confidentiality owed</u> to the client as <del># applies</del><u>they apply</u> to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing <u>the duties of loyalty and confidentiality owed</u> to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty <u>and confidentiality owed</u> by each lawyer with whom the lawyer is associated. Paragraph (a)<del>(1)</del> operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10<del>(a)(2) and 1.10 (b)</del>.</p>	<p>The heading has been changed to reflect that the Rule is intended as a disciplinary rule, not as a rule creating a civil standard of disqualification.</p> <p>Comment [2] is based on Model Rule 1.10, cmt. [2], except that the concept of the duty of confidentiality has been added because that duty's importance as an underlying rationale for an imputation rule.</p>
<p>[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case</p>	<p>[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not <del>materially limit</del><u>have a material adverse effect on</u> the representation by others in the firm, the firm should not be <del>disqualified</del><u>prohibited</u></p>	<p>Comment [3] is based on Model Rule 1.10, cmt. [3]. The changes are intended to conform to the different standards in proposed Rule 1.10(a) ("have a material adverse effect on") and Model Rule 1.10(a) ("materially limiting"). See Explanation of Changes, paragraph (a).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.</p>	<p><a href="#">from further representation</a>. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and <a href="#">the fact of that lawyer's ownership would have a material adverse effect on the representation of the firm's client by</a> others in the firm <del>would be materially limited in pursuing the matter</del> because of loyalty to that lawyer, the personal <del>disqualification</del><a href="#">prohibition</a> of the lawyer would be imputed to all others in the firm.</p>	
<p>[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.</p>	<p>[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation <a href="#">by others in the law firm</a> if the lawyer is prohibited from acting because of events <a href="#">that occurred</a> before the person became a lawyer, for example, work that the person did while a law student. <del>Such persons</del><a href="#">In both situations</a>, however, <del>ordinarily such persons</del> must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules <del>4-0</del><a href="#">1.0.1(k)</a> and 5.3. <a href="#">See also Comment [9]</a>.</p>	<p>Comment [4] is based on Model Rule 1.10, cmt. [4]. Language has been added to the second sentence for clarity.</p> <p><u>Minority</u>. A minority of the Commission believes that the second sentence misstates California law, at least where the lawyer acted in a fiduciary capacity in the previous employment.</p> <p>The substitution of “in both situations” for “such persons” is intended to clarify that screening should be implemented in the event of either situation described in the first two sentences.</p> <p>The word “ordinarily” has been deleted because it is unclear under what circumstances such a person who was substantially involved in the matter on the other side should be permitted to participate in the matter.</p> <p>The reference to Rule 1.0.1 is to the number the Commission has assigned to the proposed terminology section.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).</p>	<p>[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a <del>present</del>current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).</p>	<p>Comment [5] is identical to Model Rule 1.10, cmt. [5], except that the word "current" is substituted for "present" to conform to the usage throughout the Rules.</p>
<p>[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).</p>	<p>[6] Rule 1.10(c) removes imputation with the informed consent of <del>the</del>each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b), [Comments [27] – [28].] and that each affected client or former client has given informed <del>written</del> consent to the representation, <del>confirmed in writing</del>. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [2233]. For a definition of informed consent, see Rule <del>1.0</del>[1.0.1(e)].</p>	<p>Comment [6] is based on Model Rule 1.10, cmt. [6]. The changes to the Model Rule comment either reflect (i) the revisions the Commission has made in the black letter of this Rule (i.e., "each" for "the" in paragraph (c), and requiring "informed written consent" instead of the Model Rule's "informed consent, confirmed in writing"); or (ii) the changes the Commission has recommended for the basic conflicts rules, proposed Rule 1.7.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.</p>	<p><del>[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.</del></p>	<p>Comments [7] through [10] of Model Rule 1.10 all relate to Model Rule 1.10(a)(2), which broadly permits screening and which the Commission has recommended not be adopted. See Explanation of Changes for paragraph (a)(2).</p>
<p>[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p><del>[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</del></p>	<p>See Explanation of Changes for Comment [7].</p>
<p>[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a</p>	<p><del>[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a</del></p>	<p>See Explanation of Changes for Comment [7].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.</p>	<p><del>statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.</del></p>	
<p>[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.</p>	<p><del>[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.</del></p>	<p>See Explanation of Changes for Comment [7].</p>
<p>[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.</p>	<p><del>[11]</del> Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually <del>disqualified</del> <u>prohibited</u> lawyer.</p>	<p>Comment [7] is identical to Model Rule 1.10, cmt. [11], except that "prohibited" has been substituted for "disqualified" to reflect that the Rule is a disciplinary rule and not intended as a civil standard.</p>
<p>[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated</p>	<p><del>[12]</del> Where a lawyer is prohibited from engaging in certain transactions under <u>Rules [1.8.1] through Rule 1.8[1.8.12]</u>, <del>paragraph (k) of that Rule [1.8.13]</del>, and not this Rule, determines whether that</p>	<p>Comment [8] is based on Model Rule 1.10, cmt. [11]. Any changes to the comment merely reflect the rule numbering convention the Commission has adopted for the 1.8 series of rules. Brackets have been placed around the Rules pending a</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>in a firm with the personally prohibited lawyer.</p>	<p>prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.</p>	<p>final decision on numbering.</p>
	<p><a href="#">[9] Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matter pertaining to disqualification. See Code Civ. P. section 128(a)(5) and Penal Code section 1424.</a></p>	<p>Comment [9] has no counterpart in the Model Rules. It has been added to signal that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it.</p>

## Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(Commission's Proposed Rule – Clean Version)

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of having a material adverse effect on the representation of the client by the remaining lawyers in the firm.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
  - (1) the matter is the same as or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.
- (d) The imputation of a conflict of interest to lawyers

associated in a firm with former or current government lawyers is governed by Rule 1.11.

### Comment

#### *Definition of "Firm"*

- [1] Whether two or more lawyers constitute a firm for purposes of this Rule can depend on the specific facts. See Rule [1.0.1(c), Comments [2] - [4].]

#### *Principles of Imputed Conflicts of Interest*

- [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the duties of loyalty and confidentiality owed to the client as they apply to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing the duties of loyalty and confidentiality owed to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty and confidentiality owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

- [3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not have a material adverse effect on the representation by others in the firm, the firm should not be prohibited from further representation. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and the fact of that lawyer's ownership would have a material adverse effect on the representation of the firm's client by others in the firm because of loyalty to that lawyer, the personal prohibition of the lawyer would be imputed to all others in the firm.
- [4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules [1.0.1(k)] and 5.3. See also Comment [9].
- [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).
- [6] Rule 1.10(c) removes imputation with the informed consent of each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7, [Comments [27] – [28],] and that each affected client or former client has given informed written consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [33]. For a definition of informed consent, see Rule [1.0.1(e)].
- [7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule

1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually prohibited lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rules [1.8.1] through Rule [1.8.12], Rule [1.8.13], and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[9] Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matter pertaining to disqualification. See Code of Civil Procedure section 128(a)(5) and Penal Code section 1424.

## Rule 1.10: Imputation of Conflicts: General Rule

### 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, Alabama's version of Rule 1.10 imputes conflicts that arise under Alabama's versions of 1.7, 1.8(a)-(k), 1.9, and 2.2.

**Arizona:** Rule 1.10(d) permits screening of a personally disqualified lateral lawyer if the "matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role," the lawyer gets no part of the fee, and "written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule."

**California** has no provision comparable to ABA Model Rule 1.10.

**Colorado:** Rule 1.10(e) permits a firm to avoid the imputation of a conflict caused by a laterally hired attorney under some circumstances through the use of a screen.

**District of Columbia** adds Rule 1.10(a)(2), which notes that imputation does not apply "if the representation is permitted by Rules 1.11, 1.12, or 1.18." The D.C. rule also contains a Rule 1.10(e) that creates a partial exception to imputation when a lawyer assists "the Office of the Attorney General of the District of Columbia in providing legal services to that agency."

**Illinois** extends the prohibition of Rule 1.10(a) to any lawyer who "knows or reasonably should know" that another lawyer in the firm is disqualified. Rules 1.10(b) and (e), which address screening, provide as follows:

(b) When a lawyer becomes associated with a firm, the firm may not represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the newly associated lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter; or

(2) the newly associated lawyer is screened from any participation in the matter. . . .

(e) For purposes of Rule 1.10, Rule 1.11, and Rule 1.12, a lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) the lawyer has been isolated from confidences, secrets, and material knowledge concerning the matter;

(2) the lawyer has been isolated from all contact with the client or any agent, officer, or employee of the client and any witness for or against the client;

(3) the lawyer and the firm have been precluded from discussing the matter with each other; and

(4) the firm has taken affirmative steps to accomplish the foregoing.

**Indiana** adds the following screening provision to Rule 1.10 in which subparagraphs (c)(2) and (c)(3) use language that was recommended in 2002 by the ABA Ethics 2000 Commission but rejected by the ABA House of Delegates:

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.

**Massachusetts:** Rule 1.10(d) provides for screening a “personally disqualified lawyer” if he or she “had neither substantial involvement nor substantial material information relating to the matter . . . and is apportioned no part of the fee therefrom.” Rule 1.10(e) describes an appropriate screening process, including a requirement in Rule 1.10(e)(4) that the former client receives an affidavit of the personally disqualified lawyer and the firm describing the screening procedures and attesting that:

(i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm; (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. . . .

In any matter not before a tribunal, “the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.”

**Michigan:** Rule 1.10(b) permits firms to avoid disqualification based on a personally disqualified lawyer who was formerly with another firm if: “(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.”

**Minnesota** includes the following screening provision in its version of Rule 1.10. It is based largely on §124 of the Restatement of the Law Governing Lawyers:

(b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from representing a client pursuant to Rule 1.9(b), other lawyers in the firm may represent that client if there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because:

(1) any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter;

(2) the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation; and

(3) timely and adequate notice of the screening has been provided to all affected clients.

