

ATTACHMENT 4

Clean Version Drafts of Proposed Rules in
Batches 1, 2 & 3 as Distributed for Public Comment

DISCUSSION DRAFT*

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF
THE STATE BAR OF CALIFORNIA

Commission for the Revision of the
Rules of Professional Conduct



State Bar of California

June, 2006

*This version of the Discussion Draft provides the clean text of the proposed rules. Refer to the expanded Discussion Draft for comparison drafts to the current California Rules and the ABA Model Rules.

HOW TO COMMENT:

The State Bar encourages all interested persons or organizations to submit comments on the proposed new and amended Rules of Professional Conduct.

An expanded Discussion Draft is available on a CD-ROM disc that includes word processing files for each of the proposed rules. If your comment will include recommended modifications of any of the proposed rules, then submitting a redraft of a rule will help the Rules Revision Commission understand your desired changes. The expanded Discussion Draft is also available online at www.calbar.ca.gov. Click on the link Proposed Rules of Professional Conduct under the heading **Ethics**, which is located on the right navigation bar.

Online Submission: Comments may be submitted **online** by using an online Public Comment Form.^{*/} A link to the Public Comment Form is posted on the State Bar website at the same page as the expanded Discussion Draft indicated above.

Mail or Fax Submission: Comments may also be submitted in writing by **mail** or **fax**. To facilitate the Commission's consideration of written comments, Each rule you choose to comment on should be on a **separate sheet of paper**. Indicate the rule number **in the subject line at the beginning of the letter**, your name, any organization or entity on whose behalf you are submitting comment, and any brief information about yourself which you wish to be considered on each page.

Mail or Fax to: Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Ph. # (415) 538-2167
Fax # (415) 538-2171

^{*/} The direct url for the online comment form is: https://fs16.formsite.com/SB_RRC/PC_Batch1/secure_index.html

SUMMARY OF PUBLIC COMMENT PROPOSAL

PLEASE NOTE: *Publication for public comment is not, and shall not, be construed as a recommendation or approval by the Board of Governors of the materials published.*

SUBJECT: Twenty-Seven (27) proposed new or amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

BACKGROUND: The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval. The State Bar has assigned a special commission to conduct a thorough study of the rules and to recommend comprehensive amendments. The special commission has completed work on a group of 27 proposed new and amended rules and is seeking member and public input. This group of proposed amendments is the first of four public comment groups that will be distributed through 2008. In addition, it is anticipated that a public hearing will be conducted for each of the four public comment groups.

The Supreme Court will provide preliminary guidance to the Commission after each group of proposed rules has been circulated for public comment and the Commission has made any subsequent revisions. The Court has agreed that the Commission may submit each group of proposed rules to the Supreme Court for informal review at this stage of the Commission's consideration. The purpose of this initial submission is to provide the Commission with an opportunity to consider any initial reactions, concerns, and suggestions that the Supreme Court may have about each group of proposed amendments. This preliminary consideration by the Supreme Court will not constrain or foreclose any action by the Supreme Court in the future, but is intended to provide helpful guidance to the Commission as it proceeds with its preparation of its final draft proposals and formal recommendations to the Court. Amendments to the rules will become operative only upon formal approval by the Supreme Court.

PROPOSAL: The twenty-seven (27) proposed new or amended rules are listed below by proposed new rule number. The rule number of the comparable current rule, if any, is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.

		<u>Page</u>
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct [1-100]	1
Rule 1.0.1	Definition of the term "Law Firm" as used in the rules [1-100(B)(1)]	2
Rule 1.1	Competence [3-110]	2
Rule 1.2.1	Counseling or Assisting the Violation of Law [3-210]	3
Rule 1.4	Communication [3-500, 3-510]	3
Rule 1.5.1	Financial Arrangements Among Lawyers [2-200]	4
Rule 1.8.8	Limiting Liability to Client [3-400]	5
Rule 1.8.10	Sexual Relations With Client [3-120]	6
Rule 2.4	Lawyer as Third-Party Neutral	6
Rule 2.4.1	Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator [1-710]	7
Rule 2.4.2	Lawyer as Candidate for Judicial Office [1-700]	8
Rule 3.1	Meritorious Claims and Contentions [3-200]	8
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers	8
Rule 5.2	Responsibilities of a Subordinate Lawyer	9
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants	10
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member [1-311]	10
Rule 5.5	Unauthorized Practice of Law; Multi-jurisdictional Practice of Law [1-300]	10
Rule 5.6	Restrictions on a Lawyer's Right to Practice [1-500]	12
Rule 7.1	Communications Concerning the Availability of Legal Services [1-400]	13
Rule 7.2	Advertising [1-400]	15
Rule 7.3	Direct Contact with Prospective Clients [1-400]	16
Rule 7.4	Communication of Fields of Practice and Specialization [1-400]	17
Rule 7.5	Firm Names and Letterheads [1-400]	17
Rule 8.1	False Statement Regarding Application for Admission to Practice [1-200]	18
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline [1-110]	18
Rule 8.3	Reporting Professional Misconduct [1-500(B)]	18
Rule 8.4	Misconduct [1-120]	19

FISCAL/PERSONNEL IMPACT: No unbudgeted fiscal or personnel impact.

SOURCE: State Bar Special Commission for the Revision of the Rules of Professional Conduct

COMMENT DEADLINE: 5 p.m., October 16, 2006

Proposed Rules of Professional Conduct

Rule 1.0: Purpose and Scope of the Rules of Professional Conduct

(a) Purpose: The purposes of the following Rules are:

- (1) To protect the public;
- (2) To protect the interests of clients;
- (3) To protect the integrity of the legal system and to promote the administration of justice; and
- (4) To promote respect for, and confidence in, the legal profession.

(b) Scope of the Rules:

- (1) These Rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these Rules, regulate the conduct of lawyers and are binding upon all members of the State Bar and all other lawyers practicing law in this state.
- (2) A willful violation of these Rules is a basis for discipline.
- (3) Nothing in these Rules or the comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Comments: The comments following the Rules do not add obligations to the Rules but provide guidance for interpreting and practicing in compliance with the Rules.

(d) Title: These Rules are the "California Rules of Professional Conduct."

Comment

[1] The Rules of Professional Conduct are Rules of the Supreme Court of California regulating lawyer conduct in this state. (See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal.Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418 [25 Cal.Rptr.2d 80].) The Rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to Business and Professions Code sections 6076 and 6077. The Supreme Court of California has inherent power to regulate the practice of law in California, including the power to admit and discipline lawyers practicing in this jurisdiction. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801]; *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525, 542-543 [28 Cal.Rptr.2d 617] and see Business and Professions Code section 6100.)

[2] The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]; *Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355].) Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. (See, *Stanley v. Richmond*, supra, 35 Cal.App.4th at p. 1086; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of the rule may have other non-disciplinary consequences. (See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party).)

[3] These Rules are not the sole basis of lawyer regulation. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other statutes, rules of court, and the opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted for guidance on proper professional conduct. Ethics opinions of other bar associations may also be considered to the extent they relate to rules and laws that are consistent with the rules and laws of this state.

[4] Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code section 6077.)

[5] These Rules govern the conduct of members of the State Bar in and outside this state, except as members of the State Bar may be specifically required by a jurisdiction in which they are lawfully practicing to follow rules of professional conduct different from these Rules. These Rules also govern the conduct of other lawyers practicing in this state, but nothing contained in these Rules shall be deemed to authorize the practice of law by such persons in this state except as otherwise permitted by law. For the disciplinary authority of this state and choice of law, see Rule [8.5].

Proposed Rules of Professional Conduct

Rule 1.0.1: Terminology

Law Firm Definition

“Law firm” means a lawyer or lawyers in a law partnership, professional law corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.

Comment

[1] Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a law firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a law firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[2] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a law firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliate corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Rule 1.1: Competence

- (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this Rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

Comment

[1] This Rule requires that a lawyer act with reasonable diligence and promptness in representing a client.

[2] The duties set forth in this Rule include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [229 Cal.Rptr. 101, 714 P.2d 1239]; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525, 695 P.2d 1066]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834, 685 P.2d 1185]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670, 635 P.2d 163]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577]. See also Rules 5.1 and 5.3.)

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

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

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

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

Proposed Rules of Professional Conduct

Rule 1.2.1: Counseling or Assisting the Violation of Law

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, 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, rule or ruling of a tribunal.

Comment

[1] This Rule 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 with the intent of facilitating or encouraging the conduct. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, by 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.

[2] This Rule is intended to apply not only to the prospective conduct of a client but also to the interaction between the lawyer and client and to the specific legal service sought by the client from the lawyer. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the lawyer. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the lawyer negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

[3] A lawyer is required to avoid assisting a client where the lawyer knows of the client's improper course of action and 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 client's wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believes was legally proper but later discovers is criminal or fraudulent. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Bus. & Prof. Code § 6068, subdivision (e)(1). Subject to Bus. & Prof. Code § 6068, subdivision (e)(1), the lawyer must take such actions as appear to the lawyer to be in the best lawful interest of the client, including counseling the client to take 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].

[4] The last clause of this Rule 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. The Rule recognizes that determining the validity or interpretation of a statute, regulation or other law or ruling of a tribunal in good faith may require a course of action involving disobedience of the statute, regulation or other law or ruling of a tribunal, or of the interpretation placed upon it by governmental authorities. In addition, a lawyer may properly 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.

[5] 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).

Rule 1.4: Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules or the State Bar Act;
- (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;
- (3) keep the client reasonably informed about significant developments relating to the representation;
- (4) promptly comply with reasonable client requests for information necessary to keep the client reasonably informed as required by paragraph (a)(3);
- (5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed as required by paragraph (a)(3), which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and
- (6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Proposed Rules of Professional Conduct

(c) A lawyer shall promptly communicate to the lawyer's client:

- (1) All terms and conditions of any offer made to the client in a criminal matter; and
- (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

Comment

[1] This Rule is not intended to change a lawyer's duties to his or her clients. (See Bus. & Prof. Code, §6068, subd. (m), (n).)

[2] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in an abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. 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. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.

[3] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

[4] As used in paragraph (c), "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral.

[6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously indicated that the proposal will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)].

[7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.

[8] A lawyer ordinarily should provide to the client the information that would be appropriate for a comprehending and responsible adult. However, it can be impractical to inform the client fully according to this standard, for example, when the client is a child or suffers from diminished capacity. See Rule [1.14]. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule [1.13]. The lawyer may arrange a system of limited or occasional reporting with the client when many routine matters are involved.

[9] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. This Rule is not intended to require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is also not intended to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the lawyer. Compare Rule [1.16, comment ____].

[10] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

Rule 1.5.1: Financial Arrangements Among Lawyers

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

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

Proposed Rules of Professional Conduct

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

Comment

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

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

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

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client, and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

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

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

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

[8] This Rule differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer, that each lawyer assume joint responsibility for the representation or that the client consent to the participation of the lawyers involved as required in Model Rule 1.5(e)(1) & (2).

Rule 1.8.8: Limiting Liability to Client

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
- (1) represented by independent counsel concerning the settlement; or
 - (2) advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Comment

[1] This Rule prohibits lawyers from settling claims and potential claims for malpractice without complying with the requirements of the Rule. In view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing to seek independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

[2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-

Proposed Rules of Professional Conduct

liability entity. [Placeholder for cross-reference to Task Force's proposed Rule Of Professional Conduct re disclosing insurance coverage].

[3] Paragraph (b) addresses only particular aspects of agreements that limit a lawyer's liability to a client or former client. It is not intended to override any obligation the lawyer might have under other law.

[4] This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a lawyer from reasonably limiting the scope of the lawyer's representation. (See Rule [1.2].)

Rule 1.8.10: Sexual Relations With Client

- (a) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.
- (b) A lawyer shall not:
 - (1) Require or demand sexual relations with a client 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; or
 - (3) Continue representation of a client with whom the lawyer has sexual relations if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter.
- (c) Paragraphs (b)(1) and (b)(2) shall not apply to sexual relations between lawyers and their spouses or persons in an equivalent domestic relationship, or to ongoing consensual sexual relations which predate the initiation of the lawyer-client relationship.
- (d) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Comment

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

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

[3] Although paragraph (c) excludes representation of certain clients from the scope of this Rule, the exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including Rule 1.1 and Rule [re: conflicts of interest].

Rule 2.4: Lawyer as Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.
- (c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.5 [impartiality, conflicts of interest, disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], 1620.8 [marketing], and 1620.9 [compensation and gifts] of the Judicial Council Standards

Proposed Rules of Professional Conduct

for Mediators in Court Connected Mediation Programs. A lawyer serving as a third-party neutral in a mediation shall also comply with Rule 1620.4 [confidentiality] of those Standards.

- (d) A lawyer serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], 12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, neutral arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. See [Comment \[6\]](#) and [Comment \[7\]](#).

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. *Cho v. Superior Court* (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct and the State Bar Act.

[6] Paragraph (c) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council mediator standards whenever the lawyer is serving as a third-party neutral in a mediation or settlement conference. As indicated in paragraph (c), Rule 1620.4 [confidentiality] of the mediator standards is intended to apply to a lawyer serving in a mediation but it is not intended to apply to a lawyer serving in a settlement conference (see Evidence Code section 1117 and Rule 222 of the California Rules of Court).

[7] Paragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[9] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4.1: Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator.

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

Comment

[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

Proposed Rules of Professional Conduct

[3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

Rule 2.4.2: Lawyer as Candidate for Judicial Office

- (a) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.
- (b) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election or appointment. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer commences to become a candidate for judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with paragraph (a) shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first, or when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

Discussion:

[1] This Rule applies to lawyers who are candidates for election to judicial office and to lawyers who have applied for appointment to judicial office. (See California Code of Judicial Ethics, Canon 5B.)

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

Rule 3.1: Meritorious Claims and Contentions

- (a) A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
- (b) A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law and fact that is not frivolous. See, e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958 [87 P.3d 802, 12 Cal.Rptr.3d 54.] See also Business and Professions Code section 6068, subdivision (c) and (g), Civil Code sections 128.5, 128.6 and 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

[4] Subject to Comment [3] and Rule [3.8, paragraph (a)] addresses the duties of lawyers when bringing or defending proceedings of all kinds, including appellate and writ proceedings.

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

Proposed Rules of Professional Conduct

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) is intended to apply to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a law firm. Paragraph (b) is intended to apply to lawyers who have supervisory authority over the work of other lawyers in a firm. Paragraph (c) is intended to impose personal responsibility on a lawyer for the acts of another lawyer in the law firm. See also Rule 8.4(a). Paragraphs (a), (b) and (c) of this Rule create independent bases for discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the law firm will conform to the Rules of Professional Conduct. Such policies and procedures include, for example, those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[3] Paragraphs (a) and (b) are also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules. See Rule [2.1] and Rule 8.4(a).

[4] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, may be vicariously responsible for the conduct of the other lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, both the supervisor and the subordinate have a duty to correct the resulting misapprehension the resulting misapprehension if doing so is consistent with the lawyer's duty not to disclose confidential information under Business & Professions Code section 6068, subdivision (e)(1).

[5] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[6] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[7] This Rule is not intended to alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.2: Responsibilities of a Subordinate Lawyer

- (a) A lawyer shall comply with the Rules of Professional Conduct and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] A lawyer under the supervisory authority of another lawyer is not by the fact of supervision excused from the lawyer's obligation to comply with the Rules of Professional Conduct or the State Bar Act. Although a lawyer is not necessarily relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules. See Rule 8.4(a). For example, if a subordinate signed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under the Rules of Professional Conduct or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the arguable question of

Proposed Rules of Professional Conduct

professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.3.1: Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

(a) For the purposes of this Rule:

- (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
 - (2) "Member" means a member of the State Bar of California.
 - (3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d); and
 - (4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.
- (b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer's client:
- (1) Render legal consultation or advice to the client;
 - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
 - (3) Appear as a representative of the client at a deposition or other discovery matter;
 - (4) Negotiate or transact any matter for or on behalf of the client with third parties;

Proposed Rules of Professional Conduct

- (5) Receive, disburse or otherwise handle the client's funds; or
- (6) Engage in activities which constitute the practice of law.
- (c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:
 - (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
 - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
 - (3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The information contained in such notices shall be available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.
- (e) A lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall promptly serve upon the State Bar written notice of the termination.

Comment

[1] For discussion of the activities that constitute the practice of law, see Rule 5.5, comment [4].

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

[3] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], 983.1 [appearances by military counsel], 983.2 [certified law students], 983.4 [out-of-state attorney arbitration counsel program] and 988 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.

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

- (a) A lawyer admitted to practice law in California shall not:
 - (1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or
 - (2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.
- (b) A lawyer who is not admitted to practice law in California shall not:
 - (1) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

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

Proposed Rules of Professional Conduct

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

Guidance on what constitutes the practice of law

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the provision of legal services by unqualified persons or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work as provided in Rule 5.3. Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies.

[4] In California, the definition of the “practice of law” has evolved through case law and is generally understood to include the following:

- (a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)
- (b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup.Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)
- (c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 6126, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services they may provide in California.

Rule 5.6: Restrictions on a Lawyer's Right to Practice

(a) A lawyer shall not offer or enter into:

- (1) A partnership, shareholder, operating, employment or other similar agreement that restricts the right of a lawyer to practice law after termination of the relationship; or
- (2) Any other agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts any lawyer's right to practice law.

(b) Notwithstanding paragraph (a)(1) of this Rule or unless otherwise proscribed by law, a lawyer may offer or enter into an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in or employment by that law firm if the lawyer competes with that law firm after such termination, provided that:

- (1) The lawyer's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and

Proposed Rules of Professional Conduct

- (2) The affected compensation will be paid solely from future firm revenues, and not from compensation already earned by the lawyer, the lawyer's share in the equity of the firm, the lawyer's share of the firm's net profits, or the lawyer's vested interest in a retirement plan.

Comment

[1] Paragraph (a)(1) permits a restrictive covenant in a law corporation, partnership or employment agreement that provides that a lawyer who is a law corporation shareholder, partner or associate shall not have a separate practice during the existence of the relationship. However, upon termination of the relationship (whether voluntary or involuntary), the lawyer is free to practice law without any contractual restriction except in the case of retirement from the active practice of law or as further noted below.

