ATTACHMENT 1

Dashboard Cover Sheet, Introduction, Model Rule Comparison Table, Clean Rule Draft, Public Comment Synopsis Table and State Variation Excerpts for the Batch 4 Proposed Rules and the Previously Submitted Rules in Batches 1, 2 & 3 Returned to the Commission for Further Consideration

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

(**Draft #15, 12/14/09**)

Summary: Proposed Rule 1.8.1 sets forth a lawyer's duties when entering into a business transaction with a client or acquiring an adverse pecuniary interest. It largely tracks Model Rule 1.8(a), but retains concepts found in current California rule 3-300.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules: RPC 3-300

Statute:

Case law:

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption of the Rule ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __9___
Opposed Rule as Recommended for Adoption __2__
Abstain __0__

Approved on Consent Calendar ☐

Approved by consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

OCTC has taken the position that modification of lawyer-client fee agreements are subject to the Rule. See also Public Comment Chart for commenters who agree with OCTC's position.

☑ Very Controversial – Explanation:

1. Whether modification to lawyer-client fee agreements are subject to the Rule.
2. Whether a lawyer subject to the Rule is required to provide legal advice to the client with respect to the transaction or acquisition when the client is represented by independent counsel.

   See Introduction and Explanation of Changes for Comment [5] for Commission's proposed resolution of these two issues.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

December 2009
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.8.1 would replace current California Rule 3-300, which is similar to Model Rule 1.8(a). Proposed Rule 1.8.1 tracks Model Rule 1.8(a) with some exceptions. The proposed Rule differs from the Model Rule in that it clarifies that all of the Rule's requirements apply to both business transactions with a client and the lawyer's acquisition of an adverse pecuniary interest. The proposed Rule retains the current California Rule requirement that the lawyer affirmatively advise the client to seek the advice of independent counsel in place of the less client protective Model Rule requirement that the lawyer advise the client of the "desirability" of seeking independent counsel. The proposed Rule incorporates a concept found in the Model Rule Comment that the lawyer is not required to advise the client to seek the advice of independent counsel when the client is already represented by independent counsel.

The proposed Rule contains a more expansive Comment than the Model Rule. The proposed Rule Comment discusses the scope of the proposed Rule, the full disclosure and consent requirements and the client's opportunity to consult with independent counsel.

The Comments to the Proposed Rule address two issues that were the subject of considerable public comment: (1) the applicability of the Rule to fee agreement modifications; and (2) who is responsible for the disclosure requirements of the Rule when the client is actually represented by independent counsel.

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* Proposed Rule 1.8.1, Draft 15 (12/14/09).

Modifications to Agreements by which the Lawyer is Retained by a Client. First, the Discussion in Current California Rule 3-300 states that the current California Rule does not apply to an agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security or other adverse pecuniary interest. Comment [5] expands on the Discussion in the current California Rule by adding that the Rule also does not apply to *modifications* to such agreements by which the client retains the lawyer unless the modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. The reference was added because (i) the Discussion in the current California Rule is unclear, (ii) the Office of Chief Trial Counsel informed the Commission that it considered modifications to agreements by which a lawyer is retained by a client subject to Rule 3-300, and, (iii) the legal profession should be informed regarding the scope of the Rule in light of the first two considerations.

The applicability of proposed Rule 1.8.1 to fee agreement modifications. A majority of the Commission has concluded that modifications to lawyer-client engagement agreements occur in many lawyer-client relationships and are frequently beneficial to the client. Included below in this Report is a lengthy memorandum by two members of the Commission that reviews the law concerning fee agreement modifications, discusses many examples of when fee agreement modifications can be beneficial to a client, and concludes that the current rule's requirements (carried forward in the proposed Rule), which the California Supreme Court has referred to as a "rigorous protocol," is not necessary to provide adequate protection to clients for every fee modification. See December 13, 2009 Memorandum from Peck and Kehr to the Commission. A majority of the Commission agrees with that conclusion and continues to believe that imposing the proposed Rule's protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship and could deter modifications to engagement agreements in cases where the modification would benefit the client. In addition, the majority concluded that existing California case law protects the client in situations involving overreaching or undue influence that are not readily susceptible to regulation by a disciplinary rule. Moreover, if lawyers were required to comply with this Rule with every fee modification, sophisticated lawyers would avoid the problem by providing in advance for future increases, for example, by providing in the initial agreement for the right to increase hourly fees annually by an amount equal to cost of living increases. This would leave only unsophisticated lawyers in jeopardy. Notwithstanding the foregoing view, the Commission has, after discussions with members of the Board of Governors and lengthy deliberations, arrived at a compromise that it believes will adequately protect clients in negotiations concerning the modification of a fee agreement, while at the same time not discourage or prevent modifications intended to benefit the client.