**Nebraska** adds Rules 1.9(d)-(f) to govern conflicts arising from the past work of law clerks, paralegals, secretaries, messengers, and any other “support person,” but Rule 1.9(e)

does not impute support person conflicts to other lawyers at the firm if the former client consents or if the conflicted support person is screened to protect the former client's confidential information.

**New Jersey** adds Rule 1.10(c), which permits screening of a conflicted lawyer who becomes associated with a firm unless that lawyer had “primary responsibility” for the matter. Rule 1.10(f) provides as follows:

Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that: (1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter, (2) the screened attorney acknowledges the obligation to remain screened and takes action to insure the same, and (3) the screened attorney is apportioned no part of the fee therefrom.

Pursuant to Rule 1.7, public entities may not waive conflicts or agree to screening. And New Jersey Rule 1.9(c) reinforces Rule 1.10(c) by providing that “neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.”

**New York:** DRs 5-105(D) and 5-108(C) have the same effect as Rules 1.9(b) and 1.10(a).

**North Carolina:** Rule 1.10 adopts the screening provisions that were proposed by the ABA Ethics 2000 Commission but were rejected by the ABA House of Delegates in 2002.

**Ohio:** Rule 1.10 permits screening of a lateral lawyer, but only if the lawyer did not have a “substantial role” in the matter.

**Oregon** tracks ABA Model Rule 1.10 verbatim but adds a screening procedure in Rule 1.10(c) that requires lawyers to submit affidavits confirming compliance with the screen.

**Pennsylvania:** Rule 1.10(b) permits firms to avoid disqualification based on a personally disqualified lawyer who was formerly with another firm if: “(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.”

**Rhode Island:** In the rules effective April 15, 2007, Rule 1.10 generally tracks ABA Model Rule 1.10 verbatim, but a firm may avoid imputed disqualification based on conflicts imported into the firm by a lateral if “(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.”

**South Carolina:** Rule 1.10 tracks ABA Model Rule 1.10 verbatim but adds the following limited screening provision in Rule 1.10(e):

(e) A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if:

(1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and

(2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

**Tennessee:** Rule 1.10 includes the following screening provisions:

(c) Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may nonetheless represent the person if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

(1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by Rule 1.9(c); and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(d) The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if

(1) the disqualified lawyer was substantially involved in the representation of a former client; and

(2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and

(3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

**Texas:** Rule 1.09 provides:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10 [concerning government lawyers], when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

**Wisconsin:** Rule 1.10(a)(2) permits law firms to avoid imputation of a lateral lawyer's Rule 1.9 conflict if "(i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated"; (ii) the personally disqualified lawyer is timely screened and is apportioned no part of the fee from the matter; and (iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with this rule.



# Proposed Rule 1.12 [n/a]

## “Former Judge, Arbitrator, Mediator”

(Draft #4.1, 6/18/09)

**Summary:** This proposed new rule regulates the conduct of lawyers who may be asked to represent a client in a matter in which the lawyer previously participated personally and substantially as a judge, arbitrator, mediator or other third-party neutral. The Rule generally prohibits such representation unless all of the parties to the proceedings give their informed written consent. The rule also states that such conflicts may be imputed to other lawyers but that the imputation of the conflict can be avoided by establishing an ethical wall to screen the affected lawyer.

### Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule RPC 3-310(A)

Statute

Case law *Cho v. Superior Court* (1995) 39 Cal.App.4th 113

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and also the explanation for paragraphs (a) and (c) in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.12\* Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

September 2009

(Draft rule to be considered for public comment)

### *INTRODUCTION:*

Proposed Rule 1.12 is nearly identical to Model Rule 1.12, except for three substantive changes: (i) substituting the current California Rules' more client-protective requirement of "informed written consent" for the Model Rule's "informed consent, confirmed in writing," see Explanation of Changes, paragraph (a); (ii) expanding the restriction on employment negotiations between adjudicative officers or their staff and parties or their representatives appearing before them, see Explanation of Changes, paragraph (b); and (iii) limiting to former law clerks the availability of ethical screening to avoid imputed disqualification of a law firm after leaving judicial employment, see Explanation of Changes, paragraphs (c) and (d).

Variation in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 1.12; most have adopted Model Rule 1.12 with little or no variation. D.C. Rule 1.12 applies only to non-judicial, third party neutrals. Judges and law clerks are governed under D.C. Rule 1.11. New York, one of only two jurisdictions that has adopted law firm discipline, expressly requires that the *law firm* to which the former adjudicative officer moves to takes steps to properly screen the former adjudicative officer. There are minor variations concerning consent and notice in other jurisdictions. E.g., Georgia, Pennsylvania.

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\* Proposed Rule, Draft 5 (9/1/09).

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.</p>	<p>(a) Except as stated in paragraph (<del>de</del>), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person<sub>1</sub> or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed <u>written</u> consent, <del>confirmed in writing</del>.</p>	<p>Paragraph (a) is identical to Model Rule 1.12(a), except that the cross-reference is to paragraph (e) because of the addition of new paragraph (c), and the requirement of California's more client-protective "informed written consent" instead of the Model Rule's "informed consent, confirmed in writing."</p>
<p>(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge, or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.</p>	<p>(b) A lawyer shall not negotiate for employment with any person who is involved as a party<sub>1</sub> or as <u>a</u> lawyer for a party<sub>1</sub> <u>or with a law firm for a party</u>, in a matter in which the lawyer is participating<sub>1</sub> personally and substantially as a judge or other adjudicative officer<sub>1</sub> or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge<sub>1</sub>, or other adjudicative officer may negotiate for employment with a party<sub>1</sub> or <u>with a</u> lawyer <del>involved</del> <u>or a law firm for a party</u> in a matter in which the clerk is participating personally and substantially, but only <u>after</u><u>with</u> the <del>lawyer has notified</del> <u>approval of</u> the judge<sub>1</sub>, or other adjudicative officer.</p>	<p>Paragraph (b) is nearly identical to Model Rule 1.12(b), except that in the first sentence, the phrase "or with a law firm for a party" has been added for clarification. It makes clear that negotiations are prohibited not only with a lawyer actually appearing in the matter, but also with that lawyer's law firm. The same clarifying change is made in the second sentence. In addition, the Commission has added the requirement that the judge or adjudicative officer must <i>approve</i> negotiations by a law clerk, not just be given notice of the negotiations as specified in the Model Rule.</p>

\* Proposed Rule, Draft 5 (9/1/09), redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(c) <a href="#">Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.</a></p>	<p>The Commission has added paragraph (c) to provide for greater confidence in the integrity of the judicial system and in the administration of justice by not allowing judges to leave a case, join a law firm involved in the matter, and have that firm continue to act as counsel in the case over the objection of one of the parties simply by screening the former judge from the case.</p>
<p>(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:</p>	<p>(ed) If a lawyer is disqualified by paragraph (a) <a href="#">because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal</a>, no lawyer in a <a href="#">law</a> firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:</p>	<p>Paragraph (d) is based on Model Rule 1.12(c). Together with proposed paragraph (c), it permits screening only of law clerks to avoid imputation in a law firm. See <i>Cho v. Superior Court</i> (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863]. The Commission recommends screening for law clerks because the aforementioned concerns over reduced confidence in the administration of justice by screening adjudicative officers is not as great for law clerks. Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.</p>
<p>(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p>	<p>(1) the disqualified lawyer is <del>timely</del> <a href="#">and effectively</a> screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p>	<p>In subparagraph (d)(1), the Commission has added “and effectively” to “timely” to emphasize that not only must a screen be implemented in a timely manner, but it also must be effective.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.</p>	<p>(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this <del>rule</del>Rule.</p>	<p>Subparagraph (d)(2) is identical to Model Rule 1.12(c)(2).</p>
<p>(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.</p>	<p><del>(d)</del> (e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.</p>	<p>Paragraph (e) is identical to Model Rule 1.12(d).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.</p>	<p>[1] This Rule generally parallels Rule 1.11. <u>“Personally and substantially” is intended to include the receipt or acquisition of confidential information that is material to the matter.</u> The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, <u>or acquire confidential information.</u> So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, <u>such as uncontested procedural duties typically performed by a presiding or supervising judge or justice.</u> Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. <del>Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.</del></p>	<p>Comment [1] is based on Model Rule 1.12, cmt. [1]. The Commission has added language to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter.</p> <p>The Commission has also added language to the third sentence of the Model Rule comment to explain more precisely the kinds of duties that would fall outside the Rule.</p> <p>The last two sentences of Model Rule 1.12, cmt. [1] have been deleted because they are inapplicable in California.</p>

\* Proposed Rule, Draft 5 (9/1/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.</p>	<p>[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed <u>written consent</u>, <del>confirmed in writing</del>. [See Rule 1.0(e) <del>and (b)</del>.] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.</p>	<p>Comment [2] is identical to Model Rule 1.12, cmt. [2], except that California's more client-protective "informed written consent" has been substituted to conform to the changes to paragraph (a). See Explanation of Changes for paragraph (a).</p> <p>For the same reason, the reference to Model Rule 1.0(b) (definition of "confirmed in writing") has been deleted.</p>
<p>[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.</p>	<p>[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. <del>Thus, paragraph</del> <u>Paragraph</u> (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm <del>unless the conditions of this paragraph are met</del>.</p>	<p>Comment [3] is based on Model Rule 1.12, cmt. [3]. The revisions are necessary to conform the comment to new paragraph (c), which does not provide for screening of adjudicative officers to avoid imputation of their disqualification to members of their law firms. See Explanation of Changes for paragraph (c).</p>

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule*</u></b></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p>[4] <a href="#"><u>Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met.</u></a> Requirements for screening procedures are stated in Rule [1.0(k)]. Paragraph (ed)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p>Comment [4] is based on Model Rule 1.12, cmt. [4] and clarifies that the permissive screening provisions in paragraph (d) apply only to law clerks to adjudicative officers. See Explanation of Changes for paragraph (d).</p>
<p>[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.</p>	<p>[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.</p>	<p>Comment [5] is identical to Model Rule 1.12, cmt. [5].</p>

## Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating, personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party, or with a lawyer or a law firm for a party in a matter in which the clerk is participating personally and substantially, but only with the approval of the judge or other adjudicative officer.
- (c) Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.
- (d) If a lawyer is disqualified by paragraph (a) because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal, no lawyer in a law firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
- (1) the disqualified lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
- (e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

### Comment

- [1] This Rule generally parallels Rule 1.11. “Personally and substantially” is intended to include the receipt or acquisition of confidential information that is material to the matter. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or

acquire confidential information. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

- [2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed written consent. [See Rule 1.0(e).] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.
- [3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (c) provides that conflicts of the

personally disqualified lawyer will be imputed to other lawyers in a law firm.