[2] Paragraph (b)'s exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under American Bar Association Model Rule 5.6 have identified the factors enumerated in paragraphs (b)(1) and (b)(2) as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman* (D.C. 1998) 715 A.2d 127, 136-137 (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C.* (Iowa 1999) 599 N.W.2d 677, 682 (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service ... clearly qualifies as a retirement plan"); *Miller v. Foulston, Siefkin, Powers & Eberhardt* (Kan. 1990) 246 Kan. 450, 458 [790 P.2d 404] (payments made to former partners who satisfy age, longevity or disability requirements "[f]it squarely within the exception of [the ethics rule]"). Significantly, these authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to the Rule. See also *Neuman v. Atkman*, supra, 715 A.2d at 136 (retirement benefits come "entirely from firm profits that post-date the withdrawal of the partner"); Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg* (Iowa 1990) 461 N.W.2d 598, 601-602 [59 USLW 2311] (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison, Mahoney & Miller* (Mass. 1997) 426 Mass. 253, 257-258 [687 N.E.2d 1237] (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord, Day & Lord* (NY 1989) 75 N.Y.2d 95, 100 [550 N.E.2d 410] (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits).

[3] While this Rule bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that former Rule 1-500 does not per se prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80]. The Court's rationale for permitting such agreements is that "an agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." *Id.* at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. *Id.* at 419, 425. See also *Haight, Brown & Bonesteel v. Sup. Ct.* (1991) 234 Cal.App.3d 963, 969-971 [285 Cal.Rptr. 845] (former Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal. App. 4th 1096 [47 Cal.Rptr.2d 650] (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court* (1988) 201 Cal. App. 3rd 777 [247 Cal.Rptr. 624] (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).

[4] This Rule is not intended to prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093 (governing agreements regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practice as authorized by Business & Professions Code sections 16602 et seq. (governing agreements not to compete in connection with dissolution of or dissociation from partnership); see also Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 et seq. may violate former Rule 1-500).

Rule 7.1: Communications Concerning the Availability of Legal Services

- (a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.

Proposed Rules of Professional Conduct

- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
 - (1) Contains any untrue statement; or
 - (2) Contains any misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public.
- (d) The Board of Governors of the State Bar may formulate and adopt standards as to communications which will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Comment

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.

[2] Rule 7.1 is also intended to prohibit truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.

[5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not intended to be exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

[6] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Standards

Pursuant to Rule 7.1(d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

- (1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" which contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
- (3) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.
- (4) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
- (5) A "communication" which states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.
- (6) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period

Proposed Rules of Professional Conduct

of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule 7.2: Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any medium, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with Rule [1.17]; and
 - (4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] [RESERVED]

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. *But see* Rule 7.3(a) concerning real-time electronic communications with prospective clients.

[4] Neither this Rule nor Rule 7.3 is intended to prohibit communications authorized by law.

Paying Others to Recommend a Lawyer

[5] Notwithstanding Rule 1-320(C)'s general prohibition on a lawyer giving or promising anything of value to a representative of a communication medium in return for publicity of the lawyer, paragraph (b)(1), allows a lawyer to pay for advertising and communications permitted by this Rule, including but not limited to the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] Paragraph (b)(2) is intended to permit a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code, section 6155(c). Paragraph (b)(2) is also intended to permit a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See *also* Rule [5.4(a)(4)].

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and [5.4]. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

Proposed Rules of Professional Conduct

[8] Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule [5.4 (c)]. A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. See also Rule 1.5.1(b). Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule [re: conflicts of interest]. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule is not intended to restrict referrals or divisions of revenues or net income among lawyers within a law firm comprised of multiple entities. Divisions of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business & Professions Code, section 6155, subdivision (h). See also Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.

Rule 7.3: Direct Contact with Prospective Clients

- (a) A lawyer shall not by in person, telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or
 - (3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in person, telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.

Proposed Rules of Professional Conduct

[4] There is far less likelihood that abuse will occur when the person contacted is a lawyer, a former client, or one with whom the lawyer has a prior close personal or family relationship, or in situations in which the lawyer is not motivated by pecuniary gain. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1), or (iv) is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of paragraph (b)(3) is prohibited.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a *bona fide* group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

[7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) is also not intended to apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules [5.4] and 8.4(a).

Rule 7.4: Communication of Fields of Practice and Specialization

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.
- (b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that the lawyer is a certified specialist in a particular field of law, unless:
 - (1) the lawyer holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and
 - (2) the name of the certifying organization is clearly identified in the communication.

Rule 7.5: Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) A lawyer may state or imply that the lawyer has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

Proposed Rules of Professional Conduct

Comment

[1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

Rule 8.1: False Statement Regarding Application for Admission to Practice Law

- (a) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.
- (b) A lawyer shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.
- (c) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear *pro hac vice*; and any similar provision relating to admission or certification to practice law.

Comment

[1] A person who makes a false statement in connection with that person's own application for admission to practice law may, *inter alia*, be subject to discipline under this Rule after that person has been admitted.

[2] The examples in paragraph (c) are illustrative. As used in paragraph (c), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel *pro hac vice* under Rule of Court 983; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 983.1; an application to register as a certified law student under Rule of Court 983.2; proceedings for certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 964 and related State Bar Rules; certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as a Registered Legal Services attorney under Rule of Court 964 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 983.4, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 988 and related State Bar Rules.

[3] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e); Rule 5-200.

Rule 8.1.1: Compliance with Conditions of Discipline and Agreements In Lieu of Discipline

A lawyer shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprimands.

Comment

[1] Other provisions also require a lawyer to comply with conditions of discipline. (See e.g. Bus. & Prof. Code §6068(k) & (l); Cal. Rule of Court 956(b).)

Rule 8.3: Reporting Professional Misconduct

- (a) A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act unless precluded by the lawyer's duties to a client, or a former client, or by law.
- (b) A lawyer shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these Rules.

Proposed Rules of Professional Conduct

Comment

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

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

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

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice;
- (e) knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation, if prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not constitute a violation of this Rule.
- (f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

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

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

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

[4] Regarding paragraph (b), a lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [willful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

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

[6] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to

Proposed Rules of Professional Conduct

the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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

[9] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2.1. The provisions of Rule 1.2.1 concerning a good faith challenge to the validity, scope, meaning or application of a law, rule or ruling of a tribunal apply to challenges of legal regulation of the practice of law.

DISCUSSION DRAFT

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF
THE STATE BAR OF CALIFORNIA

Commission for the Revision of the
Rules of Professional Conduct



State Bar of California

July, 2007

SUMMARY OF PUBLIC COMMENT PROPOSAL

PLEASE NOTE: *Publication for public comment is not, and shall not, be construed as a recommendation or approval by the Board of Governors of the materials published.*

SUBJECT: Five (5) proposed amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

BACKGROUND: The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval. The State Bar has assigned a special commission to conduct a thorough study of the rules and to recommend comprehensive amendments.

Last June, the Commission completed work on a group of 27 proposed new and amended rules and those rules were distributed for a public comment period, which ended on October 16, 2006. At the State Bar's Annual Meeting on October 7, 2006 in Monterey, the Commission held a public hearing to garner further public comment on the proposed rules. After the public hearing and the end of the public comment period, the Commission worked on revising the 27 rules in response to the public comment received.

During this same time period, the Commission has completed work on five (5) more rules that are the subject of this present request for public comment. As was the case with the Commission's first group of 27 rules, a public hearing is being planned to gather additional input. The public hearing will be conducted in Anaheim during the State Bar Annual Meeting on September 29, 2007.

The Supreme Court will provide preliminary guidance to the Commission after each group of proposed rules has been circulated for public comment and the Commission has made any subsequent revisions. The Court has agreed that the Commission may submit each group of proposed rules to the Supreme Court for informal review at this stage of the Commission's consideration. The purpose of this initial submission is to provide the Commission with an opportunity to consider any initial reactions, concerns, and suggestions that the Supreme Court may have about each group of proposed amendments. This preliminary consideration by the Supreme Court will not constrain or foreclose any action by the Supreme Court in the future, but is intended to provide helpful guidance to the Commission as it proceeds with its preparation of its final draft proposals and formal recommendations to the Court. Amendments to the rules will become operative only upon formal approval by the Supreme Court.

PROPOSAL: The five (5) proposed amended rules are listed below by proposed new rule number. The rule number of the comparable current rule is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.

<u>Rule</u>	<u>Title</u>	<u>Page#</u>
Rule 1.8.3	Gifts from Client [4-400].....	1
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client [4-210].....	2
Rule 1.8.11	Relationship with Other Party's Lawyer [3-320].....	4
Rule 1.8.12	Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review [4-300].....	5
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation [2-400].....	6

FISCAL/PERSONNEL IMPACT: No unbudgeted fiscal or personnel impact.

SOURCE: State Bar Special Commission for the Revision of the Rules of Professional Conduct

COMMENT DEADLINE: 5 p.m., October 26, 2007

HOW TO COMMENT:

The State Bar encourages all interested persons or organizations to submit comments on the proposed new and amended Rules of Professional Conduct.

This Discussion Draft is available on a CD-ROM disc that includes word processing files for each of the proposed rules. If your comment will include recommended modifications of any of the proposed rules, then submitting a redraft of a rule will help the Rules Revision Commission understand your desired changes. A link to this Discussion Draft can be found at www.calbar.ca.gov. Click on the link Proposed Rules of Professional Conduct under the heading **Ethics**, which is located on the right navigation bar.

Online Submission: Comments may be submitted **online** by using an online Public Comment Form.^{*/} A link to the Public Comment Form is posted on the State Bar website at the same page as the Discussion Draft indicated above.

Mail or Fax Submission: Comments may also be submitted in writing by **mail** or **fax**. To facilitate the Commission's consideration of written comments, each rule you choose to comment on should be on a **separate sheet of paper**. Indicate the rule number **in the subject line at the beginning of the letter**, your name, any organization or entity on whose behalf you are submitting comment, and any brief information about yourself which you wish to be considered on each page.

Mail or Fax to: Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Ph. # (415) 538-2167
Fax # (415) 538-2171

^{*/} The direct url for the online comment form is: http://fs16.formsite.com/SB_RRC/form882622530/index.html

I. INTRODUCTION

A. History and Commission Charge

The last complete revision of the California rules occurred in the late 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"). In 2001, the State Bar reactivated the Commission, in part, to respond to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project for a systematic revision of the Model Rules of Professional Conduct. The Commission has been given the following charge:

The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to multi-disciplinary practice, multi-jurisdictional practice, court facilitated *in propria persona* assistance, discrete task representation and other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the California Rules that:

- 1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
- 2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
- 3) Promote confidence in the legal profession and the administration of justice; and
- 4) Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

B. State Bar Rule Amendment Process and the Commission's Methodology

The Board of Governors of the State Bar ("the Board") has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct. 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." The amendments adopted by the Board are submitted to the Supreme Court for approval and upon approval become binding disciplinary standards for all members of the State Bar. 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."

The State Bar's process for consideration of rule amendments generally involves the following steps: (1) development of draft rules (including proposed new rules, amended rules, and deletion of existing rules); (2) publication of the draft rules for public comment; (3) further drafting following consideration of public comments received; (4) Board Committee and full Board action to adopt the draft rules; and (5) State Bar submission of a memorandum to the Supreme Court requesting approval of the rules adopted by the Board. The Commission's role is to carry out the substantive study and drafting aspects of the process, both before and after public comment. Ultimately, the Commission will issue a final report and recommendation to the Board setting forth its recommendations for comprehensive rule amendments.

The Commission's methodology for conducting its study and developing rule amendment proposals is a seriatim approach. The Commission is considering each of the current California rules in current rule number order. In considering each rule, any relevant ABA Model Rule or Restatement section is compared and contrasted, both as to policy as well as language. Developments in case law and analysis found in ethics opinions are also analyzed. If there are significant state variations of the rule, national studies or other major developments, trends or initiatives, those matters are also considered. The Commission's deliberations are conducted in open session and several groups, including representatives of local bar associations, regularly attend and monitor the work of the Commission.

The Commission's plan involves the issuance of four groups or batches of proposed rule amendments. The 27 proposed new and amended rules distributed for public comment in 2006 was the first batch. This batch of 5 proposed amended rules presented in this Discussion Draft is the second of the four batches.

After each of the four batches are issued for, and returned from, public comment, the Commission will seek Board committee authorization to publish the entirety of the proposed rule amendments as a single, comprehensive work product for a final additional public comment period. This redistribution for further public comment of the entirety of the rules would follow any changes implemented by the Commission in response to each of the four initial public comment periods. Following consideration of the public comments received in response to this distribution, the Commission will present its final report and recommendation to the Board with a request that the Board adopt the Commission's proposed rule amendments.

C. Online Ethics Resources

The following ethics resources are available on the internet and may be helpful in evaluating the proposed new and amended rules.

The California Rules of Professional Conduct: ([click here](#))
http://calbar.ca.gov/calbar/pdfs/ethics/2007_Rules-Prof-Conduct.pdf

The State Bar Act portion of the California Business and Professions Code: ([click here](#))
http://calbar.ca.gov/calbar/pdfs/ethics/2007_State-Bar-Act.pdf

The ABA Model Rules of Professional Conduct: ([click here](#))
http://www.abanet.org/cpr/mrpc/mrpc_toc.html

Detailed Comparison Chart: California Rules to ABA Model Rules: ([click here](#))
http://calbar.ca.gov/calbar/pdfs/ethics/ca_to_aba.pdf

Detailed Comparison Chart: ABA Model Rules to California Rules: ([click here](#))
http://calbar.ca.gov/calbar/pdfs/ethics/aba_to_ca.pdf

In addition to the foregoing, the Ethics Information page (<http://www.calbar.ca.gov/ethics>) at the State Bar's official website includes an area containing much information about the Commission, including a schedule of meetings and open session agendas, meeting summaries, and meeting materials.

D. Discussion Draft Available on CD-ROM Disc

This Discussion Draft is available on a CD-ROM disc (contact Audrey Hollins at (415) 538-2167). If you have received this Discussion Draft on a disc, then with the exception of the ABA Model Rules, the internet resources listed above are included on your disc. In addition, if you have the disc, be sure to follow the "[README](#)" file with instructions for saving the files so that the "Table of Contents/Cross Reference Chart" in Part III of the Discussion Draft activates the icon links to word-processing versions of each of the proposed rules. The word-processing files will open in your internet browser but from there the text can be copied and pasted into either WORD or WordPerfect. Word processing files are being provided to facilitate your ability to submit comments with suggested language for modifying a proposed rule. Submitting a redraft of a rule will help the Rules Revision Commission understand a commentator's desired changes to the proposed rules.

II. SUMMARY OF PROPOSED NEW AND AMENDED RULES

The summary of the five proposed amended rules lists each rule by their proposed new rule number that tracks the ABA Model Rules numbering system. The current California rule number is shown in brackets following the rule title. The summaries include discussion of key issues considered by the Commission.

Rule 1.8.3 Gifts from Client [4-400]

Proposed Rule 1.8.3 amends current rule 4-400. (Refer to: page 11 for a clean version of this draft rule; page 12 for a redline/strikeout version that shows changes to the current rule; and page 13 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Rule 1.8.3 continues the prohibition against a lawyer inducing a substantial gift from a client. It also continues the prohibition against a lawyer preparing an instrument that gives the lawyer, or a person related to the lawyer, any substantial gift, unless the lawyer or other recipient is related to the client.

The amendments implement some substantive changes. Paragraph (a)(1) of the rule provides that an "attempt" to induce a gift is prohibited. This express prohibition against attempted violations is not found in the current rule. Adding the prohibition against attempted rule violations tracks the ABA Model Rule standard (see ABA Model Rule 8.4(a) which generally prohibits attempted rule violations). In paragraph (b), a new definition of "related persons" has been added, tracking the definition found in the California Probate Code. The current rule's Discussion section was revised to include three comments that generally track the comments to ABA Model Rule 1.8(c) (see comments [6], [7], and [8] to ABA Model Rule 1.8). Where appropriate, the Commission has modified the comment language to refer to the California Probate Code.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client [4-210]

Proposed Rule 1.8.5 amends current rule 4-210. (Refer to: page 15 for a clean version of this draft rule; page 17 for a redline/strikeout version that shows changes to the current rule; and page 19 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Rule 1.8.5 continues the prohibition on a lawyer's payment of personal or business expenses of a prospective or existing client. ABA Model Rule 1.8(e) states a comparable prohibition against a lawyer "providing financial assistance to a client." As in both the Model Rule and current rule 4-210, proposed rule 1.8.5 includes an exception for advancing costs, the repayment of which may be contingent on the outcome of the client's matter.

In addition to some clarifying amendments, there are a few substantive changes. One of the substantive changes would bring California's standard closer to the Model Rule standard by adding a new exception expressly allowing a lawyer to pay court costs and reasonable expenses of litigation on behalf of the lawyer's indigent client. (See new paragraph (a)(4) of proposed rule 1.8.5.) Another substantive change is the addition of a new paragraph (b) providing that the rule is not violated by a lawyer offering or giving a gift to a current client so long as the gift is not given in consideration of any promise,

agreement, or understanding. The Commission's amendments also include a new comment explaining the competing policy concerns that are the basis for the rule (see Comment [1] to proposed rule 1.8.5). Other new comments clarify the definition of "costs" as used in the rule and provide cross-references to related rules.

Rule 1.8.11 Relationship with Other Party's Lawyer [3-320]

Proposed Rule 1.8.11 amends current rule 3-320. (Refer to page 21 for a clean version of this draft rule and to page 22 for a redline/strikeout version that shows changes to the current rule.) Like current rule 3-320, proposed Rule 1.8.11 addresses the conflict of interest arising when opposing lawyers are related or have some other significant interpersonal relationship. Rule 1.8.11 continues the requirement that a lawyer inform a client in writing if the lawyer knows that the lawyer representing the opposing party, or another person involved in the case, is the lawyer's spouse, parent, child or sibling, or lives with the lawyer, or is a client of the lawyer, or has an intimate personal relationship with the lawyer. While this rule has been given an ABA rule number, the rule more closely tracks the current California rule. Although the ABA Model Rules do not have a precise counterpart to this rule, Model Rule 1.7 generally requires informed client consent in circumstances where a lawyer's representation is materially limited by responsibilities to third persons or personal interests in the client's matter. Comment [11] to Model Rule 1.7, in part, states: "a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent." This ABA standard differs from the California standard because the ABA standard requires informed consent while the California standard only requires that the client be informed in writing.