Addressing material modifications that are adverse to a client's interests in Rule 1.5. Beginning with two premises – (1) that only material modifications that are adverse to a client's interests require the special attention of a disciplinary rule; and (2) that a lawyer advising the client to seek the advice of an independent lawyer and be given a reasonably opportunity to do so is generally viewed as the most effective means of protecting a client in business dealings with the client's lawyer – the Commission recommends adding a new rule paragraph and several explanatory comments to Rule 1.5 (Fees For Legal Services). A copy of proposed Rule 1.5, with redline markings to show the changes from the Rule the Board adopted at its November 2009 meeting, is provided below. New paragraph (f) to Rule 1.5 would provide:

> (f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer 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.

The foregoing paragraph would apply to a "material" modification that is "adverse to the client's interests," even if the modification does not confer on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, as that term has been construed by the courts. By limiting the application of paragraph (f) to "material" modifications that are "adverse to the client's interests," the Commission believes that the Rule will not prevent or discourage modifications intended to benefit the client. By requiring the lawyer to advise the client "to seek the advice of an independent lawyer of the client's choice" and be "given a reasonable opportunity to seek that advice," the client is given the protections in dealing with the lawyer that the Office of Chief Trial Counsel has insisted be afforded in all fee agreement modifications. By placing the provision in Rule 1.5, the Commission believes that the likely confusion that would be generated by placing two different protocols in a single rule would be avoided. In addition, by addressing fee agreement modifications in Rule 1.5, the logical place lawyers will look for guidance on all things concerning fees, lawyers will more likely be aware of their duties in that regard and not succumb to the potential discipline trap the authors of the Peck memo have noted. The explanatory comments have been drafted with an eye to provide guidance to lawyers on what constitutes a "material" modification that is "adverse to the client's interests. See proposed Comments [3] and [3A] to Rule 1.5. Moreover, Comment [3B], which has been moved from proposed Rule 1.8.1, reminds lawyers that, regardless of whether Rule 1.5(f) is applicable, other law concerning fiduciaries, including case law, statutes and specific rules, might nevertheless apply and require that special protections be afforded the client. Finally, Comment [3C] clarifies what has never been at issue: if a modification does confer upon the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, then the modification is subject to the Rule 1.8.1 protocol.

A minority of the Commission believes that once a lawyer-client relationship is formed the lawyer is in a trust relationship with a client that does not exist at the time the lawyer enters into the lawyer-client relationship. As a result of that trust relationship, the lawyer is in a position to exercise the kind of overreaching and undue influence the proposed Rule is intended to address. Nevertheless, in the view of the minority, the law is evolving in this area and that the application of the Rule should be left to the courts.

The Disclosure Requirement under Rule 1.8.1. Second, the Comment to the Proposed Rule modifies the Model Rule comment, which states that the obligation to make full disclosure under the Model Rule is satisfied by written disclosure by either the lawyer in the transaction or independent counsel. The Commission modified the Comment to state that the lawyer is not required to give legal advice to the client when the client is represented by independent counsel, but is required to disclose all material facts that lawyer knows or reasonably should know have not been disclosed to the client. The Commission concluded that the Model Rule Comment is unworkable. One of the purposes of the Rule is to afford a client the protection of advice from a lawyer who is free of the conflict of interest the lawyer subject to the proposed Rule has as a result of that lawyer's involvement in the transaction or acquisition. In the majority's view, it does not make sense to require the lawyer who has a conflict to continue to advise the client when the client is being advised by a lawyer who does not have the conflict. In addition, requiring the lawyer in the transaction to continue to advise the client when the client has independent counsel could interfere with the client's confidential relationship with independent counsel. Several commenters objected, maintaining that requiring the lawyer in the transaction to make full disclosure without limitation assures that the client receives the fullest disclosure and protects the client in the event that independent counsel does not advise the client properly.

A Note on the Rule Number. As noted, the Proposed Rule appears in the Model Rules numbered 1.8(a). The Commission has not proposed that California follow the Model Rules construct of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within current client, former client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier to locate and use, the Commission has recommended that each rule in the 1.8 series be given a separate number.

Minority. A minority of the Commission maintains the position that the majority's intent to treat all modifications of a fee agreement with existing clients the same as an original agreement that is negotiated at arm's length is unprecedented in rules governing lawyers. The minority does not believe that the majority's proposal to treat certain modifications under a new Rule 1.5 protocol will provide adequate