- [4] Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met. Requirements for screening procedures are stated in Rule [1.0(k)]. Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.
- [5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

## Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

### 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 direct counterpart to Rule 1.12.

**District of Columbia:** Rule 1.12 does not include former judges.

**Georgia:** Rule 1.12(b) adds that a law clerk who accepts employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantively "shall promptly provide written notice of acceptance of employment to all counsel of record in all such matters in which the prospective employee is involved."

**Illinois:** Rule 1.12(c) covers any lawyer who "knows or reasonably should know" of the former judge's or arbitrator's disqualification. Rule 1.12(c)(1) requires that the disqualified lawyer receive "no specific share" of the fee.

**Massachusetts** extends the law clerk exception in Rule 1.12(b) to law clerks working for mediators.

**New York:** DR 9-101(A) forbids a lawyer to "accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity." DR 9-101(B)(3) provides that a lawyer "serving as a public officer or employee shall not . . . (b) [n]egotiate for private employment with any person who is

involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially."<sup>1</sup>

**Pennsylvania:** Rule 1.12 tracks ABA Model Rule 1.12 except Pennsylvania Rule 1.12(a) does not require that client consent be "confirmed in writing." Texas has no equivalent to Rule 1.12(d).

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<sup>1</sup> New York revised its rules effective 4/1/09 and the new rules no longer include this variation.

# Proposed Rule 1.14 [n/a]

## “Client with Diminished Capacity”

(Draft #11.2, 4/27/09)

**Summary:** This proposed new rule addresses the special circumstances applicable when a lawyer represents a client who has diminished capacity. It includes a permissive exception to the duty of confidentiality allowing a lawyer to notify an individual or organization that has the ability to take action to protect a client who is at risk of undue influence or other harm. The rule excludes representation of minors, clients in criminal matter, and persons who are the subject of conservatorship proceedings.

### Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule

RPC 3-100

Statute

Bus. & Prof. Code §6068(e); Family Code §3150; Welfare & Institutions Code §§300, 602, 675 et seq., §§5000-5579; and Probate Code, Division 4, Parts 1-8, §§1400-3803

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

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### Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No  
(See the introduction in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Representatives of the State Bar's Trusts & Estates Section Executive Committee have appeared at Commission meetings to discuss this rule and provided valuable assistance to the Commission.

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule Proposed Rule 1.14\* Client With Diminished Capacity

September 2009

(Draft rule to be considered for public comment.)

### *INTRODUCTION:*

Proposed Rule 1.14 generally tracks the language of Model Rule 1.14 with six principal differences: the Rule (1) carves out an exception for minors, defendants in criminal matters and persons who are the subject of guardianship or conservatorship proceedings because the rights of such individuals are separately regulated by California statutes; (2) establishes a stricter standard for when a lawyer can reveal confidential information to protect the client's interests, i.e., "significantly diminished capacity"; (3) provides more detailed guidance regarding what constitutes "significantly diminished capacity"; (4) provides that acting pursuant to paragraph (b) of the proposed Rule to reveal confidential client information in the client's interests is a last resort, and enumerates factors the lawyer should consider before taking such action; (5) emphasizes that the nature and extent of any disclosure pursuant to paragraph (b) is strictly circumscribed; and (6) clarifies that taking action pursuant to paragraph (b) is permissive, not mandatory, and that a lawyer is not subject to discipline for failing to take such action.

Minority. A minority of the Commission believes that the policy of abrogating confidentiality reflected in Model Rule 1.14 is the wrong policy for California because it impairs the trust relationship between clients and lawyers. In particular, the Commission's nonlawyer, public member asserts that the proposed rule wrongly assumes that all lawyers possess the expertise of a psychiatric professional necessary to make a threshold determination that a client's mental capacity is "significantly diminished." Absent this expertise, it is

\*Draft 11.2 (4/27/09)

*INTRODUCTION (Continued):*

argued that even well-intentioned lawyers will inevitably breach confidentiality to “protect the client” but that the actual result will be serious adverse consequences for the client. The proposed rule is also opposed based on the following: (1) paragraph (b) does not impose a primary requirement that a lawyer act in a client’s best interest; (2) the rule excludes representations of a minor, a client in a criminal matter, or a conservatee and this has an unintended effect of chilling the consideration of protective action by the lawyers for those clients; (3) the rule improperly treats disclosure of confidential information as a first resort rather than a last resort for protecting a client; (4) the rule does not require a lawyer to ask for a client’s permission before contacting a third party; and (5) the comments to the rule fail to warn lawyers that the loss of trust and candor in the client-lawyer relationship, following a disclosure of confidential information, may be so severe that it warrants mandatory withdrawal from the client’s representation. The minority also expresses concerns that the use of the phrase “confidential information relating to the representation” in paragraph (c) is problematic because it is the confidence and secrets of a client that are protected by Business and Professions Code section 6068(e), not just confidential information relating to the representation. Finally, the minority opposes statutory changes to Business and Professions Code section 6068(e) as that action might invite abrogation of the duty of confidentiality.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.</p>	<p>(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of <del>minority</del>, mental impairment or <del>for</del> some other reason, the lawyer shall, as far as reasonably possible, maintain a normal <u>client-lawyer</u> relationship with the client.</p>	<p><u>Paragraph (a)</u> tracks the language of Model Rule 1.14, except that the reference in section (a) to diminished capacity due to "minority" has been deleted because under California law, the rights and duties of lawyers representing minors are regulated by separate, pertinent statutes. See, e.g., Family Code §3150, Welfare and Institutions Code §§300, 602, 675 et seq. See also Explanation of Changes for paragraph (b) and Comment [9].</p>
<p>(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.</p>	<p><del>(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.</del></p> <p><u>(b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes</u></p> <p><u>(i) that the client has significantly diminished capacity such that the client is unable to</u></p>	<p><u>Paragraph (b).</u> The prefatory language in paragraph (b), which permits a lawyer to take limited protective action on behalf of a client with significantly diminished capacity, excludes from its scope lawyers representing (1) minors, (2) criminal defendants and (3) persons who are the subject of conservatorship proceedings because under California law, The rights of such persons are regulated under other statutory schemes. (Family Code sec. 3150 and Welfare and Institutions Code §§300, 602, 675 et seq. in the case of minors; Penal Code section 1368 et seq. in the case of criminal defendants with diminished capacity, and the Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, §§5000-5579, or Probate Code, Division 4, Parts 1-8, §§1400-3803 in the case of persons who are under conservatorship or who is the subject of a conservatorship or protective proceedings under those</p>