The Commission's proposed amendments implement one significant material change to the standard in the current rule and the ABA Model Rule comment. The current rule and ABA comment cover only relationships with another "party's" lawyer. The Commission's amendments broaden the scope of the rule to cover other person's involved in the case or matter who are not parties. For example, the amended rule would cover a relationship with a lawyer who is representing a witness in the case. The Commission believes that the client protection that is afforded under the rule is appropriate in such circumstances despite the fact that the person represented is not a party.

Rule 1.8.12 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review [4-300]

Proposed Rule 1.8.12 amends current rule 4-300. (Refer to page 23 for a clean version of this draft rule and to page 24 for a redline/strikeout version that shows changes to the current rule.) Rule 1.8.12 continues the restrictions on a lawyer who purchases property at a foreclosure sale or other sale subject to judicial review. This proposed rule tracks the current California rule as there is no corresponding ABA Model Rule. The ABA rule number that has been assigned is one that places the rule into the category of conflicts of interest that for the most part involve conflicts between the personal or business interests of the client and the lawyer (see ABA Model Rule 1.8).

The Commission's amendments to this rule include a key change in substance and policy. Under existing law, the California Probate Code conflicts with rule 4-300 because the Probate Code allows a lawyer to participate in certain probate proceeding transactions that would otherwise be prohibited by the rule. The Probate Code sets forth procedures for an independent lawyer to review suspect transactions, provide appropriate legal advice and counsel, and then execute a "Certificate of Independent Review" (see California Probate Code section 9880 et. seq.). Through this procedure, the statutory scheme seeks to nullify the risk of undue influence and overreaching that is completely avoided under current rule 4-300's absolute prohibition. The Commission's amendments would resolve the conflict of law by amending the rule to permit the lawyer participation that is allowed under the Probate Code procedures. This exception to the rule's general prohibition is found in new paragraph (c) of proposed Rule 1.8.12 and it is amplified in a new comment to the rule stating, in part, that the Probate Code provisions must be "strictly followed in order to avoid a violation of the rule."

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation [2-400]

Proposed Rule 8.4.1 amends current rule 2-400. (Refer to page 25 of Attachment 1 for a clean version of this draft rule and to page 27 for a redline/strikeout version that shows changes to the current rule.) Rule 8.4.1 continues and expands the prohibition against a lawyer engaging in unlawful discrimination in the management of a law practice. This proposed rule tracks the current California rule, as there is no precise counterpart in the ABA Model Rules (compare ABA Model Rule 8.4(d) which generally prohibits a lawyer from engaging in conduct that is "prejudicial to the administration of justice"). The ABA rule number that has been assigned is one that places the rule in the category of rules adopted to maintain the integrity of the legal profession.

The Commission's amendments to this rule include two key substantive changes. The first change is the deletion of language in the current rule that limits the prohibition to acts that occur in the hiring, promoting, discharging, or otherwise determining the conditions of employment in the law practice; or accepting or terminating client representations (see current rule 2-400 (B)(1) and (B)(2)). By deleting this language, the Commission's amendments would slightly expand the rule to cover acts of unlawful discrimination in the operation of a law practice that might not be readily characterized as discrimination against employees or discrimination in client retention. For example, under the current rule acts of discrimination against a volunteer intern or a representative of a vendor might be construed to be outside of the rule due to the existing limiting language.

The second key substantive change is the addition of language indicating that the rule's prohibition applies "whether or not the lawyer is a partner or shareholder or serves in a management role" (see paragraph (b) of proposed Rule 8.4.1). The language of prohibition found in the current rule applies only to the "management or operation of a law practice" and is silent on whether the rule applies to misconduct committed by non-managerial lawyers. The Commission considered the origin and purpose of the rule and determined that the rule should be revised to explicitly apply to misconduct by non-managerial lawyers. It should be noted, however, that the proposed rule continues the condition to enforcement found in the current rule which provides that no discipline may be

initiated under the rule "unless and until a tribunal of competent jurisdiction, other than [the State Bar Court], shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred" (see paragraph (c) of proposed Rule 8.4.1). The Commission considered deleting this condition but there was no consensus to make the change.

The Commission also considered but did not adopt an amendment to current rule 2-400 that would have greatly expanded the prohibition to reach any conduct in the "practice of law" rather than just conduct in the management of a law practice. The Commission's action in rejecting this broad expansion of the rule was based partly on its separate decision to recommend adoption of a California counterpart to ABA Model Rule 8.4. As circulated for public comment last year, the Commission's proposed Rule 8.4 provides that it is misconduct for a lawyer to "knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation," where such words or conduct are prejudicial to the administration of justice.

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.3 [4-400] Gifts From Client

- (a) A lawyer shall not:
- (1) induce or attempt to induce a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or
 - (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,
- unless the lawyer or other recipient of the gift is related to the client.
- (b) For purposes of this Rule, related persons include a spouse, registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Comment

- [1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce or attempt to induce a substantial gift from a client except where the lawyer is related to the client as set forth in paragraph (a). (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)
- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.
- [3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except a lawyer may:
- (1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) lend money to the client after the lawyer is retained by the client, based on the client's promise, in writing, to repay the loan, provided the lawyer complies with Rule 1.8.1 [3-300] before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and
 - (4) pay court costs and reasonable expenses of litigation on behalf of an indigent client in a matter in which the lawyer represents the client.
- (b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that the gift was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

Comment

- [1] This Rule is intended to balance two competing concerns. One is the concern that, if lawyers subsidize their clients' legal proceedings, they might encourage clients to pursue matters that might not otherwise be brought and might give lawyers a financial stake in the proceedings that might injuriously affect the performance of their duties to their clients, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that the prohibition on lawyers providing financial assistance to their clients might adversely affect clients' access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect lawyers against client demands for loans or gifts.
- [2] The lawyer must comply with Rule 1.8.1 [3-300] before entering into any proposed agreement with a client that is described in paragraph (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) [3-310(B)(4)] concerning the effect the proposed agreement might have on the lawyer's representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12 [4- 300].
- [3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable rule of court or statute.

PROPOSED RULE (CLEAN VERSION)

- [4] See Rule 7.1 concerning the potential consequence of a representation by a lawyer, directly or indirectly, that the lawyer will provide any financial benefit that is not permitted by this Rule.

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.11 [3-320] Relationship With Other Party's Lawyer

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

Comment

- [1] Rule 1.8.11 [3-320] is not limited to litigation matters.
- [2] Rule 1.8.11 [3-320] is not intended to apply to circumstances in which a lawyer fails to advise the client of a relationship with another lawyer who is in the same law firm as the lawyer of another person involved in the matter, and who has no direct involvement in the matter.

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.12 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].

Comment

- [1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 – 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

PROPOSED RULE (CLEAN VERSION)

Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation

- (a) For purposes of this Rule:
- (1) “knowingly permit” means a failure to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and
 - (2) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.
- (b) In the management or operation of a law practice, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, whether or not the lawyer is a partner or shareholder or serves in a management role.
- (c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Comment

- [1] Consistent with lawyers’ duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.
- [2] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (But see Rule 8.4(d).) “Law practice” in this Rule means “law firm,” as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Bus. & Prof. Code §6068, subd. (a).)
- [3] In order for discriminatory conduct to be actionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.

PROPOSED RULE (CLEAN VERSION)

- [4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.
- [5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(d).

DISCUSSION DRAFT

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF
THE STATE BAR OF CALIFORNIA

Commission for the Revision of the
Rules of Professional Conduct



State Bar of California

March, 2008

This page intentionally left blank.

SUMMARY OF PUBLIC COMMENT PROPOSAL

PLEASE NOTE: *Publication for public comment is not, and shall not be construed as a recommendation or approval by the Board of Governors of the materials published.*

SUBJECT: Thirteen (13) proposed amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

BACKGROUND: The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval. The State Bar has assigned a special commission to conduct a thorough study of the rules and to recommend comprehensive amendments.

In 2006, the Commission completed work on a group of twenty-seven proposed new and amended rules and those rules were distributed for a public comment period, which ended on October 16, 2006. In 2007, the Commission completed work on a group of five proposed amended rules and those rules were distributed for a public comment period, which ended on October 26, 2007. Public hearings were conducted in connection with each of the two public comment distributions.

The Commission has now completed work on thirteen (13) more rules that are the subject of this present request for public comment. As was the case with the Commission's prior proposals, a public hearing is being planned to gather additional input.

The Supreme Court will provide preliminary guidance to the Commission after each group of proposed rules has been circulated for public comment and the Commission has made any subsequent revisions. The Court has agreed that the Commission may submit each group of proposed rules to the Supreme Court for informal review at this stage of the Commission's consideration. The purpose of this initial submission is to provide the Commission with an opportunity to consider any initial reactions, concerns, and suggestions that the Supreme Court may have about each group of proposed amendments. This preliminary consideration by the Supreme Court will not constrain or foreclose any action by the Supreme Court in the future, but is intended to provide helpful guidance to the Commission as it proceeds with its preparation of its final draft proposals and formal recommendations to the Court. Amendments to the rules will become operative only upon formal approval by the Supreme Court.

PROPOSAL: The thirteen (13) proposed amended rules are listed below by proposed new rule number. The rule number of the comparable current rule is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.

<u>Rule</u>	<u>Title</u>	<u>Page</u>
Rule 1.5	Fees for Legal Services [4-200]	1
Rule 1.7	Conflicts of Interests: Current Clients [3-310]	4
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client [3-300]	15
Rule 1.13	Organization as Client [3-600]	20
Rule 1.16	Declining or Terminating Representation [3-700]	26
Rule 1.17.1	Purchase and Sale of a Law Practice [2-300]	30
Rule 1.17.2	Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]	34
Rule 3.4	Fairness to Opposing Party and Counsel [5-200(E)][5-220][5-310(A)]	39
Rule 3.5	Impartiality and Decorum of the Tribunal [5-300, 5-320]	41
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges [5-100]	44
Rule 4.2	Communication with a Person Represented by Counsel [2-100]	46
Rule 4.3	Dealing with Unrepresented Person [n/a]	51
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence [1-310][1-320][1-600]	53

FISCAL/PERSONNEL IMPACT: No unbudgeted fiscal or personnel impact.

SOURCE: State Bar Special Commission for the Revision of the Rules of Professional Conduct

COMMENT DEADLINE: 5 p.m., June 6, 2008

HOW TO COMMENT:

The State Bar encourages all interested persons or organizations to submit comments on the proposed new and amended Rules of Professional Conduct.

This Discussion Draft is available on a CD-ROM disk that includes word processing files for each of the proposed rules. If your comment will include recommended modifications of any of the proposed rules, then submitting a redraft of a rule will help the Rules Revision Commission understand your desired changes. The Discussion Draft is available online on the State Bar's website (<http://www.calbar.ca.gov>). Under the heading **Ethics**, which is located on the right navigation bar, there is a link ([Proposed Rules of Professional Conduct](#)) which should bring you to the Public Comment page.

Electronic Submission: Comments may be submitted **electronically** by using the online [Public Comment Form](#).^{*/} A link to the Public Comment Form is also posted at the State Bar's website on the Public Comment page for the proposed Rules.

Mail or Fax Submission: Comments may also be submitted in writing by **mail** or **fax**. To facilitate the Commission's consideration of written comments, each rule you choose to comment on should be on a **separate sheet of paper**. Indicate the rule number **in the subject line at the beginning of the letter**, your name, any organization or entity on whose behalf you are submitting comment, and any brief information about yourself which you wish to be considered on each page.

Mail or Fax to: Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Ph. # (415) 538-2167
Fax # (415) 538-2171

^{*/} The url for the online comment form is: http://fs16.formsite.com/SB_RRC/CommentFormBatch3/index.html

I. INTRODUCTION

A. History and Commission Charge

The last complete revision of the California rules occurred in the late 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")*. In 2001, the State Bar reactivated the Commission, in part, to respond to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project for a systematic revision of the Model Rules of Professional Conduct. The Commission has been given the following charge:

The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to multi-disciplinary practice, multi-jurisdictional practice, court facilitated *in propria persona* assistance, discrete task representation and other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the California Rules that:

- 1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
- 2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
- 3) Promote confidence in the legal profession and the administration of justice; and
- 4) Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

* For more information about the Commission, including the schedule of meetings, open session agendas, and meeting materials, visit: http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=1100.

B. State Bar Rule Amendment Process and the Commission's Methodology

The Board of Governors of the State Bar ("the Board") has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct. 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." The amendments adopted by the Board are submitted to the Supreme Court for approval and upon approval become binding disciplinary standards for all members of the State Bar. 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."

The State Bar's process for consideration of rule amendments generally involves the following steps: (1) development of draft rules (including proposed new rules, amended rules, and deletion of existing rules); (2) publication of the draft rules for public comment; (3) further drafting following consideration of public comments received; (4) Board Committee and full Board action to adopt the draft rules; and (5) State Bar submission of a memorandum to the Supreme Court requesting approval of the rules adopted by the Board. The Commission's role is to carry out the substantive study and drafting aspects of the process, both before and after public comment. Ultimately, the Commission will issue a final report and recommendation to the Board setting forth its recommendations for comprehensive rule amendments.

The Commission's methodology for conducting its study and developing rule amendment proposals is a seriatim approach. The Commission is considering each of the current California rules in current rule number order. In considering each rule, any relevant ABA Model Rule or Restatement section is compared and contrasted, both as to policy as well as language. Developments in case law and analysis found in ethics opinions are also analyzed. If there are significant state variations of the rule, national studies or other major developments, trends or initiatives, those matters are also considered. The Commission's deliberations are conducted in open session and several groups, including representatives of local bar associations, regularly attend and monitor the work of the Commission.

The Commission's plan involves the issuance of four groups or batches of proposed rule amendments. In 2006, 27 proposed new and amended rules were distributed for public comment. In 2007, 5 proposed amended rules were distributed for public comment. This current Discussion Draft presents 13 proposed new and amended rules and is the third of four batches of rules.

After each of the four batches are issued for, and returned from public comment, the Commission will seek Board committee authorization to publish the entirety of the proposed rule amendments as a single, comprehensive work product for a final additional public comment period. This redistribution for further public comment of the entirety of the rules would follow any changes implemented by the Commission in response to each of the four initial public comment periods. Following consideration of the public comments received in response to this distribution, the Commission will present its final report and recommendation to the Board with a request that the Board adopt the Commission's proposed rule amendments.

C. Ethics Resources

The following ethics resources are available on the internet and may be helpful in evaluating the proposed new and amended rules.

The California Rules of Professional Conduct:

http://www.calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf

The State Bar Act portion of the California Business and Professions Code:

<http://www.calbar.ca.gov/calbar/pdfs/ethics/State-Bar-Act.pdf>

The ABA Model Rules of Professional Conduct:

http://www.abanet.org/cpr/mrpc/mrpc_toc.html

Detailed Comparison Chart: California Rules to ABA Model Rules:

http://calbar.ca.gov/calbar/pdfs/ethics/ca_to_aba.pdf

Detailed Comparison Chart: ABA Model Rules to California Rules:

http://calbar.ca.gov/calbar/pdfs/ethics/aba_to_ca.pdf

Commission's 2006 Public Comment Discussion Draft of the Proposed Amendments to the Rules of Professional Conduct [Batch 1]:

<http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Discussion-Draft.pdf>

Commission's 2007 Public Comment Discussion Draft of the Proposed Amendments to the Rules of Professional Conduct [Batch 2]:

<http://calbar.ca.gov/calbar/pdfs/public-comment/2007/DiscussionDraft.pdf>

State Bar of California Ethics Information page:

<http://www.calbar.ca.gov/ethics>

D. Discussion Draft is Available on CD-ROM Disc

This Discussion Draft is available on a CD-ROM disc upon request (contact Audrey Hollins: (415) 538-2167). If you have received this Discussion Draft on a disc, then with the exception of the ABA Model Rules, the internet resources listed above are included on your disc. You will need Adobe Acrobat Reader (6.0 or newer) in order to view the Proposed Rules Discussion Draft. A free copy of [Adobe Acrobat Reader](#) is available for download from Adobe's Web site. Word processing files are being provided to facilitate your ability to submit comments with suggested language for modifying a proposed rule. These can be found by opening the Discussion Draft document and then by clicking the **Attachments** icon () located at the bottom right corner of the Acrobat Reader window. Select the Rule document from the **Attachments** window and choose **Open** from the **Options** menu. Submitting a redraft of a rule will help the Rules Revision Commission understand a commentator's desired changes to the proposed rules.

I. SUMMARY OF PROPOSED NEW AND AMENDED RULES

The following summary of the thirteen proposed rules lists each new or amended rule by its proposed new rule number that tracks the ABA Model Rules numbering system. The summaries include discussion of any key issues considered by the Commission.^{5/}

Rule 1.5 Fees for Legal Services [4-200]

Proposed Rule 1.5 amends current rule 4-200. Proposed Rule 1.5 continues the prohibition against a lawyer making an agreement for, charging, or collecting an illegal or unconscionable fee.

The amendments implement substantive changes. Paragraph (b) of the rule adds a description of an unconscionable fee that codifies case law. The current rule does not include this description and only offers factors to consider in evaluating the conscionability of fee. The factors have been modified for style and clarity but no substantive changes are made to the factors. A new paragraph (d) states that expenses for which a client can be charged cannot be unconscionable. A new paragraph (e) codifies case law prohibitions against contingent fee arrangements in criminal defense matters and in certain family law matters. A new paragraph (f) states a prohibition against charging a “non-refundable fee” but this includes a clarification that a “true retainer fee” is permissible.

Current rule 4-200 does not include any commentary. As proposed, the amended rule adds eight new comments. Comment [1] provides case law examples of illegal fees and also gives guidance on how to apply the factors for determining the conscionability of a fee.