protection for clients. The minority notes that Comment [5] would eliminate the application of this Rule to any modification of an existing fee agreement, no matter how significant it impairs the rights of the client, unless the revised agreement amounts to the lawyer acquiring an adverse pecuniary interest. The minority notes that whether a particular modification to an existing agreement triggers the Rule depends on the particular modification and the effect it has on the existing client's substantive rights. The minority agrees that a minor modification to clarify an existing provision or correct a technical error would not invoke the Rule. On the other hand, a material modification, such as a change in the method by which the lawyer is compensated or a modification that results in the client losing a substantive legal or contractual right would require compliance with this Rule. For example, the Supreme Court in *In re Silverton* (2005) 36 Cal. 4th. 81, 84-87, 89, confirmed the State Bar Court's holding that the terms of an agreement, made during the representation, that authorized the attorney to compromise the client's medical bills constituted a "business transaction" requiring compliance with current rule 3-300. Changing a fee agreement in mid stream with an existing client to add a binding arbitration clause that deprives the client of the client's right to a jury trial and appellate review should also trigger the Rule. The Rule is intended to apply where important matters are left out of an initial fee agreement, such as whether the lawyer or the client is entitled to a statutory fee award or whether the lawyer can receive his or her fee up front in the event of a structured settlement. See State Bar Formal Opinion 1994-135. Comment [5] would eliminate the application of the Rule to significant changes in a fee agreement that do not amount to an adverse pecuniary interest but which result in a transfer of a present interest to the lawyer. No known authority supports the majority's proposed limitation of the rule and no other jurisdiction has such a provision. Proposed Comment [5] takes away important public protection that exists under the current rule and under the rules in other jurisdictions.

ABA Model Rule **Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules**	**Commission's Proposed Rule*** **Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client**	**Explanation of Changes to the ABA Model Rule**
(a) 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:	~~(a)~~ 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:	Model Rule 1.8(a) has been reformatted to become the introductory paragraph. It retains the language in current rule 3-300, which, is the same as the text of Model Rule 1.8(a) with the exception of the language added at the end of the sentence. The Commission decided to retain the additional language in rule 3-300, which emphasizes a lawyer's responsibility to satisfy all of the Rule's requirements.
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;	(~~1~~a) ~~the~~The transaction or acquisition and its terms ~~on which the lawyer acquires the interest~~ 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 ~~reasonably~~ understood by the client; and	Paragraph (a) is an amalgamation of Model Rule 1.8(a)(1) and current California rule 3-300(A). The Model Rule language was modified to refer to both a transaction and an acquisition of an adverse pecuniary interest. The Commission believes that the Model Rule reference to terms "on which the lawyer acquires the interest" narrows the focus to the terms of an acquisition, rather than all of the aspects of the acquisition. The deletion of the Model Rule language and replacement with the term "acquisition" broadens the scope of the Rule and affords greater client protection. The change conforms to the current California rule. The Commission added the words "to the client" to clarify that the client is the person to whom the terms are transmitted. The change conforms to the language in the current California rule. The word "reasonably" was moved to correct grammar. The word "and" was added at the end of the paragraph to emphasize that the requirements are conjunctive.

* Proposed Rule 1.8.1, Draft 13 (10/17/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules**	Commission's Proposed Rule* **Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client**	Explanation of Changes to the ABA Model Rule
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and	(~~2~~b) ~~the~~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 ~~desirability of seeking~~client's choice and is given a reasonable opportunity to seek ~~the~~that advice ~~of independent legal counsel on the transaction~~; and	Paragraph (b) is a substantial revision of both Model Rule 1.8(a)(2) and California Rule 3-300(B). First, the rule has been revised to provide that compliance with the Rule occurs either if the client is represented in the transaction or acquisition by independent counsel of the client's choice or advise to seek such advice. Comment [14] to the Model Rule states the requirement to advise the client to seek independent counsel does not apply when the client is already represented by independent counsel. The Commission was concerned that the Model Rule Comment conflicted with the Rule, which did not suggest any limitation on the lawyer's obligation to advise the client to seek the advice of independent counsel. As a result, the Commission added the limitation into the Rule. The Commission concluded that it is not necessary to require a lawyer to advise the client to seek the advice of independent counsel which the client is actually receiving such advice. The Commission concluded that it would not advance the purposes of the Rule or the interest of client protection to require a lawyer to advise the client to seek the advice of independent counsel when the client already has independent counsel. In fact, a lawyer who did so might be understood as having denigrated the ability of the independent counsel, which would interfere with the goal of the requirement. Second, the Commission replaced the Model Rule reference to advising a client "of the desirability of seeking" advice from independent counsel with the reference in the current California rule to advising the client "to seek the advice of an independent lawyer." The California Supreme Court has held that a lawyer