\* Redline/strikeout showing changes to the ABA Model Rule

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,</u></p> <p>(ii) <u>the client is at risk of substantial physical, financial or other harm unless action is taken, and</u></p> <p>(iii) <u>the client cannot adequately act in his or her own interest,</u></p> <p><u>the lawyer may, but is not required to, notify an individual or organization- that has the ability to take action to protect the client.</u></p>	<p>statutes).</p> <p>Subparagraphs (b)(ii) and (iii) track the language of Model Rule 1.14(b) but break out the two criteria into separate subparagraphs for ease of reference. In addition, subparagraph (b)(i) provides a clearer standard by requiring that the client have “significantly diminished capacity,” rather than the Model Rule’s reference to the loose concept of “diminished capacity.” Subparagraph (b)(i) also focuses the inquiry on whether the impairment specifically affects the client’s ability to make decisions in connection with the representation in order to increase client protection in the context of the lawyer-client relationship.</p> <p>Finally, the last, unnumbered subparagraph of paragraph (b) limits permissible action by the lawyer to notification of a person or organization that can take action to protect the client. The Commission voted to omit Model Rule 1.14’s reference to permitting the lawyer to seek appointment of a guardian <i>ad litem</i>, conservator or guardian because a lawyer who took such action would be engaging in conduct adverse to the client and that typically would require the lawyer to withdraw from the representation. Instead, the lawyer can address the problem by notifying an individual or organization with the ability to take action to protect the client, as provided in the proposed Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.</p>	<p>(c) <u>[Confidential information relating to the representation]</u> of a client with diminished capacity is protected by <del>Rule 1.6</del><u>Business and Professions Code section 6068(e)</u>. When taking protective action pursuant to paragraph (b), the lawyer is <del>impliedly</del><u>authorized</u> under <del>Rule 1.6</del><u>section 6068(ae)</u> to reveal information about the client, but only to the extent reasonably necessary to protect the client's <del>interests</del><u>interest, given the information known to the lawyer at the time of the disclosure.</u></p>	<p><u>Paragraph (c)</u> refers to information protected under Business and Professions Code section 6068(e), rather than Rule 1.6, because section 6068(e) is the source of the lawyer's obligation to protect client confidential information under California law. The word "confidential" has been added to modify "information relating to the representation" to conform the phrase to that used in section 6068(e)(2), and the entire phrase placed in brackets pending the Commission's completion of Rule 1.6.</p> <p>Further, because unlike Model Rule 1.6 there is no concept of "implied authority" in section 6068(e), the word "impliedly" has been deleted. The Commission believes an amendment of section 6068(e) is required to provide the authorization contemplated under this Rule.</p> <p>The remainder of paragraph (c) tracks the language of the Model Rule, except to clarify that whether disclosure is "reasonably necessary to protect the client's interest" is determined with reference to "the information known to the lawyer at the time of the disclosure."</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.</p>	<p>[1] <u>The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests.</u> The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client <del>is a minor or</del> suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a <del>severely incapacitated person</del><u>client with significantly diminished capacity</u> may <del>have no power</del><u>not be competent</u> to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about <u>many</u> matters affecting the client's own well-being. For example, <del>children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that</del> some persons of advanced age <del>can be quite</del><u>are</u> capable of handling routine financial matters <del>while needing</del><u>but may need</u> special legal protection concerning major transactions.</p>	<p>Comment [1] is based on Model Rule 1.14, cmt. [1], but (1) adds an introductory sentence to identify the purposes of the rule and (2) omits the reference to minors, representation of whom is addressed in the Family Code and the Welfare and Institutions Code. See Explanation Of Changes to paragraph (a) and the prefatory language of paragraph (b), above. The Commission has also substituted the standard it recommends in the Rule itself, "significantly diminished capacity," for the Model Rule phrase, "severely incapacitated person," which neither appears in the blackletter of Model Rule 1.14 nor is defined. The remaining changes are stylistic.</p>
<p>[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible</p>	<p>[2] The fact that a client suffers <del>a disability from</del><u>diminished capacity</u> does not <del>diminish</del><u>affect</u> the lawyer's obligation to treat the client with attention and respect. Even if the <del>person</del><u>client</u> has a legal representative, the</p>	<p>Comment [2] uses the term "diminished capacity" rather than the Model Rule's term "disability" for consistency of reference with the title of the Rule. The remainder of the Comment tracks Model Rule 1.14, cmt. [2], except that a</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 1.14 Client with Diminished Capacity</b>  <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.14 Client with Diminished Capacity</b>  <b>Comments</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>accord the represented person the status of client, particularly in maintaining communication.</p>	<p>lawyer should as far as possible accord the represented person the <u>full</u> status of client, particularly in maintaining communication. <u>As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal client-lawyer relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.</u></p>	<p>sentence has been added to clarify that the lawyer may need to adapt the method of communication to the client's capacity to comprehend and deliberate.</p>
	<p><u>[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate his or her reasons for a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and</u></p>	<p>Except for its last two sentences, which are based on Model Rule 1.14, cmt. [6], Comment [3] has no Model Rule counterpart. It has been added to provide much-needed clarity to the significantly diminished capacity standard set forth in section (b)(1). It accomplishes this by reference to standards articulated in the Probate Code and by enumerating some of the factors to be considered and steps that may be taken in determining whether the client meets the significantly diminished capacity standard. The last clause of the Comment cautions that the lawyer must take care at all times to maintain lawyer-client confidentiality.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.14 Client with Diminished Capacity Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation.</u></p>	
	<p><u>[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:</u></p> <ul style="list-style-type: none"> <li><u>(1) the amount of time that the lawyer has to make a decision about disclosure;</u></li> <li><u>(2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;</u></li> <li><u>(3) whether the disclosure is likely to lead to proceedings which could have an effect on</u></li> </ul>	<p>Comment [4] has been added to emphasize that the lawyer's disclosure to a third party of a client's perceived significant diminished capacity should be a last resort, by identifying the steps to be taken and the factors to be considered before making such disclosure. The Comment is an attempt to balance the lawyer's obligation to protect the client's interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.14 Client with Diminished Capacity Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.14 Client with Diminished Capacity Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;</a></p> <p>(4) <a href="#">the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and</a></p> <p>(5) <a href="#">the nature and extent of information that must be disclosed to prevent the risk of harm to the client.</a></p> <p><a href="#">A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.</a></p>	
<p>[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's</p>	<p>[<del>3</del>5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally <del>does</del>will not affect the applicability of the <del>attorney</del>lawyer-client <del>evidentiary</del> privilege. <del>Nevertheless</del>See Evidence Code section 952. <del>However</del>, the lawyer must keep the client's interests foremost and, except <del>for protective action</del>as authorized under paragraph (b), must look to the client, and not</p>	<p>Comment [5] is based on Model Rule 1.14, Cmt. [3], but has been modified to add a reference to California Evidence Code 952, which governs in these situations.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>behalf.</p>	<p>family members, to make decisions on the client's behalf.</p>	
<p>[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).</p>	<p><del>[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).</del></p>	<p>Model Rule 1.14, Cmt. [4], has been deleted. As noted above, (see Explanation of Changes for paragraphs (a) and (b)), the rights of minors and conservatees are addressed in California statutes. See also Proposed Comment [9].</p>
<p><b>Taking Protective Action</b></p> <p>[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using</p>	<p><del><b>Taking Protective Action</b></del></p> <p><del>[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph</del> <b>Paragraph</b> (b) permits the lawyer to take protective measures deemed necessary <u>to protect the client's interests</u>. Such measures could include: consulting with family members, using a reconsideration period to permit</p>	<p>Comment [6] is based on the latter half of Model Rule 1.14, Cmt. [5], which addresses section (b) of the Rule.</p> <p>The first part of the Model Rule comment merely repeats the language of the black letter rule as the predicate for the substantive comment and has been eliminated as surplusage.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.</p>	<p>clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of <del>intruding</del> <u>minimizing intrusion</u> into the client's decisionmaking autonomy <del>to the least extent feasible</del>, maximizing client capacities and respecting the client's family and social connections.</p>	
<p>[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.</p>	<p><del>[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.</del></p>	<p>Most of the language from MR 1.14, cmt. [6], has been inserted in Comment [3], above.</p>
	<p><u>[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals</u></p>	<p>Comment [7] has no Model Rule counterpart. It sets forth the rationale for paragraph (b) and also clarifies that a lawyer who makes a permitted disclosure pursuant to paragraph (b) is not subject to discipline.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">information as permitted under paragraph (b) is not subject to discipline.</a></p>	
<p>[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.</p>	<p><del>[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.</del> <a href="#">[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another party where the lawyer would not otherwise be permitted to do so under Rule 1.7 [3-310].</a></p>	<p>Model Rule 1.14, Cmt. [7], has been deleted. As noted above, (see Explanation of Changes for paragraph (b)), the proposed Rule does not permit the lawyer to take steps to have a guardian, guardian <i>ad litem</i> or conservator to be appointed for the client.</p> <p>Instead, the Commission has proposed substituting Comment [8], which clarifies that that this Rule does not permit a lawyer to file for appointment of a guardian or conservator where such conduct is not otherwise permitted by Rule 1.7, or to take any action adverse to the client.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.14 Client with Diminished Capacity Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Disclosure of the Client's Condition</b></p> <p>[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.</p>	<p><del><b>Disclosure of the Client's Condition</b></del></p> <p><del>[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.</del></p>	<p>Model Rule 1.14, cmt. [8], has been deleted. As noted above, (see Explanation of Changes for paragraph (c)), there is no counterpart in Business &amp; Professions Code § 6068(e) to Model Rule 1.6's concept of "implied authorization," so this Comment does not clarify the strictly limited disclosure permitted under paragraph (b).</p>
	<p><u>[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) who is under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code § 3150, Welfare and Institutions Code §§300, 602, 675 et</u></p>	<p>Comment [9], which has no counterpart in the Model Rule, explains that certain categories of person have been excluded from the rule because the rights of such persons are addressed in specific California statutes. See also Explanation of Changes for paragraphs (b) and (c).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, §§5000-5579; Probate Code, Division 4, Parts 1-8, §§1400-3803.</a></p>	
	<p><a href="#">[10] Taking action under paragraph (b) is permitted, but not required, and a lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.</a></p>	<p>Comment [10] has no counterpart in Model Rule 1.14. It clarifies that the course of conduct described in paragraph (b) is not mandatory and that a lawyer is not subject to discipline for violation of the rule for failing to take action under paragraph (b).</p>
<p><b>Emergency Legal Assistance</b></p> <p>[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same</p>	<p><b>Emergency Legal Assistance</b></p> <p><del>[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same</del></p>	<p>The Commission recommends deleting Comments [9] and [10], both of which are addressed to providing emergency legal assistance to a non-client. Comments that are concerned with a lawyer's interactions with non-clients have no place in a Rule that has been carefully crafted to balance the lawyer's obligation to protect a <b>client's</b> interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.14 Client with Diminished Capacity</b></p> <p align="center"><b>Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>duties under these Rules as the lawyer would with respect to a client.</p>	<p><del>duties under these Rules as the lawyer would with respect to a client.</del></p>	
<p>[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.</p>	<p><del>[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.</del></p>	

## Rule 1.14 Client with Diminished Capacity

(Commission's Proposed Rule – Clean Version)

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal -client-lawyer relationship with the client.

(b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes

(1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,

(2) the client is at risk of substantial physical, financial or other harm unless action is taken, and

(3) the client cannot adequately act in his or her own interest,

the lawyer may, but is not required to, notify an individual or organization- that has the ability to take action to protect the client.

(c) Confidential information relating to the

representation of a client with diminished capacity is protected by Business and Professions Code section 6068(e). When taking protective action pursuant to paragraph (b), the lawyer is authorized under section 6068(e) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest, given the information known to the lawyer at the time of the disclosure.

### Comment

[1] The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client suffers from diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a client with significantly diminished capacity may not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, some persons of advanced age are capable of handling routine

financial matters but may need special legal protection concerning major transactions.

- [2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal client-lawyer relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.
- [3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under

Probate Code section 811 et seq. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate his or her reasons for a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation.

- [4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:
  - (1) the amount of time that the lawyer has to make a decision about disclosure;
  - (2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as

adverse to her or his interests;

- (3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;
- (4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer should disclose the information without waiting until immediately before the harm is likely to occur.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally will not affect the applicability of the lawyer-client privilege. See Evidence Code section 952. However, the lawyer must keep the client's interests foremost and, except as authorized under paragraph (b), must look to

the client, and not family members, to make decisions on the client's behalf.

- [6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client's interests. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of minimizing intrusion into the client's decisionmaking autonomy, maximizing client capacities and respecting the client's family and social connections.
- [7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.
- [8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does

paragraph (b) authorize a lawyer to take such actions on behalf of another party where the lawyer would not otherwise be permitted to do so under Rule 1.7 [3-310].