Comment [2] distinguishes a “non-refundable fee” from a “true retainer fee.” Comment [3] refers to the statutory written fee agreement provisions in the State Bar Act and cites a case discussing the consequences for violating these statutory provisions. Comment [4] provides a cross-reference to proposed Rule 1.8.1 (re adverse interests and business transactions with clients) for guidance on modifications of fee agreements. Comment [5] provides a cross-reference to proposed Rule 1.16 (re terminating a client’s representation) for guidance on a lawyer’s obligation to return unearned portions of a fee paid in advance. Comment [5] also provides a cross-reference to proposed Rule 1.8.1 (re adverse interests and business transactions with clients) for guidance on fees paid in property rather than money. Comment [6] cautions against fee agreement terms that might induce a lawyer to curtail services or perform services in a way that is contrary to the client’s interests.

^{5/} As was the case with Commission’s first two public comment proposals distributed in 2006 and 2007, this current group of proposed amendments includes a global change that is under consideration by the Commission. That change is the replacement of the term “member” with the term “lawyer” throughout the entirety of the rules. The Commission believes that the term “member,” which is operative term used in the current rules, may be construed to be an under-inclusive concept. Consistent with the promulgation of multi-jurisdictional practice Rules of Court (see California Rules of Court 9.45 - 9.47), the Rules of Professional Conduct should be understood to govern the conduct of all persons authorized to practice law in California and not just those persons who are members of the State Bar of California.

Comment [7] elaborates on the impermissible contingent fees in certain family law matters. Comment [8] provides a cross-reference to proposed Rule 1.5.1 (re division of fees among separate practitioners) for guidance on lawyer fee splits.

As proposed, the rule is a departure from ABA Model Rule 1.5 in four significant aspects. First, the Model Rule states a prohibition against an “unreasonable fee” while the proposed rule continues California’s longstanding standard prohibiting an “unconscionable fee.” Second, the Model Rule prohibits “unreasonable expenses” but the proposed rule generally states that expenses cannot be unconscionable. Third, the proposed rule includes four factors that are not included in the Model Rule (see factors (1), (2), (10), and (11) in paragraph (c) of proposed Rule 1.5) while the Model Rule includes one factor not included in the proposed rule (see factor (3) in paragraph (a) of ABA Model Rule 1.5). Fourth, unlike the proposed rule, the Model Rule includes a provision governing fee divisions among lawyers who are not in the same firm (see ABA Model Rule 1.5 (e)). The Commission has recommended that the fee division provision remain a separate, stand-alone rule as is currently the case in California (current rule 2-200). The proposed rule on fee divisions, Rule 1.5.1, revised current rule 2-200 in significant respects and was submitted as part of the first group of rules that were distributed for public comment.

Regarding the comments, comments [5], [6], and [7] are variations of comments found in the Model Rule but the other comments are not comparable to any of the Model Rule’s comments. In consideration of the foregoing differences with the ABA Model Rule, the most significant is the retention of California’s longstanding standard prohibiting an unconscionable fee. It is anticipated that some public commentators will regard this issue as a major policy decision for the State Bar.

Rule 1.7 Conflicts of Interests: Current Clients [3-310]

Proposed Rule 1.7 amends current rule 3-310. Proposed Rule 1.7 continues the regulation of conflicts of interest arising from certain client representations and from a lawyer’s own interests and relationships. Although the proposed rule is numbered to track the comparable ABA Model Rule, the rules are substantially different in terms of the approach and language used to regulate conflicting interests that involve *current* clients.

Proposed Rule 1.7 incorporates some but not all of the provisions found in rule 3-310, specifically, 3-310(A), (B) and (C), and part of (E). The provisions included are intended to track the analogous concepts in ABA Model Rule 1.7. Regarding the rule 3-310 provisions that are not included in proposed Rule 1.7 (3-310(D) and (F), and the remaining aspects of (E)), these provisions are pending consideration by the Commission and it is anticipated that these provisions will be covered by other rule proposals that will track the ABA’s organization of its conflicts rules under the “Client-Lawyer Relationship” title of the ABA Model Rules.

In addition, the Commission anticipates making a future decision on whether the rules should include a global definitions section similar to the ABA Model Rule 1.0 terminology rule. In proposed Rule 1.7, the definitions of “disclosure” and “informed written consent”

carried over from rule 3-310(A) are placed in brackets at the end of the rule text because the Commission's decision on a global definitions section is presently pending. Whether or not the substance of the definitions remains as drafted, they might be moved to a global definitions rule when the Commission submits its final report and recommendations.

Paragraph (a) of the proposed rule is derived from that aspect of rule 3-310(E) that prohibits a lawyer from accepting or continuing a representation of a client that is directly adverse to another client *currently* represented by the lawyer. Paragraph (a) implements a material change to the standard in rule 3-310(E) because it deletes the current rule's element of confidential information. Rule 3-310(E) applies if a lawyer possesses confidential information material to the conflicting representation. In contrast, the proposed rule only requires that the conflicting representations be directly adverse and the absence or presence of a risk that the lawyer will violate confidentiality is no longer a prerequisite for the applicability of the rule. It is important to note, however, that the aspect of rule 3-310(E) that is concerned with the confidentiality of client information is not being discarded. Rather, it is being addressed in proposed Rules 1.9 ("Duties to Former Clients") and 1.18 ("Duties to Prospective Clients"), both of which are anticipated to be modeled on the respective Model Rules. These proposed rules are expected to be in the Commission's next group of public comment proposals.

This substantive change adopts the standard used by the Supreme Court in analyzing current client conflicts under the rubric of a lawyer's duty of undivided loyalty. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284-289 [36 Cal.Rptr. 373].) Although some courts have elected to construe rule 3-310(C)(3) as a rule which codifies the duty of loyalty owed to a current client, the background on the development of rule 3-310(C)(3) by the Commission (a.k.a. the "legislative history" of the rule) arguably does not support that interpretation. Rather, the rule 3-310 legislative history reveals a 1991 memorandum from the Commission to the Board Committee on Admissions and Competence (the predecessor to RAD) describing a proposed rule 3-310(C)(4) that was developed, too late in the process to be a part of the Commission's final report, and thus was never adopted. As drafted in 1991 by the Commission, proposed rule 3-310(C)(4) provided: "(C) A member shall not, without the informed written consent of each client: . . . (4) Accept employment in a matter by one client adverse to another party being represented by the member or the member's firm in another matter, whether or not the matters are related." (See "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation," December, 1991, Enclosure 5, memorandum discussing "Rule Paragraph Which Was Considered But Not Recommended for Adoption at This Time.")

In 1998, the Committee on Professional Responsibility and Conduct ("COPRAC") revived the State Bar's consideration of a proposed rule 3-310(C)(4), distributing several revised versions of the rule for public comment. The public comment on COPRAC's proposals was divided, with the majority of commentators opposed to the proposed rule. Among the opposition comments were letters from local bar association ethics committees that questioned whether the rule would be workable as a disciplinary rule in the context of non-

litigation matters. The commentators believed that a bright line standard would be necessary for fair disciplinary enforcement of the rule and that most non-litigation contexts would not be susceptible to a clear application of the rule. Due to the opposition comments, COPRAC ceased consideration of a proposed rule 3-310(C)(4).

In view of the history on this issue, the Commission anticipates that public commentators will regard the issue of whether to adopt paragraph (a) of proposed Rule 1.7 without the confidential information element found in current rule 3-310(E) as a major policy decision for the State Bar. In developing paragraph (a) of proposed Rule 1.7, the Commission noted that the jurisdictions that have adopted ABA Model Rule 1.7 do not appear to have any special problems applying the rule. Similarly, the California courts seem to be able to apply the common law duty of loyalty in an evenhanded manner. Accordingly, it would not be unreasonable to expect that the State Bar Court would be able to apply a current client conflicts rule that uses a standard of “directly adverse.”

By comparison, the other provisions in proposed Rule 1.7 are less controversial. Paragraph (b) carries forward the standards in current rules 3-310(C)(1) and (C)(2) that regulate dual or multiple representations of clients in a case or matter. Like the current rule, paragraph (b) of proposed Rule 1.7 requires informed written consent to potential or actual conflicts from each of the clients who are represented in the case or matter.

Paragraph (c) of proposed Rule 1.7 carries forward the standard in rule 3-310(C)(3) that requires the informed written consent of each client when a lawyer accepts representation of a client’s adversary in a separate matter against another party. Both paragraphs (b) and (c) have been revised for clarity. Sub-headings have been added to aid lawyers in understanding the distinct type of conflicts addressed in each of the rule’s paragraphs. Paragraph (c) also has been modified to include the “directly adverse” standard. This is consistent with the amendments in paragraph (a), described above.

Paragraph (d) of proposed Rule 1.7 carries forward the standard currently found in rule 3-310(B) that requires written disclosure to a client when a lawyer has or had certain personal, business or professional relationships or interests that might affect a lawyer’s zealous or impartial representation of a client. Like current rule 3-310(B), paragraph (d) requires a lawyer to make written disclosure of the relevant circumstances and the reasonably foreseeable adverse consequences, but written consent from the client is not required. In addition, the descriptions of the specific relationships and interests in paragraph (d) have been revised for clarity.

It bears emphasizing that these proposed standards track rule 3-310’s approach to current client conflicts and is a significant departure from ABA Model Rule 1.7. Unlike current rule 3-310 and proposed Rule 1.7, ABA Model Rule 1.7 does not treat conflicts arising from a joint representation of multiple clients and conflicts arising from a concurrent representation of a current client’s adversary as separate types of conflicts. Moreover, Model Rule 1.7 does not attempt to identify with specificity the kinds of interests and relationships that could give rise to a lawyer’s personal conflict. Instead, the model rule regulates all of these

concurrent conflict situations under one or the other of two standards: (1) representations that are “directly adverse” to one another; or (2) representations that create a risk that the lawyer’s representation of one client will be “materially limited” by the lawyer’s own relationships or interests, or by duties owed another person. Accordingly, the model rule approach does not involve characterizations of “potential conflicts” or “actual conflicts” that are the concepts used in rule 3-310(C)(1) and (C)(2) and perpetuated in paragraph (b) of the proposed rule. Nor does the model rule use a “written disclosure” protocol to address personal interest conflicts, as does paragraph (d) [current rule 3-310(B)]. Instead, any conflicting personal interest or relationship that *materially limits* the lawyer’s representation imposes an obligation to seek a client’s informed consent, *confirmed in writing*. As in the case of the Commission’s proposed paragraph (a), some public commentators may regard as a major policy decision for the State Bar the issue of whether to retain, in proposed paragraphs (b), (c) and (d), California’s unique approach to conflicts found in current rule 3-310(B) and (C).

It is worthwhile noting another divergence of proposed Rule 1.7 from the ABA Model Rule, this involving the client’s consent to a conflict. Proposed Rules 1.7(a), (b) and (c) carry forward the requirement in paragraphs (C) and (E) of current rule 3-310 that a lawyer obtain the “informed written consent” of the client to a potential or actual conflict. In effect, the client must sign a writing that demonstrates the client is consenting and that the consent is informed. Although the ABA Model Rule also requires client consent, the ABA’s approach is somewhat different. The Model Rule requires only that the lawyer obtain the client’s consent, for example orally, and then confirm that consent, for example, with an e-mail. The client’s signature is not required. Rather than following the Model Rule’s protocol of client consent confirmed in writing, the Commission determined to carry forward California’s traditional requirement of “informed written consent” as more protective of the client’s interests. Similarly, the Commission also determined to carry forward, in proposed Rule 1.7(d), current rule 3-310(B)’s requirement that the lawyer give “written disclosure” of the lawyer’s business, professional and personal relationships that might affect the representation. Here, however, the Model Rule arguably sets a higher standard for these conflicts by requiring the client’s consent, confirmed in writing.

Because of the proposed Rule’s divergence from the standards found in the Model Rule, the comments to proposed Rule 1.7 differ substantially from those found in the commentary to the Model Rule. In addition, the commentary found in current rule 3-310 has been expanded to provide enhanced guidance on the application of the Rule. There are thirty-nine comments. The bulk of these comments are new. Some portions are revisions of existing comments to rule 3-310 and a few are derived from comments to ABA Model Rule 1.7. Comments [1] through [3] address general principles applicable to conflicts rules. Comments [4] through [9] offer guidance on applying the “directly adverse” standard. In particular, comment [7] gives actual examples of circumstances that ordinarily would not constitute direct adversity. Comments [10] through [16] elaborate on representations of multiple clients under paragraph (b), including discussion of “potential conflicts” and “actual conflicts.”

Comment [17] describes the conflicting duties that might arise when a lawyer acts in a non-lawyer fiduciary capacity (i.e., as a corporate director or executor). Comment [18] addresses the obligation to obtain client consent under paragraph (c) when a lawyer represents a client's adversary. This comment clarifies that the paragraph is intended to apply to both litigation and non-litigation matters. Comments [19] through [26] offer guidance on applying paragraph (d)'s requirement to make written disclosure of personal interests and relationships. In particular, comment [23] carries forward a comment to rule 3-310 clarifying that the requirement to make disclosure only applies to a lawyer's own interests and relationships, unless the lawyer knows that another lawyer in the same law firm has or had an interest or relationship covered by the Rule.

Comments [27] and [28] describe prohibited representations, such as a conflict where a lawyer cannot obtain the required client consent. Cases are cited to illustrate what is contemplated as a prohibited representation. Comments [29] through [32] offer general guidance on the requirements to make written disclosure and obtain informed written consent. These comments explain that a disclosure or informed written consent is only valid to the extent that the material facts and circumstances giving rise to the conflict remain unchanged.

Comment [33] addresses the risk management practice utilized by some law firms to seek from a client advance consent to unspecified conflicts that might arise at sometime in the future. This comment is a variation on its counterpart in ABA Model Rule 1.7, comment [22]. The comment states that the determination of whether an advance consent is in compliance with the rule is a fact-specific inquiry; however, the comment also identifies some factors to consider in making that determination. The Commission anticipates that some public commentators may regard the issue of whether to include this comment as a key policy decision for the State Bar.

Comment [34] offers guidance on the application of the rule to class action representations. In part, the comment discusses whether an unnamed class member or potential member of a class should be regarded as a client for purposes of the rule. Similarly, comments [35] and [36] offer guidance on the application of the Rule to the representation of an organization. A cross-reference to proposed Rule 1.13 [current rule 3-600, re organizations as clients] is included together with a discussion of the situation where a lawyer for a corporation also serves on the company's governing board.

Comments [37] and [38] slightly modify and carry forward an existing comment to rule 3-310 which clarifies the application of the rule to conflicts involving the insurance defense tripartite relationship. Comment [39] is placed in brackets because it is included as a placeholder until the Commission considers ABA Model Rules 6.3 (re membership in a legal services organization) and 6.5 (re nonprofit and court-annexed limited legal services programs). It is anticipated that if these model rules are recommended by the Commission, then it also would be appropriate to recommend including comment [39] for its useful cross-references.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client [3-300]

Proposed Rule 1.8.1 amends current rule 3-300. Proposed Rule 1.8.1 continues the regulation of conflicts of interest arising from a lawyer's business transaction with a client and from a lawyer's acquisition of an ownership, possessory, security, or other pecuniary interest adverse to a client. Only one substantive change has been made to the rule text. In paragraph (b), new language provides that if a client is already represented in the transaction or acquisition by an independent lawyer of the client's choice, then the lawyer is not required to advise the client in writing to seek the advice of an independent lawyer. Under current rule 3-300, no language to that effect is present and the rule thus implies that the requirement to give such advice applies even if the client is already represented by an independent lawyer. Aside from this change, all other amendments to the rule text are for style and clarity, including a change in the rule title. This proposed rule has been given a rule number in the 1.8 series to track ABA Model Rule 1.8(a). As current rule 3-300 is a standalone rule and not part of another rule, the proposed Rule is numbered 1.8.1 to maintain its visibility as a standalone rule.

The comments to the rule have been significantly expanded, from only three paragraphs of commentary in the current rule to fifteen paragraphs in the proposed rule.

Comments [1] and [2] address the purpose and scope of the rule. Comments [3] through [6] discuss the application of the rule to business transactions with clients, providing guidance on transactions that are generally covered and those that are not intended to be covered. Of particular significance, are comments [5] and [6] which state that the rule is not intended to apply to a modification of an agreement by which the lawyer has been retained (e.g., a written fee agreement as required by the State Bar Act), unless the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. Current rule 3-300 is silent on its application to modification of fee agreements and existing case law and ethics opinions addressing this issue arguably offer only limited guidance. For this reason, it is anticipated that comments [5] and [6] will be recognized as a significant policy issue by public commentators, especially bar association ethics committees.

Comment [7] provides case citations concerning the application of the rule to adverse pecuniary interests, including a citation to a recent California Supreme Court decision, *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58], in which the Supreme Court held that a charging lien in an hourly fee arrangement with a client constitutes an adverse interest and requires compliance with the rule.

Comments [8] through [13] discuss the requirement that full disclosure be given in a manner that reasonably can be understood by the client. Comment [8] clarifies that the standard for this requirement is an objective standard. Comment [9] provides citation to cases discussing the required breadth of full disclosure to a client. This comment states the lawyer must give the same advice regarding the transaction or adverse interest that the

lawyer would provide to the client if the transaction was a transaction with a third party and not the lawyer. Comment [10] is derived from an analogous comment to ABA Model Rule 1.8(a) and identifies the risks of harm to the client that are inherent in lawyer-client business transactions and in a lawyer's acquisition of an adverse interest. Comment [11] raises additional considerations that might occur when a lawyer-client relationship will continue after a business transaction or the lawyer's acquisition of an interest adverse to a client. This comment discusses an example of a lawyer who enters into a business transaction with a client to form or acquire a business entity and it is contemplated that the lawyer will represent that business entity once it is formed or acquired. Comment [12] cross-references proposed Rule 1.7(d) (re conflicts of interests with current clients) and describes how that rule might also be applicable. Comment [13] cautions that a business transaction with a client might not be permitted notwithstanding compliance with proposed Rule 1.8.1 where, for example, the lawyer could not continue to represent the client competently as a result of the transaction.

Comments [14] and [15] provide guidance on the requirement that a client either be represented by an independent lawyer or be advised in writing to seek such advice. Comment [14] discusses the requirement for independence and clarifies that an independent lawyer must not have any ongoing financial interest or legal, business, financial, professional or personal interest with the lawyer who is seeking the client's consent. Comment [15] clarifies that even where a client already has an independent lawyer who is advising on the transaction or adverse interest, the lawyer seeking client consent remains obligated to make full disclosure to the client in writing of all material facts.

As proposed, the substance of the rule is very similar to the analogous ABA Model Rule, ABA Model Rule 1.8 (a). The main difference between the proposed rule and the ABA Model Rule is that paragraph (b) adds language providing that if a client is represented in the transaction or acquisition by an independent lawyer of the client's choice, then the lawyer is not required to advise the client in writing to seek the advice of an independent lawyer. ABA Model Rule 1.8(a), like the current California rule, has no language in the rule text to that effect. However, comment [4] to ABA Model Rule 1.8(a) does state that if a client is already independently represented, then the obligation to give such advice is not required. This ABA comment goes even further than the standard in proposed Rule 1.8.1 because it also states that the rule's requirement of full disclosure is satisfied either by a written disclosure by the lawyer who is a party to the transaction or by the fact that the client is represented by an independent lawyer. In contrast, proposed Rule 1.8.1 does not provide for an exception to the obligation of full disclosure, even if the client is represented by an independent lawyer.

One other slight difference is that ABA Model Rule 1.8(a) explicitly provides that the required written consent must address "the lawyer's role in the transaction" and "whether the lawyer is representing the client in the transaction." Proposed rule 1.8.1 generally addresses these concepts in the comments (see comments [10] through [13] and comment [15]) but, in the rule text, only states the lawyer's obligation to make full disclosure and thereafter obtain client consent in writing.

Rule 1.13 Organization as Client [3-600]

Proposed Rule 1.13 amends current rule 3-600. Rule 1.13 continues the regulation of a lawyer's representation of an organization as client. As proposed, the rule is materially different from both the current rule and the corresponding ABA Model Rule, Model Rule 1.13.

The proposed Rule differs from current rule 3-600 in that it enhances a lawyer's accountability for responding to acts or omissions by officers, employees or other constituents of the client organization that are reasonably believed to be *either* a violation of a legal obligation to the organization *or* a violation of law reasonably imputable to the organization, *and* also likely to result in substantial injury to the organization. As proposed, the rule's requirement for "up-the-ladder" reporting within the client organization is more prescriptive. Under current rule 3-600, such internal reporting is completely within the lawyer's discretion. Proposed Rule 1.13 requires that the lawyer go "up the ladder" within the organization "[u]nless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so." In both the conduct that triggers the obligation (violation of legal obligation or violation of law, and substantial injury to the organization) and the mandatory "up-the-ladder" reporting, the proposed Rule tracks Model Rule 1.13. It diverges, however, from current rule 3-600, under which such internal reporting is completely within the discretion of the lawyer. The proposed Rule also diverges from current rule 3-600 in the conduct that triggers the lawyer's internal reporting. Rule 3-600 permits a lawyer to exercise *discretion* and report up the ladder even if the wrongful acts or omissions do not pose a threat of substantial injury to the organization, or if there is a threat of substantial injury to the organization not caused by a wrongful act or omission. Like ABA Model Rule 1.13, the proposed rule requires both a violation of duty or law by constituents of the organization *and* a threat of substantial injury to the organization before the lawyer is *required* to take action.

To implement these changes, much of the rule text has been revised and the current rule's three paragraphs of commentary have been expanded to seventeen comments. Paragraph (b) of the proposed rule mandates internal reporting obligations by providing that unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer *shall refer* misconduct that poses a risk of substantial injury to the organization to a higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization.

The proposed rule differs from ABA Model Rule 1.13 because, unlike the Model Rule, there is no provision for reporting outside the organization, that is, that would permit a lawyer for an organization to act as a whistle-blower. Paragraph (c) of proposed Rule 1.13 expressly states that a lawyer shall not violate the duty of confidentiality owed to a client organization. This approach is consistent with existing California law, which prohibits a lawyer from acting as a whistle-blower unless the disclosure falls under current rule 3-100, which

permits, but does not require, a lawyer to reveal confidential information relating to the representation of a client to the extent necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. This status quo would continue under the proposed rule. Further, like current rule 3-600, the proposed Rule by its terms applies to lawyers who represent a governmental organization. The absence of a provision permitting a lawyer to act as a whistle-blower to prevent or rectify improprieties that impact the financial interests of employees, investors or the public is an important aspect of the proposed rule that is anticipated to be identified by public commentators as a key policy issue for the State Bar, especially the issue of whistle blowing by lawyers who represent governmental organizations.

Paragraph (e) of the proposed rule adds a new provision providing that a lawyer, who reasonably believes that he or she has been discharged as a result of internal reporting (or who resigns or withdraws), shall inform the organization's highest authority about the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best interests of the organization to do so. Paragraph (e) is derived from ABA Model Rule 1.13.

Although revised, paragraph (f) of the proposed rule carries forward rule 3-600(D)'s requirement that an organization's lawyer explain the identity of the lawyer's client when dealing with employees or other constituents of a client organization who may be under a mistaken belief that they have a lawyer-client relationship with the organization's lawyer. Similarly, paragraph (g) carries forward rule 3-600(E)'s provision for permissible representation of both an organization and any of its directors, officers, employees, members, shareholders or other constituents, subject to the requirements of the relevant conflicts of interest rules. Both of these provisions have counterparts in Model Rule 1.13.

The expanded comments cover five main topics: (1) the entity as the client (comments [1] - [10]); (2) the relation of the rule to other rules (comments [11] - [14]); (3) representation of governmental agencies and organizations (comments [13] and [14]); (4) clarification of the lawyer's role when the organization's interests become adverse to the interests of one or more constituents of the organization (comment [15]); and (5) dual representation of both the organization and an officer, employee or other constituent of the organization (comments [16] and [17]). Of these comments, the following are variations of comments to ABA Model Rule 1.13: comments [3]; [4]; [7]; [8]; [11]; [13]; and [15].

Rule 1.16 Declining or Terminating Representation [3-700].

Proposed Rule 1.16 amends current rule 3-700. Proposed Rule 1.16 continues the regulation of a lawyer's conduct in terminating a representation.

The proposed amendments to this rule generally retain the substantive content of the current rule but reorganize that content to track the structure of the comparable ABA model rule, Model Rule 1.16. Like both the current rule and ABA Model Rule 1.16, the proposed

rule identifies circumstances where a lawyer *must* seek to withdraw from a representation and circumstances where it is *permissible* for a lawyer to seek to withdraw. In addition to addressing withdrawal, the proposed rule includes new language expressly stating that a lawyer must decline to accept a representation in any circumstance where a mandatory withdrawal would be required. This concept, found in ABA Model Rule 1.16 but not expressly stated in current rule 3-700, is thus regarded as a substantive change.

Current rule 3-700's three paragraphs of commentary have been expanded to ten comments. Comments [1] through [4] are variations of the corresponding comments to ABA Model Rule 1.16. Comments [5] and [6] also are derived from comments to ABA Model Rule 1.16. Comment [7] is new language that gives guidance on situations where a lawyer's request for permission to withdraw is denied by a tribunal.

Comments [8] through [10] revise the existing comments to current rule 3-700. A possible substantive point is raised by the new language found in comment [9]. Comment [9] expands the guidance addressing a withdrawing lawyer's obligation to release client papers and property to their client or their client's new counsel. In part, the comment clarifies that a lawyer's duty to release papers and property may be subject to restrictions imposed by statute, citing, as examples, Penal Code sections 1054.2 and 1054.10 (re restrictions in a criminal matter on the release of certain witness and victim information to the defendant). Similarly, the comment clarifies that statutory law may require that a lawyer release client papers and property to a designated person other than the client, citing, as an example, Penal Code section 1054.2(b) (re release of the address and telephone number of a victim or witness to an investigator appointed by the court where the defendant is self-represented). In adding this new language, the Commission recognized that public commentators might identify other examples of statutory provisions that similarly impact a lawyer's release of client papers and property. The criminal law examples used in Comment [9] are not intended to be exhaustive.

Rule 1.17.1 Purchase and Sale of a Law Practice [2-300]

Proposed Rule 1.17.1 amends current rule 2-300. Proposed Rule 1.17.1 continues the restrictions imposed on the purchase and sale of all, or substantially all, of a lawyer's law practice.

This proposed rule is one of two separate rules proposed by the Commission to address sales of law practices. Proposed Rule 1.17.1 is consistent with the policy of the current rule that permits a sale of a law practice when that sale involves the transfer of *all or substantially* all of the entire law practice. In a separate proposal summarized below, the Commission recommends consideration of a second rule, proposed new Rule 1.17.2, that is intended to permit the sale of a *geographic area* of a law practice or a sale of a *substantive field* of a lawyer's practice. This provision is consistent with the policy of the ABA Model Rule on sales of a law practice, ABA Model Rule 1.17.

While the subject matter of the two rules is similar, the Commission developed separate rules with the objective of obtaining public comment on the distinct policies of the respective rules. The Commission was concerned that if the longstanding California policy permitting sales of an entire practice were combined in a single rule with the ABA-inspired expansion that permits sales for discrete practice areas, public commentators who might object to the expansion would feel compelled to object to the entire rule, even though California's longstanding policy of permitting the sale of an entire practice has been non-controversial and a benefit to both clients and lawyers. Accordingly, the two categories of sale were segregated and set forth in two separate rules. Adoption of one or both of the rules is under consideration. The rules are not competing proposals because they are not intended to be mutually exclusive.

Proposed Rule 1.17.1 makes several clarifying revisions to the current rule. First, it expressly refers to the subject matter of the rule as covering purchases as well as sales. The terms of the proposed rule, like the current rule, governs both the seller and purchaser so it is more accurate to have the rule title and rule text specifically refer to both the purchase and the sale of a law practice. Second, the proposed rule expressly acknowledges the option of a client to elect to represent himself or herself rather than having the client's matter transferred to the purchasing lawyer. Third, the references in the rule to a lawyer's duty to properly handle the transfer or release of client papers or property have been clarified to refer to client papers or property "in any form or format." This change is intended to assure that the interpretation of this obligation is broad enough to encompass electronic files and documents held by the selling lawyer. In addition, some changes for style or formatting have been made.

The current rule's three paragraphs of commentary have been expanded to twelve comments. Comments [1] through [4] in part revise the comments in current rule 2-300 that address the concept of a purchase or sale involving all or substantially all of a law practice. Comment [5] is new and clarifies that a lawyer who has sold a practice under this rule is not precluded from returning to practicing law after a sale. Comments [6] through [9] revise the comments in current rule 2-300 that address the fee arrangement between the client and purchaser. These comments also add guidance on sales where the selling lawyer is disabled or deceased, as well as note the potential applicability of other rules, such as conflicts of interest rules, to any purchase or sale of a law practice. Comments [10] and [11] add guidance on the protection of confidential information and, specifically, the requirement to obtain client consent before such information is shared between the seller and purchaser. Comment [12] is new and explains the relationship between Rule 1.17.1 and Rule 1.17.2, which governs sales of part of a law practice.

Rule 1.17.2 Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

As described above in the section on proposed Rule 1.17.1, proposed Rule 1.17.2 is the second of two proposed rules addressing the purchase and sale of a law practice. As a part of the ABA's complete revision of the Model Rules of Professional Conduct, the ABA's model rule on sale of a law practice, Model Rule 1.17, was amended to permit the sale of a geographic area or substantive field of a law practice. The Commission believes this expansion of the rule raises substantive and policy issues that are distinct from the issues raised by the pre-ABA Ethics 2000 model rule and current rule 2-300, both of which are limited to sales of all or substantially all of an entire law practice. To better identify any potential advantages or disadvantages in permitting the sale of part of a law practice, and to garner public comment on the proposed rule, the Commission has drafted proposed Rule 1.17.2.

In comparison with proposed Rule 1.17.1, proposed Rule 1.17.2 sets similar but not identical restrictions. Regarding similarities, both rules require client notice, consent and protection of confidential information. In addition, like proposed Rule 1.17.1, proposed Rule 1.17.2 restricts a partial sale of a law practice to a sale of "substantially all" of a geographic area or substantive field of practice.

As for differences, there are several restrictions, not present in proposed 1.17.1, that are included in proposed Rule 1.17.2. These restrictions are intended to set public protection boundaries that prophylactically guard against potential commercialization in the sale of a part of a law practice. First, the proposed rule states that such sales must be made "directly to one or more lawyers or law firms" so as to preclude the involvement, of any broker, finder or middleman that might result in additional fees or transactional costs. Second, the proposed rule places a "one time" only limitation on the sale of a substantive field of practice, unless there are extraordinary circumstances. Third, for a sale of a geographic area, the seller must cease practice in the geographic area covered by the sale and the seller is prohibited from resuming practice in that geographic area; however, for a sale of a substantive field of practice, the prohibition against resuming practice includes an exception for extraordinary circumstances. In addition, because there are certain exceptions for extraordinary circumstances, proposed Rule 1.17.2 identifies types of situations that constitute extraordinary circumstances under the rule (i.e., circumstances involving the seller's health or career changes between government service and private practice).

There are fourteen comments to the proposed rule. Some are variations of comments to ABA Model Rule 1.17. Among the subjects addressed in the comments are the following: the concept of a "direct" sale; cessation of practice by a seller; assumption by the buyer of the seller's fee arrangements with clients; sales involving a disabled or deceased lawyer; and the requirement to protect confidential information and obtain client consent to a sale.

As can be seen by the foregoing, the sale of an entire practice under proposed Rule 1.17.1 and the sale of a part of a practice under proposed Rule 1.17.2 involve different policy considerations and the Commission is interested in public comment on both the continuation of the existing rule's policy and the expanded policy inspired by the ABA model rule.

Rule 3.4 Fairness to Opposing Party and Counsel [5-200(E), 5-220, 5-310]

Proposed Rule 3.4 amends current rules 5-200(E), 5-220 and 5-310 and incorporates new provisions found in ABA Model Rule 3.4. As explained in more detail below, most of the added provisions are already impliedly covered by existing prohibitions in the Business & Professions Code. Proposed Rule 3.4 also adopts the Model Rule title.

Paragraph (a) of the proposed rule is taken from ABA Model Rule 3.4 (a) and prohibits a lawyer from unlawfully obstructing access to evidence, including the unlawful altering or destruction of evidence. Although this explicit prohibition is not found in the existing rules, it can be construed to be encompassed within the existing general prohibitions against dishonest conduct. (For example, see: Bus. & Prof. Code sec. 6106 re moral turpitude; sec. 6128, subd. (a) re misdemeanor charge for a lawyer's act of deceit or collusion with the intent to deceive a court or any party; and see also rule 5-200 re the duty of a lawyer to employ means consistent with truth in presenting a matter to a tribunal.)

Proposed Rule 3.4 also continues the prohibition in rule 5-220 stating that a lawyer shall not suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce. Rule 5-220 is captured in paragraph (b) of the proposed rule and there is no substantive change.

Paragraph (c) is taken from ABA Model Rule 3.4 (b) and prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely. As in the case of paragraph (a), this explicit prohibition is not stated in the existing rules but may be construed to be encompassed within other existing prohibitions against dishonest conduct, especially those existing provisions regarding candor in the presentation of a matter to a tribunal.

Proposed Rule 3.4 also continues the prohibition in rule 5-310(A) stating that a lawyer shall not advise a person to leave a jurisdiction for the purpose of making that person unavailable as a witness. Rule 5-310(A) is captured in paragraph (d) of the proposed rule with no substantive change.

Proposed Rule 3.4 also continues the prohibition in rule 5-310(B) on improper payments to witnesses. Rule 5-310(B) is captured in paragraph (e) of the proposed rule and the first phrase in paragraph (e) adds new language expressly prohibiting the offering of an inducement to a witness that is prohibited by law.

Paragraph (f) is taken from ABA Model Rule 3.4 (c) and prohibits a lawyer from falsifying evidence or counseling or assisting a witness to testify falsely. Like both proposed

paragraph (a) and proposed paragraph (c), this explicit prohibition is not stated in the existing rules but may be construed to be encompassed within other existing prohibitions against dishonest conduct, especially those existing provisions regarding candor in the presentation of a matter to a tribunal.

Proposed Rule 3.4 continues the prohibition in rule 5-200(E) stating that a lawyer shall not assert personal knowledge of facts in issue except when testifying as a witness. Rule 5-200(E) is captured in paragraph (g) of the proposed rule and is revised to restrict the prohibition to conduct occurring “in trial” as opposed to any and all conduct occurring when a lawyer presents a matter “to a tribunal.”

Paragraph (h) is taken from ABA Model Rule 3.4 (f) and prohibits a lawyer from asking a person, other than a client, to refrain from voluntarily giving relevant information to another party. There are two exceptions to the prohibition. The first exception is for requests made to a person who is a relative, employee or other agent of a client and the lawyer believes that the person’s interest will not be adversely affected. The second exception is for situations where the person may be required by law to refrain from disclosing information.

Current rules 5-200(E), 5-220 and 5-310(A) and (B) do not include any comments. Proposed Rule 3.4 has five comments. Comments [1] and [2] are derived from the corresponding comments to ABA Model Rule 3.4. Comment [1] addresses the need for fairness in an adversary system. Comment [2] describes how the system relies upon fair access to documents and other evidentiary items that are necessary for the of establishment a party’s claim or defense. Comments [3] and [4] are new. Comment [3] clarifies that the Rule is not intended to be a regulatory standard that governs civil or criminal discovery disputes. Comment [4] provides guidance on paragraph (e) of the proposed rule and, in part, states that it is permissible for a lawyer to pay a non-expert witness for time spent preparing for a deposition or trial. Comment [5] is derived from the last comment to ABA Model Rule 3.4. Comment [5] clarifies that a lawyer is permitted to request employees of a client to refrain from giving information to another party and includes a cross reference to the rules governing communications with a represented person (proposed Rule 4.2) and communications with an unrepresented person (proposed Rule 4.3).

Rule 3.5 Impartiality and Decorum of the Tribunal [5-300, 5-320]

Proposed Rule 3.5 amends current rules 5-300 and 5-320. The proposed amendments generally retain the substantive content of the current rules but reorganize that content into a single rule to follow the approach used in the comparable ABA Model Rule, Model Rule 3.5.