[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) under conservatorship or who is the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code § 3150, Welfare and Institutions Code §§300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, §§5000-5579; Probate Code, Division 4, Parts 1-8, §§1400-3803.

[10] Taking action under paragraph (b) is permitted, but not required, and a lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

## Rule 1.14: Client with Diminished Capacity

### 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 rule comparable to ABA Model Rule 1.14.

**Indiana** adds Rule 1.14(d), which states: “This Rule is not violated if the lawyer acts in good faith to comply with the Rule.”

**Massachusetts:** Rule 1.14(b) permits a lawyer who reasonably believes that a client lacks capacity as described in Rule 1.14(a) to consult “family members, adult protective agencies, or other individuals or entities that have authority to protect the client, and, if it reasonably appears necessary, the lawyer may seek the appointment of a guardian ad litem, conservator, or guardian, as the case may be. The lawyer “may not consult any individual or entity that the lawyer believes, after reasonable inquiry, will act in a fashion adverse to the interests of the client. In taking any of these actions the lawyer may disclose confidential information of the client only to the extent necessary to protect the client’s interests.” Massachusetts has no counterpart to ABA Model Rule 1.14(c).

**New York** has no counterpart to ABA Model Rule 1.14 in its Disciplinary Rules, but ECs 7-11 and 7-12 provide as follows:

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC 7-12 Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and

the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.<sup>1</sup>

**Texas:** Rule 1.02(g) provides: “A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.”

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<sup>1</sup> New York revised its rules effective 4/1/09 and the new rules no longer include this variation.



# Proposed Rule 2.1 [n/a]

## “Advisor”

(Draft #2.1, 9/1/09 )

**Summary:** This proposed new rule describes a lawyer’s role as a client’s advisor. It provides that a lawyer must exercise independent professional judgment. The rule also states that in advising clients, a lawyer may consider factors beyond the law, such as moral, economic, social and political considerations that may be relevant to a client’s situation.

### Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

This Model Rule has no counterpart in the current California rules but in stating the duty of independent professional judgment, the rule emphasizes an important principle that is fully consistent with California law.

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No  
(See the introduction in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 2.1\* Advisor

September 2009  
(Draft rule to be considered for public comment)

### *INTRODUCTION:*

Proposed Rule 2.1 describes a lawyer's role as a client's advisor. There is no counterpart to this Rule in the California Rules, and the Commission is recommending adoption of the black letter rule without any change. Although it is anticipated that the terms of the Rule may not be frequently applied as a lawyer disciplinary standard, the Commission recognizes the importance of this Rule as guidance to lawyers and clients on a lawyer's duty to exercise independent professional judgment.

Regarding the Rule comments, the Commission has made some substantial deletions. For the most part, deletions have been made to focus the Rule on key concepts of independent professional judgment and candor. The commentary concerning a lawyer's responsibility to render *advice* on factors beyond technical legal considerations, such as moral or social factors, was viewed as inconsistent with the terms of the Rule itself, which provides only that a lawyer duly consider these factors in rendering legal advice.

*Minority.* A minority of the Commission believes that an express statement should be added to the Rule or to the Comment to the effect that a lawyer who does not render moral, economic, social, or political advice as permitted by the second sentence of the Rule does not violate this Rule. Proposed Rule 1.6(e) and Rule 1.14, Comment [7], contain such provisions. The second sentence of Rule 2.1 is not intended to be mandatory. However, the absence of such a disclaimer of a violation in this Rule will lead people to argue that a lawyer who does not render such advice should be held accountable in disciplinary proceedings. Otherwise, Rule 1.6(e) and Rule 1.14, Comment [7], would not be necessary.

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\* Proposed Rule 2.1, Draft 2.1 (9/1/09).

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 2.1 Advisor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.</p>	<p>In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.</p>	<p>This language is identical to the Model Rule.</p>

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\* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Scope of Advice</b></p> <p>[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.</p>	<p><b>Scope of Advice</b></p> <p>[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.</p>	<p>Comment [1] is identical to the Model Rule.</p>
<p>[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.</p>	<p>[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. <del>Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.</del> Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.</p>	<p>With the exception of the second sentence, Comment [2] is identical to the Model Rule. The second sentence has been deleted because it may suggest to some lawyers that there is a risk of disciplinary exposure if a lawyer provides competent advice but does not also provide advice on moral issues.</p>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 2.1 Advisor Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 2.1 Advisor Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.</p>	<p><del>[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.</del></p>	<p>Comment [3] has been deleted because the proposition stated therein may be construed as creating a substantive legal standard that goes beyond the terms of the rule itself.</p>
<p>[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.</p>	<p><del>[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts</del></p>	<p>Comment [4] has been deleted as unnecessary practice pointers that distract and potentially undermine the primary message to lawyers and clients that there is a duty of independent professional judgment and candor.</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Offering Advice</b></p> <p>[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.</p>	<p><del><b>Offering Advice</b></del></p> <p><del>[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.</del></p>	<p>Comment [5] has been deleted, in part, because the Commission has included comparable guidance in other proposed rules. For example, the proposed rule on client communication, Rule 1.4, includes Comment [1] that, in part, states:</p> <p>“Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in alternative dispute resolution processes.”</p>

**Rule 2.1 Advisor**  
**(Commission's Proposed Rule – Clean Version)**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

**Comment**

*Scope of Advice*

- [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
  
- [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

## Rule 2.1: Advisor

### 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 direct counterpart to Rule 2.1.

**Colorado** adds the following sentence at the end of Rule 2.1: “In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”

**Georgia** moves the second sentence of the ABA rule to a Comment, and adds the following sentence to the text of the rule in its place: “A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”

**New York** has no Disciplinary Rule counterpart to ABA Model Rule 2.1, but compare New York's EC 7-8, which provides, in part, as follows:

. . . Advice of a lawyer to the client need not be confined to purely legal considerations. . . . A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint. In assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a

decision that is morally just as well as legally permissible.<sup>1</sup>

**Texas:** Rule 2.01 begins, “In advising or otherwise representing a client. . .” and Texas deletes the second sentence of ABA Model Rule 2.1.

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<sup>1</sup> *New York revised its rules effective 4/1/09 and the new rules no longer include this variation.*



# Proposed Rule 3.8 [RPC 5-110]

## “Special Responsibilities of a Prosecutor”

(Draft # 6.1, 4/14/09)

**Summary:** This amended rule states the responsibilities of a prosecutor to assure that charges are supported by probable cause and addresses when and how a prosecutor must respond to new exculpatory information, including evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtained in the prosecutor’s jurisdiction.

### Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule	RPC 5-110
Statute	
Case law	

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

New York

- Other Primary Factor(s)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No  
(See the introduction and explanation of paragraph (g) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Prosecutors have appeared at Commission meetings to address the proposed requirements for responding to new exculpatory information.

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction in the Model Rule comparison chart and Explanation of Changes for paragraph (g), below.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 3.8\* Special Responsibilities Of A Prosecutor

April 2009

(Draft rule revised following consideration of public comment)

### *INTRODUCTION:*

Proposed Rule 3.8 adopts in substance ABA Model Rule 3.8, as amended in February 2008, which imposes special obligations on prosecutors in criminal cases.

However, Proposed Rule 3.8 clarifies and, in some instances, expands the scope of a prosecutor's duties under the Model Rule to provide greater certainty to prosecutors and greater procedural protection to the criminal defendant, specifically by (1) clarifying that the prohibition on prosecution of a charge not supported by probable cause applies at all stages of prosecution; (2) prohibiting such prosecution not only when the prosecutor knows the charge is not supported by probable cause, but also where the prosecutor has reason to know; and (3) clarifying the prosecutor's duties under the Rule to disclose exculpatory information during a proceeding.

In addition, the Commission is recommending the adoption of provisions recently added by the ABA (paragraphs (g) and (h)) to expand the scope of a prosecutor's duty of prompt disclosure of evidence demonstrating the innocence of a defendant who has been convicted, regardless of whether or not the conviction was obtained in the prosecutor's jurisdiction. This Model Rule provision is under consideration in a number of jurisdictions (e.g., Delaware and Michigan) but, to date, only Wisconsin has adopted it.

Minority. A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." See Explanation of Changes for paragraph (g), below.

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\* Proposed Rule 3.8, Draft 6.1 (4/14/09).

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>The prosecutor in a criminal case shall:</p> <p>(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;</p>	<p><del>The</del><sup>A</sup> prosecutor in a criminal case shall:</p> <p>(a) refrain from <del>prosecuting</del><sup>recommending, commencing, or continuing to prosecute</sup> a charge that the prosecutor knows <sup>or reasonably should know</sup> is not supported by probable cause;</p>	<p>The proposed language of paragraph (a) adopts the language of the ABA Model Rule, but adds language to increase client protection in two ways: first, by clarifying that the scope of prohibited conduct includes not only the act of commencing a prosecution that a prosecutor knows is not supported by probable cause, but also conduct before the prosecution is commenced and conduct when, in the course of the prosecution, the prosecutor learns that the prosecution is not supported by reasonable cause; and, second, by lowering the knowledge standard to “knows or reasonably should know” so that a prosecutor’s negligent ignorance will not excuse compliance with the rule.</p>
<p>(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;</p>	<p>(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;</p>	<p>The proposed language of paragraph (b) is identical to that of the ABA Model Rule.</p>
<p>(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;</p>	<p>(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, <sup>unless the tribunal has approved the appearance of the accused in propria persona;</sup></p>	<p>The proposed language of paragraph (c) adopts the language of the ABA Model Rule but carves out an exception to the rule where the accused is not represented by counsel but where the accused is proceeding <i>in propria persona</i> with leave of the tribunal.</p>

\* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>	<p>(d) <del>make</del> <a href="#">comply with all constitutional obligations, as defined by relevant case law regarding the</a> timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;</p>	<p>The proposed language of paragraph (d) generally follows the ABA Model Rule but further clarifies that the requirement of a prosecutor's timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law.</p>
<p>(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:</p>	<p>(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:</p>	<p>Paragraph (e) largely tracks the Model Rule language. Explanations for any variations are provided next to the subparagraphs.</p>
<p>(1) the information sought is not protected from disclosure by any applicable privilege;</p>	<p>(1) the information sought is not protected from disclosure by any applicable privilege <a href="#">or the work product doctrine</a>;</p>	<p>The proposed language of paragraph (e)(1) is taken from the ABA Model Rule, but the Commission has included an additional reference to the work product doctrine because, under California law, work product protection does not constitute a privilege.</p>
<p>(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and</p>	<p>(2) the evidence sought is <del>essential</del> <a href="#">reasonably necessary</a> to the successful completion of an ongoing investigation or prosecution; and</p>	<p>The proposed language of paragraph (e)(2) is taken from the ABA Model Rule, except that the standard for evidence to be disclosed has been changed from "essential to the successful completion etc." to "reasonably necessary to the successful completion etc." in order to provide greater guidance to the prosecutor. It is a difficult, if not impossible, task to decide <i>ex ante</i> what evidence will</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>be "essential" to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of "evidence reasonably necessary to the successful prosecution" is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.</p>
<p>(3) there is no other feasible alternative to obtain the information;</p>	<p>(3) there is no other <del>feasible</del>reasonable alternative t obtain the information;</p>	<p>The proposed language of paragraph (e)(3) is taken from the ABA Model Rule, except that the availability of an alternative that will preclude subpoena to a lawyer had been changed from "feasible" to "reasonable" in order to invoke a frequently used standard that will provide clearer guidance for the prosecutor. If "feasible" means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If "feasible" means that the alternative is reasonable, the more familiar term "reasonable" should be used.</p>
<p>(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this</p>	<p>(f) <del>except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and</del> exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 <del>or this</del></p>	<p>The proposed language of paragraph (f) is taken from the ABA Model Rule, except that the reference to the prosecutor's ability to make statements that serve a legitimate law enforcement purpose, etc. subject to the duty to refrain from making extrajudicial comments with a substantial likelihood of heightening public condemnation of the accused has been deleted as an unnecessary and imprecise re-formulation of the more detailed Model Rule paragraphs 3.6(a) and (b).</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Rule.</p>	<p><del>Rule.</del></p>	
<p>(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor's jurisdiction,</p> <p>(A) promptly disclose that evidence to the defendant unless a court authorizes delay, and</p> <p>(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.</p>	<p>(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:</p> <p>(1) promptly disclose that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor's jurisdiction,</p> <p>(A) promptly disclose that evidence to the defendant unless a court authorizes delay, and</p> <p>(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.</p>	<p>Paragraph (g) and all of its subparagraphs are taken verbatim from the Model Rule. The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of "new, credible and material evidence" that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. The Commission agrees with the policies underlying these paragraphs and recommend their adoption. See also Explanation of Changes for Comments [6A] through [9].</p> <p><u>Minority.</u> A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." The minority argues that the way the rule is drafted suggests that if a prosecutor knows of information and it turns out later on that the information was "new, credible and material information creating a reasonable doubt," the prosecutor may be subject to discipline unless the prosecutor always discloses to a court or appropriate authority any information he or she receives.</p> <p>The majority, however, takes the position that rather than create a trap for unwary prosecutors, the "new, credible and material" modifier was specifically added to the proposed New York rule on which paragraph (g) is based to create a higher standard for triggering the prosecutor's duty of disclosure. The language used encourages prosecutors to err on the side of disclosure in close</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>cases, but does not require the disclosure of all exculpatory information of which the prosecutor might become aware.</p>
<p>(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.</p>	<p>(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.</p>	<p>See Explanation of Changes for paragraph (g).</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.</p>	<p>[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, <del>and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation.</del> Applicable law may require other measures by the prosecutor <del>and knowing</del>, <u>Knowing</u> disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.</p>	<p>The deleted language is unnecessary. The final two sentences of proposed Comment [1] to the ABA Model Rule are a sufficient caution that there may be law or standards governing these obligations or imposing additional obligations upon a prosecutor, violation of which could also constitute a violation of Rule 8.4.</p>
	<p><u>[1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.</u></p>	<p>This definition is intended to clarify, but not to expand, the scope of persons covered by the Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[1B] <a href="#">Paragraph (b) is not intended to expand upon the obligations imposed on prosecutors by applicable law. It also does not prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.</a></p>	<p>Proposed Comment [1B] is intended to clarify paragraph 3.8(b), which is adopted from the ABA Model Rule.</p>
<p>[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a an uncharged suspect who has knowingly waived the rights to counsel and silence.</p>	<p>[2] <del>In some jurisdictions, a</del> defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) <del>does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it</del>not forbid the lawful questioning of <del>a</del>an uncharged suspect who has knowingly waived the rights to counsel and silence.</p>	<p>Proposed Comment [2] is adopted from Comment [2] to the ABA Model Rule, except that the exception governing an accused who is appearing <i>in propria persona</i> with approval of the tribunal has been moved into the black letter rule and therefore removed from the comment. See paragraph (c).</p>
	<p>[3] <a href="#">The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.</a></p>	<p>The first sentence of proposed Comment [3] has been added to clarify that paragraph (d) is intended to apply in the disciplinary context to prevent discipline being imposed in the situation in which a prosecutor followed the law at the time the case was pending, but the law was subsequently changed and applied retroactively. Although the new law and court decision will apply to the defendant's case, the prosecutor should not be disciplined because he or she could not have known that the law would change and be applied retroactively.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>The second sentence in proposed Comment [3] was added at the request of OCTC to clarify that a prosecutor is subject to discipline for failure to fulfill paragraph (d)'s disclosure obligations even if the non-disclosure does not result in actual prejudice to the defendant.</p>
<p>[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.</p>	<p>[3A] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.</p>	<p>Proposed Comment [3A] is adopted verbatim from Comment [3] of the ABA Model Rule.</p>
<p>[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.</p>	<p>[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the <del>client-lawyer</del><u>client or other privileged</u> relationship.</p>	<p>Proposed Comment [4] is adopted from Comment [4] of the ABA Model Rule, but the requirement of "genuine need" has been expanded to include situations in which there would be an intrusion into privileged relationships other than the lawyer-client relationship.</p>
<p>[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing</p>	<p>[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. <del>In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing</del></p>	<p>Proposed Comment [5] is adopted from Comment [5] of the ABA Model Rule, but omits the vague standard that (1) would protect a prosecutor's extrajudicial statements made for a "legitimate law enforcement purpose;" and (2) does not provide adequate guidance to a prosecutor who could be disciplined under paragraph 3.8[f] for extrajudicial statements that "have a substantial likelihood of increasing public opprobrium of the accused." Instead, the Proposed Comment, like the Model Rule, confirms that paragraph 3.8[f] is not intended to prohibit statements by a prosecutor in</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 3.8 Special Responsibilities of a Prosecutor Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 3.8 Special Responsibilities of a Prosecutor Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).</p>	<p><del>public opprobrium of the accused. Nothing in this Comment</del> This comment is <u>not</u> intended to restrict the statements which a prosecutor may make <del>which</del><u>that</u> comply with Rule 3.6(b) or 3.6(c).</p>	<p>compliance with paragraphs (b) or (c) of Rule 3.6, the rule governing trial publicity.</p>
<p>[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.</p>	<p>[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.</p>	<p>Proposed Comment [6] is adopted verbatim from Comment [6] of the ABA Model Rule.</p>
	<p><u>[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Comment [12] to Rule 3.3.</u></p>	<p>Proposed Comment [6A] has been added to clarify that prosecutors are also subject to Rule 3.3, which imposes an obligation upon a lawyer who has offered material evidence that the lawyer later comes to know is false.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.</p>	<p>[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person <del>outside the prosecutor's jurisdiction</del> was convicted of a crime that the person did not commit, <u>and the conviction was obtained outside the prosecutor's jurisdiction</u>, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. <u>The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule [1.0(i)], that the conviction should or should not be set aside. Alternatively, the prosecutor is required to</u> make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to</p>	<p>Proposed Comment [7] is adopted from Comment [7] of the ABA Model Rule, except for three amendments or additions.</p> <p>First, the first sentence has been revised to clarify that a prosecutor has duties even when the wrongly-convicted person was convicted outside the prosecutor's jurisdiction.</p> <p>Second, a third sentence has been added and the fourth sentence of the Model Rule comment has been revised to provide guidance to prosecutors about the scope of the inquiry they are required to make.</p> <p>Third, the last sentence of the Comment has been added to clarify that the duties imposed on the prosecutor are not dependent upon whether the lawyer of the wrongly-convicted defendant could have discovered the evidence.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 3.8 Special Responsibilities of a Prosecutor</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 3.8 Special Responsibilities of a Prosecutor</b></p> <p align="center"><b>Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>assist the defendant in taking such legal measures as may be appropriate. <a href="#">The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.</a></p>	
<p>[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.</p>	<p>[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.</p>	<p>Proposed Comment [8] is adopted verbatim from Comment [8] to ABA Model Rule.</p>
<p>[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.</p>	<p>[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.</p>	<p>Proposed Comment [9] is adopted verbatim from Comment [9] to the ABA Model Rule.</p>

### Rule 3.8 Special Responsibilities of a Prosecutor

(Commission's Proposed Rule – Clean Version)

A prosecutor in a criminal case shall:

- (a) refrain from recommending, commencing, or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;
- (d) comply with all constitutional obligations, as defined by relevant case law regarding the timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
  - (2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other reasonable alternative to obtain the information;
- (f) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
  - (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - (B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

### **Comment**

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereignty may require a prosecutor to undertake

some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.

- [2] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.
- [3] Paragraph (b) is not intended to expand upon the obligations imposed on prosecutors by applicable law. It also does not prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.
- [4] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.
- [5] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the

defendant is acquitted or is able to avoid prejudice on grounds unrelated to the prosecutor's failure to disclose the evidence or information to the defense.