Proposed Rule 3.5 continues the prohibition in rule 5-300 on improper contacts with officials, including improper ex parte communications with judges and improper gifts or loans to judges. Rule 5-300 is captured in paragraphs (a), (b), and (c) the proposed rule. Paragraph (a) of the proposed rule amends current rule 5-300(A) to include a new

exception for a lawyer to give a gift or make a loan to a judge when such gift or loan is permitted under the Code of Judicial Ethics. Similarly, paragraph (b) of the proposed rule amends current rule 5-300(B) to include a new exception, derived from a corresponding exception in ABA Model Rule 3.5(b) that permits ex parte communications with a judge when authorized by law, by the Code of Judicial Ethics, or by a court order or other ruling of a tribunal. Paragraph (c) notes that for purposes of the Rule, the terms “judge” and “judicial officer” includes law clerks and other court personnel who participate in the decision-making process.

Proposed Rule 3.5 also continues the prohibition in rule 5-320 on improper contacts with jurors. Rule 5-320 is captured in paragraphs (d) through (i) of the rule. Some changes have been made for clarity and style. The only substantive amendment is in paragraph (g) of the proposed rule. Paragraph (g) modifies the existing language in rule 5-320(D) that restricts contacts with a juror after discharge from the jury. The current rule prohibits questions or comments to a juror that are “intended to harass or embarrass the juror.” This language is deleted and replaced with the following four types of prohibited communications: (1) communications prohibited by law or court order; (2) communications made when a juror has made known to the lawyer their desire not to communicate with the lawyer; (3) communications involving misrepresentation, coercion, duress or harassment; and (4) communications intended to influence a juror’s actions in future jury service. Of these four types of prohibited communications, the first three are taken from ABA Model Rule 3.5. The fourth type is a carry-over from the current rule and is not found in the model rule.

Current rules 5-300 and 5-320 do not include any comments. Proposed Rule 3.5 has four comments. Comments [1] and [2] are derived from the corresponding comments to ABA Model Rule 3.5. Comment [1] indicates that prohibitions against improper influence on a tribunal may be found in both criminal law and in judicial conduct standards. Comment [2] includes a clarification, not found in the model rule, stating that a lawyer serving as a temporary judge, referee or court appointed arbitrator is permitted to engage in ex parte communications with judges when those communications occur in the performance of the lawyer’s service as temporary judge, referee or court appointed arbitrator. Comment [3] is new and provides a cross reference to Code of Civil Procedure, section 206, concerning communications with a juror after the discharge of the jury. Comment [4] is derived from comment [3] to ABA Model Rule 3.5 and emphasizes the restriction on communications with a juror who has been removed from an empanelled jury.

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges [5-100]

Proposed Rule 3.10 amends current rule 5-100. Proposed Rule 3.10 continues the prohibition against a lawyer threatening criminal, administrative, or disciplinary action to obtain an advantage in a civil dispute. This proposed rule tracks the current California rule as there is no corresponding ABA Model Rule. The ABA rule number that has been assigned is one that places the rule into the category of rules governing a lawyer’s role as

an advocate for a client. Some changes have been made to the rule text for clarity and style but there are no substantive amendments.

Current rule 5-100 has three comments that are expanded in the proposed new rule. Comment [1] clarifies the scope of the rule, in part, indicating that the rule does not apply to a threat to bring a civil action. This comment also includes a citation to a California Supreme Court disciplinary case that discusses implied threats. Comment [2] addresses threats to initiate contempt proceedings and adds a new discussion of good faith offers made by a government lawyer to settle all, or a portion of, the civil, administrative, and criminal aspects of a case. This comment was developed with input from government lawyer stakeholders. Comment [3] continues the existing rule's discussion of a threat arising from the context of an administrative charge which is a procedural prerequisite to filing a civil complaint.

A drafting issue that arose during the Commission's deliberations on this rule was the question of whether to include a definition of the term "threaten." Ultimately, the Commission voted to not include a definition because of the factually-intensive inquiry required to determine the Rule's applicability. It is possible that some public commentators will regard this as a significant decision limiting the guidance afforded by the rule.

Rule 4.2 Communication with a Person Represented by Counsel [2-100]

Proposed Rule 4.2 amends current rule 2-100. Proposed Rule 4.2 continues the prohibition on a lawyer's ex parte communications with another lawyer's client. It also carries forward the exception that permits communications authorized by law.

Although the proposed Rule generally retains the substantive content of current rule 2-100, there are significant changes. The current rule refers to communications with a represented "party." The proposed rule replaces the term "party" with the term "person." This change tracks the comparable ABA Model Rule, Model Rule 4.2. The Commission believes this is a clarifying change which makes clear that the client protection afforded by current rule 2-100 extends to a person who is represented by a lawyer in a matter, but who is not a party to a legal proceeding pending before a tribunal or a party represented in a transactional matter. One example of such a person would be a witness represented by a lawyer in connection with a civil litigation matter where the witness is not also one of the litigants. The Commission believes this historical interpretation of the rule was called into doubt by a recent decision by the State Bar Court. (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [no violation of rule 2-100 found where respondent lawyer, who represented plaintiffs in a negligence action against apartment owner defendant, communicated with an incarcerated person, who was not a party to the negligence action but was represented by defense counsel in criminal proceedings arising from the same facts as the negligence action].)

The Commission anticipates that the proposed change from "party" to "person" will be identified by public commentators as a key policy issue for the State Bar. In connection

with the Commission's open session deliberations on the Rule, representatives of the California Attorney General, the California District Attorneys Association and other interested persons expressed concerns that the amendment would be a major substantive change and would impair longstanding investigative and prosecutorial practices. The Commission considered these concerns and determined that the express exception language in proposed paragraph (c)(3), which permits "communications authorized by law or a court order" obviated the concerns. The Commission, however, also determined that paragraph (c)(3) should be amplified with new commentary to make clear that authorized investigative and prosecutorial practices are not intended to be affected by the change from "party" to "person." This proposed new commentary states:

"Communications Authorized by Law or Court Order"

[18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in

civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.”

With the addition of this new commentary, the Commission believes that the change from “party” to “person” appropriately balances the interests in client protection and legitimate law enforcement practices.

In addition to the change from “party” to “person,” there are several other noteworthy amendments. Several new provisions have been added. A new paragraph (d) states that: “When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.” This new provision is similar to ABA Model Rule 4.3, which addresses a lawyers communications with an “unrepresented person.” Another new provision in proposed Rule 4.2 is new paragraph (e) which states: “In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.” This provision is derived from principles in case law concerning the protection of information that is subject to the attorney-client privilege. A third new provision, paragraph (f), provides: “A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.” This new provision is intended to preclude an organization’s lawyer from interfering with the opposing lawyer’s attempt to obtain information from organizational constituents who are not “persons” within the meaning of paragraph (b). Finally, paragraph (g) defines “public official” as “a duly-appointed or elected public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization.” Together with the change of “public officer” to “public official” in the paragraph (c)(1) exception to the Rule permitting communications with “public officials, boards, committees or bodies,” this definition helps delimit the scope of the exception.

Current rule 2-100's six paragraphs of commentary have been expanded to twenty-four comments. Comments [1] through [6] provide an overview of the rule and state its purpose with comments [1], [2], [3], and [4] derived from the commentary to ABA Model 4.2. Comment [5] is new language that addresses “indirect” communications with represented persons. Comments [7] and [8] are updated versions of existing comments to rule 2-100 on communications between the parties themselves, including the situation where a lawyer is party. Comments [9] and [10] are new. They provide general guidance on the scienter element of the rule and also specifically address knowledge of limited scope attorney-client representations (a.k.a., “unbundling”).

Comments [11] through [16] are new and discuss the potentially complex application of the rule to represented organizations and employees and other constituents of those organizations. Comment [16] specifically addresses represented government organizations and the Commission anticipates that the continued inclusion of an exception, in paragraph (c)(1) of the proposed rule, that permits a lawyer to communicate with any represented public official, board, or committee will be identified by public commentators as a key policy issue for the State Bar. During the Commission’s open session deliberations on this issue, representatives of the California League of Cities, the County Counsels Association, and other interested persons expressed concerns that the inclusion of this broad exception would be unfair to represented public officials and entities, particularly in litigation matters where a plaintiff’s lawyer’s access to an official can result in admissions that otherwise would not be made if the government’s lawyer had an opportunity to counsel the official. As described in comment [16], the Commission believes that the exception for communications with public officials is necessary to avoid impairing the constitutional right of access conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. As already noted, the addition of a definition for “public official” in paragraph (g) helps delimit the scope of the exception.

Comment [17] is an updated version of an existing comment to rule 2-100 providing guidance on the scenario where a represented client seeks a “second opinion” from another lawyer. Comments [18] through [21], excerpted above, are the new comments intended to elaborate on the exception for communications authorized by law or court order. Comments [22] through [24] are comments added to give guidance on new paragraphs (d) and (e) of the proposed rule.

Rule 4.3 Dealing with Unrepresented Person [n/a]

Proposed Rule 4.3 places restrictions on a lawyer’s communications with an unrepresented person. The rule is based on the substantially similar ABA Model Rule 4.3. Although some aspects of Model Rule 4.3 are addressed in the context of an organization in current rule 3-600(D), the proposed Rule has no stand-alone counterpart in the existing California rules. The proposed rule is intended to prohibit a lawyer from making misleading statements or omissions when communicating with an unrepresented person.

Paragraph (a) of the proposed rule is a variation of language in ABA Model Rule 4.3. Paragraph (b) is new and provides that: “In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty owed to another or which the lawyer is not otherwise entitled to receive.”

Comments [1] and [3] address the purpose of the rule and are slightly modified versions of comments [1] and [2] to ABA Model Rule 4.3. Comment [2] is new and identifies erroneous assumptions and other misunderstandings that an unrepresented person might have when dealing with a lawyer. Comments [4] and [5] are new and discuss the restriction, in paragraph (b), on a lawyer’s efforts to obtain information that should not be disclosed by an unrepresented person due to the privileged nature of that information or some other legally cognizable confidentiality obligation. Comment [6] is new and addresses the application of the rule to covert criminal and civil enforcement investigations. The Commission anticipates that the terms of this last comment may be regarded by some public commentators as a key policy issue due to its impact on law enforcement activities.

Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence
[1-310, 1-320, 1-600]

Proposed Rule 5.4 is patterned after ABA Model Rule 5.4 and combines the standards relating to the preservation of a lawyer’s professional independence that are presently found in three separate California rules, rules 1-310, 1-320, and 1-600. These standards set restrictions on: partnerships with non-lawyers; sharing of fees with non-lawyers; and a lawyer’s participation in a non-governmental program, activity, or organization that renders, recommends, or pays for legal services.

The proposed rule generally retains the substantive content of each of the current rules that are incorporated but reorganizes that content to track the structure of ABA Model Rule 5.4. As is the case with the current California rules and ABA Model Rule 5.4, the proposed rule prohibits partnerships with non-lawyers where the activities of the partnership consist of the practice of law and prohibits fee sharing with non-lawyers, subject to specified exceptions. The proposed rule also restricts a lawyer’s involvement in the provision of legal services for for-profit corporations and other organizations. In particular, the proposed rule prohibits any involvement if: a non-lawyer owns any interest in the corporation; a non-lawyer is a corporate director or officer; or a non-lawyer has authority to direct, influence or control the lawyer’s professional judgment. The proposed rule also continues the requirement in current rule 1-600(B) that a lawyer complies with the State Bar’s Rules and Regulations Pertaining to Lawyer Referral Services.

The six proposed comments to the rule include four new comments and two comments that are slight revisions of existing comments to rule 1-600. Comments [1] and [2] address the rule’s protection of lawyer independence and offer cross-references to other rules that contribute to this protection. Comment [3] describes a practice, permitted but not expressly addressed in the current rules, whereby a lawyer places law corporation shares into a

revocable living trust for estate planning purposes. Comment [4] perpetuates a comment to rule 1-600 stating that a lawyer's participation in certified lawyer referral service is encouraged. Comment [5] states that the rule applies to group, prepaid, and voluntary legal service programs and also clarifies that the rule is not intended to prohibit the payment of court-awarded legal fees to a non-profit legal aid, mutual benefit and advocacy groups that are not engaged in the unauthorized practice of law. This comment includes a citation to *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221] in which the California Supreme Court held that such payments of court-awarded legal fees are permitted. Comment [6] carries forward a comment to rule 1-600 stating that the rule is not intended to abrogate case law concerning the relationship between insurers and lawyers who provide legal services to insureds.

ATTACHMENT 1

{ IMPORTANT NOTE: Explanation of markings on rule drafts

Some of the rule drafts may place certain text and/or rule number references in brackets with superscript notations. A legend of the specific markings is provided below. These markings serve two purposes.

First, the markings indicate whether the rule referenced in the brackets is a rule that is a part of the current public comment proposal. A superscript notation to []^[B3] indicates that the rule referenced in the brackets is a rule found in this current public comment proposal. The other superscript notations indicate that the text and/or rule number references within the brackets are a reference to a rule that is not found in this current group of proposed rules. The reference may be to proposed rules previously distributed for public comment or to proposed rules that are pending consideration by the Commission and are anticipated to be distributed for public comment in the future.

Second, in some circumstances the markings also signal that the text within the brackets is tentative and subject to the Commission's pending consideration of a rule that has not yet been distributed for public comment. Where appropriate, the rule summaries include explanations of the tentative status of any bracketed text.

Legend:

[]^[B1] = A superscript notation to [B1] refers to a proposed rule that was included in the Commission's 2006 public comment discussion draft. The full text of that discussion draft is available online at:
<http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Discussion-Draft.pdf>

[]^[B2] = A superscript notation to [B2] refers to a proposed rule that was included in the Commission's 2007 public comment discussion draft. The full text of that discussion draft is available online at:
<http://calbar.ca.gov/calbar/pdfs/public-comment/2007/DiscussionDraft.pdf>

[]^[B3] = A superscript notation to [B3] refers to a proposed rule that is included in this current public comment discussion draft.

[]^[B4] = A superscript notation to [B4] refers to a proposed rule that is pending consideration by the Commission and is anticipated to be included in a future public comment proposal. Refer to the corresponding current California rule or ABA Model rule in reading these parts of the text.

The current California rules are found at:

http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf

The ABA Model Rules are found at:

http://www.abanet.org/cpr/mrpc/model_rules.html }

PROPOSED RULE (CLEAN VERSION)

Rule 1.5: Fees For Legal Services

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.
- (b) A fee is unconscionable for purposes of this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraud or overreaching, so that the fee charged, under the circumstances, constitutes an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:
 - (1) the amount of the fee in proportion to the value of the services performed;
 - (2) the relative sophistication of the lawyer and the client;
 - (3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (5) the amount at stake and the results obtained;
 - (6) the time limitations imposed by the client or by the circumstances;
 - (7) the nature and length of the professional relationship with the client;
 - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (9) whether the fee is fixed or contingent;
 - (10) the time and labor required;
 - (11) the informed consent of the client to the fee.
- (d) Expenses for which the client will be charged cannot be unconscionable.
- (e) A lawyer shall not enter into an arrangement for, charge, or collect:

PROPOSED RULE (CLEAN VERSION)

- (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (f) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule.

Non-refundable Fee

[2] This Rule prohibits a lawyer from making an agreement for, charging, or collecting a non-refundable fee. However, a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.

PROPOSED RULE (CLEAN VERSION)

Basis or Rate of Fee

[3] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.)

[4] With respect to modifications to the basis or rate of a fee after the commencement of the attorney-client relationship, see Rule 1.8.1^[B3], Comments [5], [6].

Terms of Payment

[5] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(d)^[B3].) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1^[B3].

[6] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

Prohibited Contingent Fees

[7] Paragraph (e)(1) prohibits a lawyer from charging a contingent fee in a family law matter when payment is contingent upon the securing of a dissolution or nullity of a marriage or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances due under child or spousal support, or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] Division of fees among lawyers is governed by Rule 1.5.1^[B1].

PROPOSED RULE (CLEAN VERSION)

Rule 1.7: Conflict Of Interest: Current Clients

- (a) **Representation directly adverse to current client.** A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.
- (b) **Representation of multiple clients in one matter.** A lawyer shall not, without the informed written consent of each client:
 - (1) Accept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict; or
 - (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.
- (c) **Representing a client's adversary.** A lawyer shall not, while representing a client in a first matter, accept in a second matter the representation of a person or organization who is directly adverse to the lawyer's current client in the first matter, without the informed written consent of each client.
- (d) **Disclosure of relationships and interests.** A lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:
 - (1) The lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
 - (2) The lawyer knows or reasonably should know that:
 - (a) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (b) the previous relationship would substantially affect the lawyer's representation; or
 - (3) The lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity the lawyer knows or reasonably should know would be affected substantially by resolution of the matter; or
 - (4) The lawyer has or had a legal, business, financial, or professional interest in the subject matter of the representation.

PROPOSED RULE (CLEAN VERSION)

[To be placed in a “global” definitions section:

Definitions of “disclosure” and “informed written consent.”

- (1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances to the client or former client;
- (2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;
- (3) “Written” means any writing as defined in Evidence Code section 250.]^[B4]

Comment

General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)

[1] This rule and the other conflict rules seek to protect a lawyer’s ability to carry out the lawyer’s basic fiduciary duties to each client. For the purpose of considering whether the lawyer’s duties to a client or other person could impair the lawyer’s ability to fulfill the lawyer’s duties to another client, it is helpful to consider the following: (1) the duty of undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client’s benefit, not influenced by the lawyer’s duties to or relationships with others, and not influenced by the lawyer’s own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently within the bounds of the law; and (5) the duty to make full and candid disclosure to the client of all information and developments material to the client’s understanding of the representation and its control and direction of the lawyer. (See Rule 1.2(a)^[B4] regarding the allocation of authority between lawyer and client.)

[2] The first step in a lawyer’s conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules. [For guidance in determining whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3^[B4].]

[3] This rule describes a lawyer’s duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1^[B4] to 1.8.12^[B1]. [For conflicts duties

PROPOSED RULE (CLEAN VERSION)

to former clients, see Rule 1.9^[B4].] [For conflicts of interest involving prospective clients, see Rule 1.18^[B4].] [For definitions of “disclosure,” “informed consent” and “written,” see Rule 1.0(e)^[B4] and (b), and see Comments [18] – [20].]