- [6] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [7] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.
- [8] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).
- [9] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from

making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

- [10] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Comment [12] to Rule 3.3.
- [11] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation must be

such as to provide a “reasonable belief,” as defined in Rule [1.0(i)], that the conviction should or should not be set aside. Alternatively, the prosecutor is required to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. The post-conviction disclosure duty applies to new, credible and material evidence of innocence regardless of whether it could previously have been discovered by the defense.

[12] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[13] A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[14] Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matter pertaining to disqualification. See Code of Civil Procedure section 128(a)(5) and Penal Code section 1424.

## Rule 3.8: Special Responsibilities of a Prosecutor

### 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 5-110 provides as follows:

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

In addition, Rule 5-220 provides that a lawyer “shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.”

**Connecticut and Michigan** omit paragraphs (e) and (f) of ABA Model Rule 3.8.

**District of Columbia:** Every paragraph of Rule 3.8 differs from the Model Rule. The D.C. version of Rule 3.8 provides that the prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution’s case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

**Florida** omits paragraphs (b), (e), and (f) of ABA Model Rule 3.8.

**Georgia:** In place of Rule 3.8(b) and (c), Georgia substitutes the simple caution that a prosecutor shall "refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel." Georgia also shortens Rule 3.8(d) by eliminating the part that begins "in connection with sentencing." Georgia also limits the application of Rule 3.8(e) to statements the prosecutor would be prohibited from making only under Rule 3.6(g) (as opposed to the entire rule).

**Illinois:** At the beginning of Rule 3.8, Illinois adds a new paragraph (a) stating: "The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict."

**Maryland** omits Rule 3.8(e), and Rule 3.8(f) extends only to an "employee or other person under the control of a prosecutor."

**Massachusetts:** Rule 3.8(c) prohibits prosecutors from seeking waivers of important pretrial rights from unrepresented defendants unless "a court has first obtained from the accused a knowing and intelligent written waiver of counsel." Massachusetts Rule 3.8(f) tracks ABA Model Rule 3.8(e), but adds that the prosecutor must obtain "prior judicial approval after an opportunity for an adversarial proceeding."

Massachusetts also adds paragraphs (h) and (i), which track DR 7-106(C)(3) and (4), and adds a new paragraph (j) providing that a prosecutor in a criminal case shall "not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused."

The Massachusetts federal court version of Rule 3.8(e) - Local Rule 3.8(f) was declared invalid in *Stern v. United States District Court for the District of Massachusetts*, 16 F. Supp. 2d 88 (1st Cir. 2000), reh'g and reh'g en banc denied, 214 F.3d 4 (1st Cir. 2000) (concluding that "the adoption of Local Rule 3.8(f) exceeded the district court's lawful authority to regulate both grand jury and trial subpoenas" in federal courts).

**New Jersey:** Rule 3.8(c) prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver only of important "post-indictment" pretrial rights, and New Jersey Rule 3.8(d) requires timely disclosure to the defense only of all "evidence," not "information."

**New York:** Regarding ABA Model Rule 3.8(a), New York's DR 7-103(A) provides that a "public prosecutor or other government lawyer" shall not "institute or cause to be instituted" criminal charges when he or she knows "or it is obvious" that the charges are not supported by probable cause. Regarding ABA Model Rule 3.8(b) and (c), New York

has no counterparts. Regarding Rule 3.8(d), DR 7-103(B) provides that a “public prosecutor or other government lawyer” in criminal litigation shall make timely disclosure to counsel for the defendant, “or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer,” that tends to negate the guilt of the accused, mitigate “the degree of” the offense or “reduce the punishment.” Regarding Rule 3.8(e), New York has no counterpart. Regarding Rule 3.8(f), New York has no counterpart except the general supervisory obligation in DR 1-104(C) which provides that a “law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm.” Regarding Rules 3.8(g) and (h), New York has no counterpart.<sup>1</sup>

**North Carolina:** Rule 3.8(e) adds that the prosecutor shall not “participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer,” unless the conditions stated in ABA Model Rule 3.8(e) are satisfied.

**Ohio:** Rule 3.8(a) provides that a prosecutor shall not “pursue or” prosecute a charge that the prosecutor knows is not supported by probable cause. (A note by the drafters says the rule is thus expanded to prohibit either the pursuit or prosecution of unsupported charges and thus is broad enough to include grand jury proceedings.) Ohio omits Rule 3.8(b) because (according to a Model Rules Comparison) ensuring that the defendant is advised about the right to counsel is a

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<sup>1</sup> New York revised its rules effective 4/1/09 and the new rules no longer include this variation.

police and judicial function, and because Rule 4.3 already sets forth duties applicable to all lawyers in dealing with unrepresented persons. Ohio also omits Rule 3.8(c) because that rule has a potential adverse impact on defendants who seek continuances or seek to participate in diversion programs. Rule 3.8(d) deletes the words “and to the tribunal” in connection with sentencing disclosures. Ohio omits Rule 3.8(f) because prosecutors, like all lawyers, are already subject to Rule 3.6.

**Pennsylvania** deletes Rule 3.8(e) (governing subpoenas to lawyers) and instead adopts a separate rule, Pennsylvania Rule 3.10, which forbids a prosecutor or other governmental lawyer, absent judicial approval, to subpoena a lawyer before a grand jury or other tribunal investigating criminal conduct if the prosecutor seeks to compel evidence concerning a current or former client of the lawyer.

**Rhode Island** switches the order of paragraphs (e) and (f) and substitutes the following for ABA Model Rule 3.8(e):

The prosecutor in a criminal case shall . . . (f) not without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

**Texas:** Rule 3.09(a) provides that a prosecutor shall refrain from prosecuting “or threatening to prosecute” a charge that the prosecutor knows is not supported by probable cause. Texas Rule 3.09(b) and (c) provides that a prosecutor shall:

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the

prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights.

Texas omits paragraph (e) and the first half of ABA Model Rule 3.8(f) but retains in Rule 3.07 the obligation to exercise reasonable care to prevent “persons employed or controlled by the prosecutor” in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making.

**Utah:** Rule 3.8(d) eliminates the obligation to disclose unprivileged mitigating information “to the tribunal” in connection with sentencing; Utah omits ABA Model Rule 3.8(e) (regarding subpoenas to lawyers); and Utah’s equivalent to ABA Model Rule 3.8(f) deletes everything up to the phrase “exercise reasonable care.”

**Virginia:** Rule 3.8, which Virginia calls “Additional Responsibilities of a Prosecutor,” states that a prosecutor shall:

(b) not knowingly take advantage of an unrepresented defendant.

(c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense.

(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; . . .

Virginia omits paragraph (e) and the first half of paragraph (f) of ABA Model Rule 3.8 and replaces the duty to “exercise reasonable care to prevent” in the second half of Rule 3.8(f) with a mandate that a prosecutor not “direct or encourage” others to make statements that Rule 3.6 would prohibit the prosecutor from making.

**Wisconsin:** Rule 3.8(b) requires a prosecutor who is “communicating with an unrepresented person in the context of an investigation or proceedings” to “inform the person of the prosecutor’s role and interest in the matter:”

**Wyoming:** Rule 3.8(b) begins with the words “prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an accused.” Wyoming omits Rule 3.8(e) (regarding subpoenas to lawyers).

# Proposed Rule 8.5 [RPC 1-100(D)] “Disciplinary Authority; Choice of Law” (Draft #3, 8/31/09)

**Summary:** This amended rule states the territorial and extra-territorial reach of the California Rules of Professional Conduct. It also addresses conflicts of law with regard to professional conduct rules by setting a choice of law standard.

## Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rule

RPC 1-100(D); Rules 9.40 - 9.48 of the California Rules of Court

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

\* \* \* \* \*

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and the explanation of paragraph (b) of the proposed rule in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 8.5\* Disciplinary Authority; Choice of Law

August 2009

(Draft rule to be considered for public comment.)

### *INTRODUCTION:*

Proposed rule 8.5 is based upon Model Rule 8.5, except that proposed 8.5(b)(2) adopts the California rules as a choice of law unless an admitted lawyer, lawfully practicing in another jurisdiction, is required by the rules of another jurisdiction to engage in different conduct. The Model Rule concepts of the “predominant effect of the conduct is in a different jurisdiction” and the “safe harbor” provision (providing no discipline to a lawyer believing that the predominant effect of the rules of another jurisdiction applied) have been deleted in the interests of protecting the residents of California and in creating a brighter line for application by practicing lawyers, disciplinary prosecutors and disciplinary adjudicators.

Most of the Model Rule 8.5 comments have been retained and used as a basis for the comments to the proposed rules, except where the comments have been inconsistent with the proposed black letter rules or California law.

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\* Proposed Rule 8.5, Draft 3 (8-31-09).