Paragraph (a): Representation Directly Adverse to Current Client

[4] A lawyer owes a duty of undivided loyalty to each current client. For purposes of paragraph (a), the duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the matters are wholly unrelated. The duty of loyalty reflected in paragraph (a) applies equally in transactional and litigation matters. For example, a lawyer may not represent the seller of a business in negotiations when the lawyer represents the buyer in another matter, even if unrelated, without the informed written consent of each client. Paragraph (a) would apply even if the parties to the transaction expect to, or are, working cooperatively toward a goal of common interest to them. (If a lawyer proposes to represent two or more parties concerning the same negotiation or lawsuit, the situation should be analyzed under paragraph (b), not paragraph (a). As an example, if a lawyer proposes to represent two parties concerning a transaction between them, the lawyer should consult paragraph (b).)

[5] Paragraph (a) applies only to engagements in which the lawyer’s work in a matter is *directly* adverse to a current client in any matter. The term “direct adversity” reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions “adverse” to his or her client and thus inconsistent with the client’s reasonable expectation that the lawyer will be loyal to the client. The word “direct” limits the scope of the rule to take into account the public policy favoring the right to select counsel of one’s choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer’s actions are directly adverse to a current client for purposes of this Rule.

[6] Generally speaking, a lawyer’s work on a matter will not be directly adverse to a person if that person is not a party to the matter. If the non-party’s interests could be affected adversely by the outcome of the matter, then the adversity is indirect, not direct. However, in some situations, a lawyer’s work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer’s clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer’s client in another matter, if the examination is likely to harm or embarrass the witness. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)

PROPOSED RULE (CLEAN VERSION)

[7] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, *e.g.*, if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.

[8] **[RESERVED]**

[9] If a conflict arises during a representation, the lawyer must in all events continue to protect the confidentiality of information of each affected client and former client. [Regarding former clients, see Rule 1.9(c)^[B4].]

Paragraph (b): Representation of multiple clients in a matter

[10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer's full performance of the duties owed to one of the joint clients might or does interfere with the lawyer's full performance of the duties owed to another of the joint clients. See Comment [38] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.

[11] A potential conflict exists when one can reasonably foresee an actual conflict arising among the joint clients in the matter in the future.

[12] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the

PROPOSED RULE (CLEAN VERSION)

lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.

[13] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068, subdivision (e), Rule 3-100, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4^[B1], and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.

[14] If a lawyer obtains the consent of multiple clients to the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain the further informed written consent of each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [33].

[15] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). [See Rule 1.2(c)^[B4] (limiting the scope of representation)].

[16] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or previously did so.

PROPOSED RULE (CLEAN VERSION)

Lawyer Acting in Dual Roles

[17] A lawyer might owe fiduciary duties in capacities other than as a lawyer that could conflict with the duties the lawyer owes to clients or former clients, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director. (See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)

Paragraph (c): Representing a Client's Adversary.

[18] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in which the lawyer's work will not be adverse to A. (If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).) The purpose of paragraph (c) is (1) to ensure that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; (2) to ensure B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter; and (3) to apprise B of the lawyer's obligation to disclose to A all information that is material to the representation of A even if that information otherwise is the confidential information of B. Paragraph (c) applies in litigation and in non-litigation representations.

Paragraph (d): Disclosure of Relationships and Interests

[19] Paragraph (d) requires a lawyer to disclose to a potential or current client certain of the lawyer's present or past relationships with others, and the lawyer's own interest in the subject matter of the representation. The purpose of this disclosure is to permit the client or potential client to make a more informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.

[20] A lawyer should not allow his or her own interests to have an adverse effect on the representation of a client. Paragraph (d)(4) requires a lawyer to make a disclosure to the client when the lawyer has an interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (2) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by Paragraph (d)(4) unless the lawyer and client have agreed to take a common position in compliance with Rule 1.4^[B1], as might occur, for example, in response to a motion for discovery sanctions. [See Rule 1.8.1^[B3] through 1.8.12^[B2] for additional Rules pertaining to other personal

PROPOSED RULE (CLEAN VERSION)

interest conflicts, including business transactions with clients, and Rule 3.7^[B4] concerning lawyer as witness.]

[21] Paragraph (d)(4) does not require a lawyer to investigate whether mutual funds or similar investment vehicles in which the lawyer holds an interest own interests in parties to a matter. However, if the lawyer knows that a mutual fund in which the lawyer owns an interest in a party to a matter the lawyer is handling, paragraph (d)(4) would apply.

[22] Paragraph (d)(4) requires disclosure to the lawyer's client if the lawyer has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.

[23] Paragraph (d) applies only to a lawyer's own relationships and interests, unless the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party, witness or has or had an interest in the subject matter of the representation. [See also Rule 1.10^[B4] (personal interest conflicts under Rule 1.7^[B3] ordinarily are not imputed to other lawyers in a law firm).]

[24] Paragraph (d) does not apply to the relationship of a lawyer to another person's lawyer. (See Rule 1.8.12^[B2].)

[25] Paragraph (d) requires disclosures only to current clients. Rule 1.9^[B4] specifies when a lawyer must obtain informed written consent from a former client.

[26] Paragraph (a) applies, rather than paragraph (d)(1) or (3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [4].)

Prohibited Representations

[27] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)^[B1]); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068, subdivision (e) and Rule 3-100^[B4]); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action"]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 74–75 [67 Cal.Rptr.2d 857, 863] [attorney may not represent both a

PROPOSED RULE (CLEAN VERSION)

closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38, and see Rule 1.14^[B4] regarding clients with diminished capacity.)

[28] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied, the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c)^[B3].)

Disclosure and Informed Written Consent

[29] Informed written consent requires the lawyer to disclose in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client. [See Rule 1.0(e)^[B4] (informed written consent).] The facts and explanation the lawyer must disclose will depend on the nature of the potential or actual conflict and the nature of the risks involved for the client or potential client. When undertaking the representation of multiple clients in a single matter, the information must include the implications of the joint representation, including possible effects on loyalty, and the confidentiality and lawyer-client privilege issues described in Comment [13].

[30] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and, if applicable, obtaining a new written consent under paragraph (a), (b), or (c).

[31] If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068, subdivision (e), Rule 3-100^[B4].) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board of directors, or because of contractual or court-ordered restrictions.

[32] In some situations, Rule 1.13(g)^[B3] limits who has authority to grant consent on behalf of an organization.

Consent to Future Conflict

[33] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but this is subject to the usual requirement that a client's consent must be "informed" to comply with this Rule. Determining whether a client's advance consent is

PROPOSED RULE (CLEAN VERSION)

“informed,” and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [30] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comment [30] ordinarily requires. Whenever seeking an advance consent, the lawyer’s disclosure to the client should include an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also should disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer’s explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client’s degree of experience as a user of the legal services, including experience with the type of legal services involved; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client’s choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client’s choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client’s ability to understand the nature and extent of the advance consent. A client’s ability to understand the nature and extent of the advance consent might depend on factors such as the client’s education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent will not be in compliance in the circumstances described in Comment [29] (prohibited representations). [See Rule 1.0(g)^[B4] (“informed consent”).]

Representation of a Class

[34] This Rule applies to a lawyer’s representation of named class representatives. For purposes of this Rule, an unnamed current or potential member of a plaintiff class or a defendant class in a class action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to obtain the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

PROPOSED RULE (CLEAN VERSION)

Organizational Clients

[35] A lawyer who represents an organization does not, by virtue of that representation alone, represent any constituent of the organization. (See Rule 1.13(a)^[B3].) The lawyer for an organization also does not, by virtue of that representation alone, represent any affiliated organization, such as a subsidiary or organization under common ownership. The lawyer nevertheless could be barred under case law from accepting a representation adverse to an affiliate of an organizational client, even in a matter unrelated to the lawyer's representation of the client, under certain circumstances.

[36] A lawyer for a corporation who also is a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether it is reasonably foreseeable that the responsibilities of the two roles might conflict, for example, because, as its lawyer, he or she might be called on to advise the corporation on matters involving actions of the directors. The lawyer should consider such things as the frequency with which these situations might arise, the potential materiality of the conflict to the lawyer's performance of his or her duties as a lawyer, and the possibility of the corporation obtaining legal advice from another lawyer in these situations. If there is material risk that the dual role will compromise the lawyer's ability to perform any of his or her duties to the client, the lawyer should not serve as a director or should cease to act as the corporation's lawyer. The lawyer should advise the other members of the board whenever matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that conflict of interest considerations might require the lawyer to withdraw as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

[37] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, neither paragraph (a) nor (c) is intended to apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[38] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint-clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

PROPOSED RULE (CLEAN VERSION)

Public Service

[39] [For special rules governing membership in a legal service organization, see Rule 6.3^[B4]; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with nonprofit and court-annexed limited legal services programs, see Rule 6.5^[B4].]

PROPOSED RULE (CLEAN VERSION)

Rule 1.8.1: Business Transactions with a Client and Acquiring Interests Adverse to the Client

A lawyer shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that reasonably can be understood by the client; and
- (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Comment

Scope of Rule

[1] A lawyer's legal training and skill, and the relationship of trust and confidence that arises between a lawyer and client, create the possibility that a lawyer, even unintentionally, will overreach or exploit client information when the lawyer enters into a business transaction with the client or acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or acquisition and the importance of having independent legal advice. (See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121].) This Rule also requires that the transaction or acquisition be fair and reasonable to the client.

[2] Except as set forth in comments [5] and [6], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a legal, business, financial or professional interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(d)(4)^[B3]

PROPOSED RULE (CLEAN VERSION)

Business Transactions With Clients

[3] This Rule applies even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client agrees to make a loan to a client to pay expenses that are not related to the representation. This Rule also applies to lawyers engaged in the sale of goods or non-legal services that are related to the practice of law, such as when a lawyer sells insurance, brokerage or investment products or services to a client.

[4] Not all business transactions with a client are within the scope of this Rule. This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. (See State Bar Formal Opn. 1995-141.) This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.

[5] This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5^[B3]. An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

[6] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. However, even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other fiduciary principles might apply. Once a lawyer-client relationship has been established, the lawyer owes

PROPOSED RULE (CLEAN VERSION)

fiduciary duties to the client that apply to the modification of the agreement. Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr. 915].)

Adverse Pecuniary Interests

[7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. *Hawk v. State Bar* (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58].) Under this Rule, a pecuniary interest adverse to a client also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].)

Full Disclosure to the Client

[8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.

[9] The requirement for full disclosure in writing in paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection the transaction or acquisition. It also requires the lawyer to fully inform the client of the risks of the transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836].) The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].

PROPOSED RULE (CLEAN VERSION)

[10] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the lawyer's interests at the expense of the client. The lawyer must also comply with Rule 1.7(d)^[B3]. In some cases, the lawyer's interest may be such that Rule 1.7^[B3] will preclude the lawyer from representing the client in the transaction or acquisition.

[11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. The lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(d)^[B3] when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.

[12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(d)^[B3] when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.

Full Disclosure and Consent

[13] In some cases, the lawyer's interest will preclude the lawyer from obtaining the client's consent to the transaction or acquisition, such as when the lawyer cannot continue to represent the client competently as a result of the transaction or acquisition. When a lawyer is precluded from obtaining a client's consent, the lawyer cannot enter into the transaction or acquisition with the client.

PROPOSED RULE (CLEAN VERSION)

Opportunity to Seek Advice of Independent Counsel

[14] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who does not have a financial interest in the transaction or acquisition and who does not have an ongoing, close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent. Once the lawyer has advised the client to seek the advice of an independent lawyer, the lawyer must afford the client a reasonable period of time to obtain such advice.

[15] A lawyer is not required to advise the client to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of such independent counsel. Under such circumstances, the lawyer is not required to provide legal advice to the client; however, the lawyer is still required under paragraph (a) to make full disclosure to the client in writing of all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the client has not been informed of such facts. The fact that the client was independently represented in the transaction or acquisition is relevant in determining whether the terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a) requires.

PROPOSED RULE (CLEAN VERSION)

Proposed Rule 1.13: Organization As Client

- (a) In representing an organization, a lawyer shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.
- (b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting, intends to act or refuses to act in a matter related to the representation that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e)(1).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right, and where appropriate, duty to resign or withdraw in accordance with Rule 1.16^[B3].
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall inform the organization's highest authority of the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing an organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know (i) that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing or (ii) that the constituent is under the mistaken belief that he or she is in a client-lawyer relationship with the

PROPOSED RULE (CLEAN VERSION)

lawyer. (See Rule 4.3^[B3].) The lawyer shall not mislead such a constituent into believing, and shall make a reasonable effort to correct the constituent's mistaken belief, that the constituent is in a lawyer-client relationship with the lawyer or that the constituent may communicate confidential information to the lawyer that will not be disclosed to the organization or used for the organization's benefit.

- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 1.7^[B3], 1.8.2 (3-310(E))^[B4], 1.8.7 (3-310(D))^[B4], 1.8.6 (3-310(F))^[B4]. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] This Rule is intended to apply to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.

[2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with the constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.

[3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the lawyer has a duty to the organization under Business and Professions Code section 6068, subdivision (e)(1) to protect the confidential information imparted. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or [impliedly authorized] by the organizational client in order to carry out the representation or as otherwise permitted by Rule 3-100^[B4] or by law.

PROPOSED RULE (CLEAN VERSION)

[4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4^[B1] and Business and Professions Code, section 6068, subdivision (m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in conduct that the lawyer knows or reasonably should know violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.

[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. (Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0(f)^[B4].)

[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).

[7] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.

PROPOSED RULE (CLEAN VERSION)

[8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority is elsewhere, for example, the independent directors of a corporation.

[9] Even in circumstances where a lawyer is not obligated by Rule 1.13^[B3] to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that is or may be a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068, subdivision (e)(1), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority, as determined by applicable law, that can act on behalf of the organization.

[10] Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Relation to Other Rules

[11] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4^[B1], 1.8^[B4], 1.16^[B3], 3.3^[B4] or 4.1^[B4].

[12] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions

PROPOSED RULE (CLEAN VERSION)

under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16^[B3]. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1^[B1] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1)^[B3].

Government Agencies and Organizations

[13] This Rule applies to the representation of governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. (See Scope [18].) Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

[14] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068, subdivision (e) or Rule 3-100^[B4], a governmental organization has the option of considering and establishing internal organizational policies that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

Clarifying the Lawyer's Role

[15] There are times when the lawyer knows or reasonably should know that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. Under paragraph (f), in such circumstances the lawyer must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communication between the lawyer and the constituent are not confidential as to the

PROPOSED RULE (CLEAN VERSION)

organization and may be disclosed to the organization or used for the benefit of the organization. (See Rule 4.3^[B3].)

Dual Representation

[16] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7^[B3], 1.8.2[3-310(E)]^[B4], 1.8.6[3-310(F)]^[B4], and 1.8.7[3-310(D)]^[B4]. Paragraph (g) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. (See State Bar Formal Opn. 1999-153.)

[17] This Rule is not intended to prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.) In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

PROPOSED RULE (CLEAN VERSION)

Rule 1.16: Declining Or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the lawyer knows or should know that the representation will result in violation of these Rules or of the State Bar Act;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or
 - (3) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;
 - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;
 - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
 - (5) the client breaches an agreement or obligation to the lawyer as to expenses or fees, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the agreement or obligation is fulfilled;
 - (6) the client knowingly and freely assents to termination of the representation;
 - (7) the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;
 - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;

PROPOSED RULE (CLEAN VERSION)

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

Comment

[1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without limitation, to any sale under Rules 1.17.1^[B3] and 1.17.2^[B3]. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (See Rules 1.2(c)^[B4] and 6.5^[B4].)

PROPOSED RULE (CLEAN VERSION)

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate the Rules of Professional Conduct or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. (See Rules 1.2(c)^[B4] and 1.4^[B1].)

[3] [When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. (See also Rule 6.2^[B4].)

[4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

Optional Withdrawal

[5] Paragraph (b)(2) is intended to permit a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Business and Professions Code, section 6068, subdivision (e)(1) and Rule 3-100^[B4].

[6] Paragraph (b)(5) is intended to allow a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.

Permission to Withdraw

[7] Lawyers must comply with their obligations to their clients under Rule 3-100 and to the courts under Rule 3.3^[B4] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. (See Business and Professions Code sections 6068, subdivision (b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

PROPOSED RULE (CLEAN VERSION)

Assisting the Client upon Withdrawal

[8] Paragraph (d) requires the lawyer to take “reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client.” These steps will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.

[9] Paragraph (e) states a lawyer’s duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal C. sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with Rule 1.15^[B4].

[10] A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer’s fees and costs. Paragraph (e)(1) is not intended to prohibit a lawyer from making, at the lawyer’s own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer’s expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

PROPOSED RULE (CLEAN VERSION)

Rule 1.17.1: Purchase and Sale of a Law Practice

All or substantially all of the law practice of a lawyer, living or deceased, including goodwill, may be sold to a lawyer or law firm subject to all the following conditions:

- (a) Fees charged to clients shall not be increased solely by reason of the purchase or sale.
- (b) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 3-100^[B4] and Business and Professions Code section 6068, subdivision (e), then:
 - (1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:
 - (i) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format as provided by Rule 1.16(e)^[B3]; and that, if no response is received to the notification within 90 days after it is sent or, if the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and
 - (ii) the purchaser shall obtain the written consent of the client, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (b)(1)(i) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure to act during the 90-day period.
 - (2) In all other circumstances, not less than 90 days prior to the transfer:
 - (i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format as provided by Rule 1.16(e)^[B3]; and that, if no response is received

PROPOSED RULE (CLEAN VERSION)

to the notification within 90 days after it is sent, the purchaser may act on behalf of the client until otherwise notified by the client, and

- (ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (b)(1)(i) notification within 90 days after it is sent to the client's last address as shown on the records of the seller.
- (c) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.
- (d) A lawyer shall not disclose confidential information to a non-lawyer in connection with a sale under this Rule.
- (e) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] Any sale of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer to sell a practice only in accordance with the limitations contained in this Rule and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the interests and reasonable expectations of the seller's clients have priority over the seller's interests.