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) <b>Disciplinary Authority.</b> A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.</p>	<p>(a) <b>Disciplinary Authority.</b> A lawyer admitted to practice in <del>this jurisdiction</del>California is subject to the disciplinary authority of <del>this jurisdiction</del>California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in <del>this jurisdiction</del>California is also subject to the disciplinary authority of <del>this jurisdiction</del>California if the lawyer provides or offers to provide any legal services in <del>this jurisdiction</del>California. A lawyer may be subject to the disciplinary authority of both <del>this jurisdiction</del>California and another jurisdiction for the same conduct.</p>	<p>Paragraph (a) is identical to Model Rule 8.5(a), except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction."</p>
<p>(b) <b>Choice of Law.</b> In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:</p>	<p>(b) <b>Choice of Law.</b> In any exercise of the disciplinary authority of <del>this jurisdiction</del>California, the rules of professional conduct to be applied shall be as follows:</p>	<p>Paragraph (b) is identical to Model Rule 8.5(b) except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction."</p>
<p>(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and</p>	<p>(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits <u>applies</u>, unless the rules of the tribunal provide otherwise; and</p>	<p>A minor addition has been made to Paragraph (b)(1) to improve clarity. There is no substantive change.</p>

\* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.</p>	<p>(2) <del>these rules apply to</del> for any other conduct, <del>the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.</del> <del>A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur in and outside this state, except where a lawyer admitted to practice in California and who is lawfully practicing in another jurisdiction, is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.</del></p>	<p>Proposed 8.5(b)(2) deletes most of Model Rule 8.5(b)(2) and substitutes language derived from current rule 1-100(D)(1) as a model to create a brighter line and to provide that these rules remain the standards of professional conduct for all conduct over which California has disciplinary jurisdiction except where an admitted lawyer is lawfully practicing in another jurisdiction which specifically requires a different standard of conduct.</p> <p>This rule deletes the MR concept of "predominant effect" because the concept is ambiguous, over broad and undefineable for the lawyers seeking to comply with the rules and for application by disciplinary prosecutors and adjudicators.</p> <p>The rule also deletes the "safe harbor" provision (providing that a lawyer is not subject to any discipline if the lawyer reasonably believes that he or she was bound by a different set of disciplinary rules) on public protection grounds, since a violation of these rules is generally a "wilful" standard, without any intent requirement. The reasonable belief of the lawyer may properly be considered as a mitigating factor rather than a complete defense.</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 8.5 Disciplinary Authority; Choice Of Law  Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 8.5 Disciplinary Authority; Choice Of Law  Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p><b>Disciplinary Authority</b></p> <p>[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.</p>	<p><b>Disciplinary Authority</b></p> <p>[1] It is longstanding law that the conduct of a lawyer admitted to practice in <del>this jurisdiction</del><a href="#">California</a> is subject to the disciplinary authority of <del>this jurisdiction</del><a href="#">California</a>. Extension of the disciplinary authority of <del>this jurisdiction</del><a href="#">California</a> to other lawyers who provide or offer to provide legal services in <del>this jurisdiction</del><a href="#">California</a> is for the protection of the citizens of <del>this jurisdiction</del><a href="#">California</a>. <del>Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.</del> <a href="#">A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline for the same conduct in California. (See e.g., Bus. &amp; Prof. C., §6049.1.)</a></p>	<p>Comment [1] is based on Model Rule 8.5, cmt. [1] but makes three changes to conform the comment to California law.</p> <p>First, it substitutes "California" for "this jurisdiction." See explanation to proposed (a) above and cites to the court rules for multijurisdictional practice, which also contain the inherent authority of the California Supreme Court over the practice of law in California.</p> <p>Second, it deletes the language regarding reciprocal discipline since California has not adopted these provisions.</p> <p>Third, it adds references to California's statutory provisions for discipline of lawyers who are disciplined in another jurisdiction.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Choice of Law</b></p> <p>[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.</p>	<p><b>Choice of Law</b></p> <p>[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.</p>	<p>Comment [2] is identical to Model Rule 8.5 comment [2].</p>
<p>[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.</p>	<p>[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; <u>and</u> (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; <del>and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.</del></p>	<p>Comment [3] is based on Model Rule 8.5, cmt. [3] except that it deletes the third provision referring to the black letter "safe harbor" to conform to proposed 8.5(b)(2). See explanation above.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.</p>	<p>[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, <u>unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.</u><sup>1</sup> <del>of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct.</del> In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, <u>these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.</u> <del>the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.</del></p>	<p>Comment [4] is based on Model Rule 8.5, cmt. [4] but deletes language to conform the comment to proposed rule 8.5(b)(2).</p> <p>Sentence two clarifies that these rules apply to a lawyer's conduct, including prior to the initiation of a proceeding before a tribunal [after which the rules of the tribunal would generally apply under 8.5(b)(1)], unless the lawyer is lawfully practicing in another jurisdiction that requires a different standard of conduct.</p> <p>In sentence three, the same conformance to proposed rule 8.5(b)(2) has been made.</p> <p>The deleted language does not provide a bright line for lawyers engaged in multijurisdictional practice; whereas the proposed rule provides greater clarity.</p>

<sup>1</sup> Drafter's note: This part of the comment has been changed to conform to the black letter rule (8.5(b)(2). See fn. 5 above.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.</p>	<p><del>[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.</del></p>	<p>Model Rule 8.5 comment [5] has been deleted because it refers exclusively to the safe harbor language which was deleted from proposed rule 8.5(b)(2). See explanation above.</p>
<p>[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.</p>	<p><del>[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.</del></p>	<p>This entire comment has been deleted because it is improper to discuss what another disciplinary jurisdiction should or should not do or to recommend that the California Supreme Court should limit its inherent power with this comment. Moreover, the statement is inconsistent with the operation of Bus. &amp; Prof. C., §6049.1 [discipline of a California lawyer who has been disciplined by another jurisdiction].</p>
<p>[7] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.</p>	<p><del>[7]</del><u>[5]</u> The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions <del>provide otherwise</del> <u>preempt these rules</u>.</p>	<p>Comment [5] is identical to Model Rule 8.5 Comment [7] except that the words "provide otherwise" have been deleted and the words "preempt these rules" have been added. This conforms the comment to the black letter rule 8.5(b)(2) that the California rules will be the default standards, unless the rules of a jurisdiction in which the lawyer is lawfully practicing require different conduct. Accordingly, only preemption by treaty, etc. would "require other conduct."</p>

## Rule 8.5 Disciplinary Authority; Choice Of Law

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
  - (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and
  - (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California and who is lawfully practicing in another jurisdiction, is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

### Comment

#### *Disciplinary Authority*

- [1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the

disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline for the same conduct in California. (See e.g., Bus. & Prof. C., §6049.1.)

#### *Choice of Law*

- [2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.
- [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be

subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

- [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.
- [5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

## Rule 8.5: Disciplinary Authority; Choice of Law

### 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 1-100(D), headed “Geographic Scope of Rules,” provides as follows:

(1) As to members: These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

In addition, in 2004 California Supreme Court adopted Rules 964 and 965, which permit “Registered Legal Services Attorneys” and “Registered In-House Counsel” to practice law in California without being members of the California Bar. Each requires that qualifying attorneys “[a]bide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education

(MCLE) requirements.” Rules 966 and 967, respectively entitled “Attorneys Practicing Law Temporarily in California as Part of Litigation” and “Non-Litigating Attorneys Temporarily in California to Provide Legal Services,” each contain the following language:

*[Conditions]* By practicing law in California pursuant to this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

(2) The jurisdiction of the courts of this state to the same extent as is a member of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

Substantial excerpts from Rules 964 through 967 are reprinted below in our chapter on California Materials following Rule 1-300 of the California Rules of Professional Conduct.

**District of Columbia:** Rule 8.5(a) omits the second sentence of ABA Model Rule 8.5(a) (“A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”) Rule 8.5(b)(2) provides as follows:

(2) For any other conduct,

(i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

**Florida:** In Supreme Court Rule 3-4.6, Florida has adopted the language of Rule 8.5(b) except for the second sentence of paragraph (b)(2). In addition, Florida Rule 3-4.1 provides as follows:

Every member of The Florida Bar and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provision of this rule and the standards of ethical and professional conduct prescribed by this

court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

When the Florida Supreme Court rejected a proposal to amend this rule in 1999, it said: “Out-of-state lawyers are not lawyers who are subject to the Rules Regulating the Florida Bar; rather, they are 'non lawyers' subject to chapter 10 unlicensed practice of law charges if they . . . engage in improper solicitation or advertising in Florida.” See Amendments to Rules Regulating the Florida Bar Advertising Rules, 762 So.2d 392, 393-395 (Fla. 1999).

**Georgia:** Rules 8.5(a) and (b) both use the phrase “Domestic and Foreign Lawyer” in place of the phrase “lawyer.” Georgia defines those terms as follows:

“Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

“Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

In addition, Georgia Rule 9.4 generally tracks Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary

Enforcement (reprinted below in the Related Materials for ABA Model Rule 8.5), which govern jurisdiction and reciprocal discipline.

**Illinois:** Illinois Supreme Court Rules 716 and 717 (summarized above in the Related Materials following ABA Model Rule 5.5) permit in-house and legal services lawyers to engage in limited law practice in Illinois. Rules 716 and 717 both provide that all lawyers licensed under the rules “shall be subject to the jurisdiction of the Court for disciplinary purposes to the same extent as all other lawyers licensed to practice law in this state.”

**Maryland:** Rule 8.5(a) explicitly extends disciplinary jurisdiction to any lawyer who “holds himself or herself out as practicing law in this State,” or who “has an obligation to supervise or control another lawyer practicing law in this State whose conduct constitutes a violation of these Rules.”

**Massachusetts** has not adopted Rule 8.5 (b). Comment 2 to Massachusetts Rule 8.5 explains that Rule 8.5(b) has been reserved because “study of ABA Model Rule 8.5(b) has revealed many instances in which its application seems problematic.”

**Michigan:** The second sentence of Rule 8.5 provides as follows: “A lawyer who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction.” Michigan has not adopted Rule 8.5(b).

**Nevada:** Rule 8.5 consists of only one sentence: “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.” Also relevant is Nevada Rule 7.2(a),

which states as follows: “These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada.”

**New Jersey** deletes the last sentence of Rule 8.5(b) (“A lawyer shall not be subject to discipline . . .”).

**New York:** DR 1-105 provides as follows:

A. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

B. In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

In addition, the last sentence of New York's EC 2-10 states: "A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state." Conversely, DR 2-103(K) provides that DR 2-103 (which governs solicitation) "shall apply to a lawyer or members of a law firm not admitted to practice in this State who solicit retention by residents of this State."

**Oregon:** Rule 8.6 designates certain entities authorized to issue advisory ethics opinions and provides that in any disciplinary matter, the tribunal "may consider any lawyer's good faith effort to comply with an opinion" in evaluating the lawyer's conduct or in mitigation of sanction.

**South Carolina:** S.C. Appellate Court Rule 418 requires any "unlicensed lawyer" (defined as "any person who is admitted to practice law in another jurisdiction but who is not admitted to practice law in South Carolina") to comply with South Carolina's lawyer advertising rules (Rules 7.1 through

7.5) if the unlicensed lawyer engages in any of six specified forms of advertising or solicitation.

**Texas:** Rule 8.05(b) provides as follows:

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

**Virginia** retains the version of ABA Model Rule 8.5 as it was amended in 1993.