Sale of Entire Practice

[2] The requirement that substantially all of the seller's practice be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative or who for other reasons might find it difficult to secure other counsel if a sale could be limited to only some lucrative matters. This Rule also recognizes that, in some instances, a seller will be unable to transfer some matters to the purchaser because, for example, the purchaser has a conflict of interest or lacks pertinent expertise, and the seller is permitted to retain those individual files. (See Comments [4] and [10].) However, when a seller seeks only to sell some substantive fields or geographic areas of practice but retain other substantive fields or other geographic areas, the seller must comply with Rule 1.17.2^[B3] (Area of Practice Rule).

PROPOSED RULE (CLEAN VERSION)

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Transfer of individual client matters, where permitted, is governed by Rule 1.5.1^[B1]. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a)^[B3].

Termination of Practice by the Seller

[5] This Rule is not intended to prohibit a selling lawyer from returning to the private practice of law after the entire practice has been sold.

Fee Arrangement Between Client and Purchaser

[6] Paragraph (a) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee agreement with the client or enter into a fee agreement with the client. (See, for example, Business and Professions Code sections 6147, 6147.5, and 6148.) If a client decides not to retain the purchaser, the selling lawyer might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

[7] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the 90-day period described paragraphs (b)(1) or (2) but has not entered into a written fee agreement with the client, or does so during the 90-day period as described in paragraph (b), the purchaser might be entitled to payment on a quantum meruit basis.

Sale of Practice of Disabled or Deceased Lawyer

[8] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code, sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7^[B3], 1.8^[B4] and 1.9^[B4], as applicable. The notice required by paragraph (b) shall comply with the requirements of Rule 7.1(b) and (c)^[B1] and with Rule 1.5^[B3].

PROPOSED RULE (CLEAN VERSION)

Confidential Information and Client Consent

[10] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a reasonably identifiable client no more violate the seller's duty of confidentiality than do similar discussions concerning the possible association of another lawyer or mergers between firms, and to engage in such discussions the seller is not required to give notice to or obtain consent from any client. However, the seller is required to obtain client consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) and (c) does not require disclosure of the terms of the agreement between purchaser and seller, but there might be circumstances in which disclosure of particular terms might be required under Rule 1.4^[B1] and Business and Professions Code section 6068, subdivision (m).

[11] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive any sale under this Rule.

Applicability of the Rule

[12] This Rule does not apply to the formation of a law firm, admission of a lawyer to a law firm, retirement from a law firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice. This Rule also does not apply to the sale only of a substantive field of practice or of a geographic area of practice, both of which are governed by Rule 1.17.2^[B3] (Area of Practice Rule).

PROPOSED RULE (CLEAN VERSION)

Rule 1.17.2: Purchase and Sale of Geographic Area or Substantive Field of Law Practice

- (a) A lawyer or personal representative of the estate of a lawyer may sell a geographic area or substantive field of a law practice, including goodwill, if:
 - (1) the seller in good faith makes all of the geographic area or substantive field of the practice available for sale;
 - (2) the seller sells substantially all of the geographic area or substantive field of the practice;
 - (3) if a geographic area of practice is sold, the seller ceases practicing law in that geographic area;
 - (4) fees charged to clients in the seller's geographic area of practice or clients of the seller's substantive area of practice are not increased solely by reason of the sale;
 - (5) the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work;
 - (6) notice is given to clients of the lawyer or of the firm whose geographic area or substantive area of practice will be sold, and consents are obtained from them, as stated in paragraphs (c) and (d) of this Rule;
 - (7) confidential information is not disclosed to a non-lawyer in connection with the sale;
 - (8) the sale is directly to one or more lawyers or law firms;
 - (9) absent extraordinary circumstances, the seller sells that substantive field of the practice only one time;
 - (10) the seller never resumes practice in a geographic area covered by a sale; and
 - (11) absent extraordinary circumstances, the seller never resumes practice in the substantive field of law that is the subject of a sale.
- (b) Notice to Clients if the Lawyer Whose Geographic Area or Substantive Field of Practice Is Sold Is Dead or Incapacitated. If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:

PROPOSED RULE (CLEAN VERSION)

- (1) the purchaser shall cause a written notice to be given to the client stating that the particular interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and may have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format, as provided by Rule 1.16^[B3]; and that, if no response is received to the notification within 90 days after it is sent or, if the client's rights would be prejudiced by failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and
 - (2) the purchaser shall obtain the written consent of the client, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (c)(1) notification within ninety days after it is sent to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during the ninety-day period.
- (c) Notice to Clients in All Other Circumstances. In all other circumstances, not less than 90 days prior to the transfer:
 - (1) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to the client stating that the particular interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel or might have the right to act in his or her own behalf; that the client may take possession of any client papers and property held by the lawyer in any form or format, as provided by Rule 1.16^[B3]; and that, if no response is received to the notification within 90 days after it is sent, the purchaser may act on behalf of the client until otherwise notified by the client; and
 - (2) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed until otherwise notified by the client if the purchaser receives no response to the paragraph (c)(1) notification within 90 days after it is sent to the client's last address as shown on the records of the seller.
- (d) Extraordinary Circumstances. For purposes of this Rule, the phrase "extraordinary circumstances" shall include, without limitation:
 - (1) a change of the lawyer's health, so that he or she must change the substantive fields or geographic area in which he or she practices; and

PROPOSED RULE (CLEAN VERSION)

- (2) a lawyer may resume handling cases in a substantive field or practice or in a geographic area of practice previously sold if the lawyer previously sold all of his or her practice to enter government service and later returned to private practice.
- (e) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.
- (f) A lawyer shall not disclose confidential information to a non-lawyer in connection with a sale under this Rule.
- (g) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] Any sale of part of a law practice necessarily raises substantive issues regarding the rights and interests of the seller's clients and the public's perception of the Bar. Accordingly, this Rule permits a lawyer or law firm to sell part of its practice only in accordance with the limitations contained in this Rule, and in other Rules and in State Bar Act provisions to which this Rule and Comment refer. These limitations are intended to assure that the interests and reasonable expectations of the seller's clients have priority over the seller's interests.

Direct Sale of a Geographic Area or Substantive Field of Practice

[2] The requirement that substantially all of the geographic area or substantive field of the seller's practice be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative or who might find it difficult to secure other counsel if a sale could be limited to only some lucrative matters.

[3] Paragraph (a) is satisfied even if the seller retains clients who decide not to accept the purchaser as their lawyer or whom the purchaser cannot represent because of conflicts of interest. Paragraph (a) also is satisfied even if seller is employed after the sale as a lawyer for a public agency, by a legal services organization, or as in-house counsel to a business.

[4] Paragraph (a)(8) requires that any sale under this Rule be direct to the purchaser without compensation to any broker, finder, or middleman.

Termination of Practice by the Seller

[5] This rule does not prohibit a lawyer who has sold a substantive field of the practice from resuming practice in that field of the law in the event of extraordinary

PROPOSED RULE (CLEAN VERSION)

circumstances. However, a seller of a geographic area of practice may never resume practicing in that geographic area, regardless of future circumstances.

Fee Arrangement Between Client and Purchaser

[6] Paragraph (a)(4) applies to the seller, who may not raise fees solely for the purpose of a sale, and to the purchaser, who may not raise fees solely because of the sale. If a client agrees to retain the purchaser, the purchaser may assume the seller's fee agreement with the client or enter into a fee agreement with the client that complies with paragraphs (a)(4) and (5). See Business and Professions Code sections 6147, 6147.5, and 6148. If a client decides not to retain the purchaser, the selling lawyer or law firm might have to continue to represent the client unless the selling lawyer is disabled or is deceased.

Sale of Practice of Disabled or Deceased Lawyer

[7] When the selling lawyer is disabled or deceased, relevant statutes may also be applicable. (See, e.g. Probate Code sections 2468, 9764, and Business and Professions Code sections 6180, et seq. and 6190, et seq.)

[8] This rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client following the 90-day period described paragraphs (b)(1) or (c)(1) but has not entered into a written fee agreement with the client, or does so during the 90-day period as described in paragraph (b)(2), the purchaser might be entitled to payment on a *quantum meruit* basis.

Other Applicable Ethical Standards

[9] If the purchaser would have a potential or actual conflict of interest by accepting the representation of any client of the seller, the transaction may not proceed as to that client absent compliance with Rules 1.7^[B3], 1.8^[B4] and 1.9^[B4], as applicable. The notice required by paragraph (b) shall comply with the requirements of Rule 7.1(b)^[B1] and (c).

[10] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1^[B1] and 5.4^[B3] when applicable.

Confidential Information and Client Consent

[11] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a reasonably identifiable client no more violate the seller's duty of confidentiality than do similar discussions concerning the possible association of another lawyer or mergers between firms, and to engage in such discussions the seller is not required to give notice to or obtain consent from any client. However, the seller is required to obtain client consent before providing to a potential purchaser any confidential client information. The obligation to obtain client consent under paragraphs (b) and (c) do not require disclosure of the terms of the agreement between purchaser

PROPOSED RULE (CLEAN VERSION)

and seller, but there might be circumstances in which disclosure of particular terms might be required under Rule 1.4^[B1] and Business and Professions Code section 6068, subdivision (m).

[12] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive any sale under this Rule.

Applicability of the Rule

[13] This Rule does not apply to the formation of a law firm, admission of a lawyer to a law firm, retirement from a law firm, or retirement plans and similar arrangements, when done in good faith as part of engaging in the practice of law together and not for the purpose of avoiding the limitations of this Rule. This Rule also does not apply to a sale of tangible assets of a law practice.

[14] This Rule does not apply to a transfer of legal representation between lawyers or law firms that is unrelated to the sale of a geographic area of practice or a substantive field of practice.

PROPOSED RULE (CLEAN VERSION)

Rule 3.4: Fairness To Opposing Party And Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence or counsel or assist a witness to testify falsely;
- (d) A lawyer shall not advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;
- (e) offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying.
 - (2) reasonable compensation to a witness for loss of time in attending or testifying.
 - (3) a reasonable fee for the professional services of an expert witness;
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness; or
- (h) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
 - (2) the person may be required by law to refrain from disclosing the information.

PROPOSED RULE (CLEAN VERSION)

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. e, e.g., Penal Code section 135; 18 United States Code section 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Penal Code section 132; 18 United States Code section 1519.) Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. Nor is this Rule intended to establish a standard that governs civil or criminal discovery disputes.

[4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.

[5] Paragraph (h) permits a lawyer to request employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. (See also Rules 4.2^[B3] and 4.3^[B3].)

PROPOSED RULE (CLEAN VERSION)

Rule 3.5: Impartiality and Decorum of the Tribunal

- (a) Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
 - (1) in open court;
 - (2) with the consent of all other counsel in the matter;
 - (3) in the presence of all other counsel in the matter;
 - (4) in writing with a copy thereof furnished promptly to all other counsel; or
 - (5) in ex parte confidential matters as permitted by law.
- (c) As used in this Rule, “judge” and “judicial officer” shall include law clerks, research attorneys, or other court personnel who participate in the decisionmaking process, and arbitrators.
- (d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.
- (e) During a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (f) During a trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.
- (g) A lawyer shall not communicate directly or indirectly with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate;

PROPOSED RULE (CLEAN VERSION)

- (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is intended to influence the juror's actions in future jury service.
- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.
- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (l) For the purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. A lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1^[B1] may communicate ex parte with such persons in the performance of that service.

[3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see Code of Civil Procedure, section 206.

[4] It is improper for a lawyer to communicate with a juror who has been removed from an empaneled jury, regardless of whether notice is given to other counsel, until

PROPOSED RULE (CLEAN VERSION)

such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

PROPOSED RULE (CLEAN VERSION)

Rule 3.10: Threatening Criminal, Administrative, or Disciplinary Charges

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this Rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (c) As used in this Rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer’s statement violates this Rule depends on the specific facts. (See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr 670].) A statement that the lawyer will pursue “all available legal remedies” by itself does not violate this Rule.

[2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78. This Rule also does not apply to an offer made in good faith by a lawyer who represents a governmental agency to settle all, or a portion of, the civil, administrative, and criminal aspects of the case. For example, where there is a good faith basis for believing that a defendant in a civil action who has not yet been criminally charged might be criminally liable for his or her conduct, a lawyer representing a governmental agency would be acting in good faith if the lawyer offers to pursue a settlement of all aspects of the defendant’s case, including any potential criminal liability, so as not to have the government incur the further expense of a criminal investigation. On the other hand, a lawyer representing a governmental agency would not be acting in good faith if, without a good faith basis for believing that criminal liability might be established, the lawyer were to offer not to seek the filing of criminal charges in return for the defendant’s agreement not to file a claim for false arrest against law enforcement personnel or the government.

PROPOSED RULE (CLEAN VERSION)

[3] Paragraph (b) exempts the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

PROPOSED RULE (CLEAN VERSION)

Rule 4.2: Communication With a Person Represented By Counsel

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) For purposes of this Rule, a “person” includes:
 - (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or
 - (2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.
- (c) This Rule shall not prohibit:
 - (1) Communications with a public official, board, committee or body; or
 - (2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person’s choice; or
 - (3) Communications authorized by law or a court order.
- (d) When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (e) In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.
- (f) A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true
- (g) As used in this Rule, “public official” means a duly-appointed or elected public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization.

PROPOSED RULE (CLEAN VERSION)

Comment

Overview and Purpose

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), “the subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[5] The prohibition against “indirect” communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

[6] This Rule does not prohibit communications with a represented person, or an employee, member, agent, or other constituent of a represented organization, concerning matters outside the representation. For example, the existence of a controversy, investigation or other matter between the government and a private person, or between two organizations, does not prohibit a lawyer for either from communicating with the other, or with nonlawyer representatives of the other, regarding a separate matter.

Communications Between Represented Persons

[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer’s client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client’s communications with a represented person, subject to paragraph (e).

PROPOSED RULE (CLEAN VERSION)

[8] This Rule is not intended to prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Knowledge of Representation and Limited Scope Representation

[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1^[B1].)

[10] When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule is not intended to prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3^[B3].

Represented Organizations and Constituents of Organizations

[11] "Represented organization" as used in paragraph (b) includes all forms of private and governmental organizations, such as corporations, partnerships, limited liability companies, and unincorporated associations.

[12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.

[13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code §1222.)

[14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.

PROPOSED RULE (CLEAN VERSION)

[15] *[This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.]****

Represented Government Organizations

[16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A lawyer seeking to communicate on behalf of a client with a governmental organization must comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3^[B3].

Represented Person Seeking Second Opinion

[17] Paragraph (c)(2) is intended to permit a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules 7.3^[B1] and 1.7^[B3].)

Communications Authorized by Law or Court Order

[18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.

[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy

*** The Commission has not yet adopted this comment, but desires public input before considering whether to adopt a comment of this type.

PROPOSED RULE (CLEAN VERSION)

considerations, including a person's right to counsel under the 5th and 6th Amendments of the United States Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing government entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.

[21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).

[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See Rule 4.4^[B4].) Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules 4.4^[B4], 8.4(c)^[B1] and 8.4(d)^[B1].

[24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3^[B3].

PROPOSED RULE (CLEAN VERSION)

Rule 4.3: Dealing With Unrepresented Person

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of an unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.
- (b) In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In acting to correct a misunderstanding about the lawyer's role, a lawyer may disclose the client's identity if it is not confidential. Whether the lawyer identifies the lawyer's client, the lawyer shall explain, where necessary, that the client has interests opposed to those of the unrepresented person. For guidance when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f)^[B3].

[2] Paragraph (a) requires that a lawyer not mislead the person concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents. For example, a lawyer may not falsely state or create the impression that the lawyer represents no one, or that the lawyer is acting impartially or that the lawyer will protect the interest of both the client and the unrepresented non-client. Paragraph (a) also requires that the lawyer not take advantage of the unrepresented person's misunderstanding.

[3] The Rule distinguishes between situations involving an unrepresented person whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented

PROPOSED RULE (CLEAN VERSION)

person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. Obtaining information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules 4.4^[B4], 8.4(c)^[B1] and 8.4(d)^[B1]. Paragraph (b) does not prohibit a lawyer from seeking to obtain such information in a legal proceeding pending before a tribunal where the person to whom the duty is owed is present or is represented by counsel.

[5] Paragraph (b) does not prohibit a lawyer from seeking to obtain, during a legal proceeding, information from an unrepresented person that is protected from disclosure by a legally cognizable duty owed by the unrepresented person, where the person to whom the duty is owed is present or is represented by counsel at the proceeding.

[6] Paragraph (a) is not intended to apply to covert criminal and civil enforcement investigations. Paragraph (a) is also not intended to apply to the exceptional situation where a lawyer supervises an investigator posing as a consumer or other person engaged in an otherwise lawful transaction for the purpose of gathering evidence that is not otherwise available where the lawyer reasonably believes that a violation of civil rights or intellectual property rights exists and the conduct of the lawyer and the conduct of the investigator the lawyer is supervising does not otherwise violate this Rules or the State Bar Act.

PROPOSED RULE (CLEAN VERSION)

Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph is not intended to prohibit:
 - (1) the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death to the lawyer's estate or to one or more specified persons pursuant to an agreement between a lawyer and either the lawyer's law firm or another lawyer in the firm.
 - (2) any payment authorized by Rules 1.17.1^[B3] or 1.17.2^[B3].
 - (3) a lawyer or law firm including non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not violate these Rules or the California State Bar Act.
 - (4) the payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California.
- (b) A lawyer shall not form a partnership or other organization with a person who is not a lawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct, regulate or interfere with the lawyer's independence of professional judgment, or with the client-lawyer relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:
 - (1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or
 - (3) a person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.

PROPOSED RULE (CLEAN VERSION)

- (e) A lawyer shall comply with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.

Comment

[1] A lawyer is required to maintain professional independence of judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a non-lawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[2] Other rules also protect the lawyer's professional independence of judgment. (See, e.g., Rule 1.5.1^[B1], Rule 1.8(f) (Rule 3-310(F))^[B4], and Rule 5.1^[B1].)

[3] A lawyer's shares of stock in a professional law corporation may be held by the lawyer trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any non-lawyer trustee to direct or control the activities of the professional law corporation.

[4] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule.

[5] This Rule is intended to apply to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups but nothing in this Rule shall be deemed to authorize the practice of law by any program, organization or group. This Rule is not intended to prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule 6.3^[B4].)

[6] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)