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	Explanation of Changes to the ABA Model Rule
		must encourage the client to seek such advice and cannot imply that such advice is unnecessary. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 663; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 309, 314.) The Commission believes that this construction of the current California rule offers greater client protection than the Model Rule approach, which suggests that a lawyer does not need to be as emphatic in advising the client to seek the advice of an independent lawyer as is mandated under the current California rule and the Supreme Court's application of the language in the current rule. At the same in revising the Model Rule, the Commission departed from the current California rule language, which states that the client must be advised that the client "may seek the advice" of independent counsel. The proposed Rule requires the lawyer to advise the client "to seek the advice" of independent counsel. The change was made in response to an observation in *Matter of Silverton II* (2004) 4 Cal.State Bar Rptr. 643, n. 16 that "the language of Rule 3-300(B) appears inconsistent with the Supreme Court precedent that requires attorneys to advise their clients to seek independent counsel." Third, the Model Rule was revised to refer to both transaction and acquisition. The terms "transaction" and "acquisition" refer to the two types of business dealings that are covered by the Rule. The ABA Model Rule language refers only to a "transaction," which suggests that advising a client to seek independent counsel is limited to business transactions and not to adverse pecuniary interests. The Commission believes that the obligation to advise a client to seek independent counsel should apply to both transactions and acquisitions.

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	Explanation of Changes to the ABA Model Rule
		Finally, the Commission modified the last clause of the rule. The change conforms to the language in the current California Rule. In addition, since the reference to advice of an independent lawyer now appears earlier in the draft rule than it does in the Model Rule, the reference to "independent counsel" at the end of the rule is unnecessary and wordy.
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.	(~~3~~c) ~~the~~The client ~~gives informed consent,~~thereafter consents in ~~a~~ writing ~~signed by the client,~~ to the ~~essential~~ terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.	Paragraph (c) is adapted from the Model Rule and would expand the scope of current rule 3-300 by including a requirement that the lawyer disclose his or her role in the transaction or acquisition, including whether the lawyer is representing the client in that matter. The Model Rule language was modified to include a reference to the acquisition of an adverse pecuniary interest in order to clarify that the paragraph applies to both transactions and acquisitions.

ABA Model Rule **Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules** **Comment**	Commission's Proposed Rule **Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client** **Comment**	Explanation of Changes to the ABA Model Rule
[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. **[CONTINUED…]**	*Scope of Rule* [1] A lawyer's legal ~~skill and~~ training and skill, ~~together with~~and the relationship of trust and confidence that arises between a lawyer and client, create the possibility ~~of overreaching~~that a lawyer, even unintentionally, will overreach or exploit client information when the lawyer ~~participates in~~enters into a business~~, property or financial~~ transaction with ~~a~~the client~~, for example, a loan~~ or ~~sales~~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 that 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 ~~a lawyer investment on behalf~~acquisition and the importance of ~~a~~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.	Comment [1] is a modified version of the first sentence of Comment [1] to the Model Rule and an elaboration of concepts related to the first sentence of the Model Rule Comment. The Comment is intended to explain the purpose of the Rule in light of California law. The Commission departed from the Model Rule Comment because the Model Rule Comment does not explain what client interests are protected by the Rule. The Commission concluded that explaining the underlying reasons for the Rule would assist lawyers in applying the Rule. The first sentence of Model Rule Comment [1] was modified to clarify that the Rule applies even if the possibility of overreaching is unintentional. The sentence also was revised to inform lawyers that the two principle considerations underlying the Rule are over reaching and exploitation of client information. The second sentence explains those two considerations in more detail. The rest of the Comment explains how the basic considerations that underlie the Rule are implemented in the Rule.

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	Explanation of Changes to the ABA Model Rule
	[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) [Rule 3-310(B)(4)].	Comment [2] is new. The Comment clarifies that the Rule does not apply to a transaction or acquisition of an adverse pecuniary interest that predates the lawyer-client relationship, except in specified circumstances. It also explains that while Rule 1.8.1 does not apply, other rules may apply to the lawyer's interest. The Model Rule Comments do not address this point; however, because both the California Rule and the Model Rule apply to transactions and acquisitions of adverse pecuniary interests with a client, the Rules do not apply when the party to the transaction or acquisition is not a client at the time the transaction or acquisition occurs. The Commission concluded that adding the Comment would assist lawyers in understanding and applying the Rule.
[…COMMENT [1] CONTINUED] *Business Transactions Between Client and Lawyer* [1] The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent.	*Business Transactions ~~Between Client and Lawyer~~With Clients* [~~1~~3] ~~The requirements of paragraph (a) must be met~~This Rule applies even when the transaction is not ~~closely~~ related to the subject matter of the representation, as when a lawyer drafting a will for a client ~~learns that the client needs money for unrelated expenses and offers~~agrees to make a loan to the client~~. The Rule applies~~ to ~~lawyers engaged in~~pay expenses that are not related to the ~~sale of~~representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, ~~for example, the sale of title~~such as insurance, brokerage or	Comment [3] is a modified version of the second and third sentences of Model Rule Comment [1]. The Commission modified the second sentence of the Model Rule Comment to delete the reference to "closely" related transaction in order to clarify that no relationship between the representation and the transaction is required. The Commission also simplified the example given in the second sentence of Model Rule Comment [1] to avoid an inference that the Rule applies only when a lawyer, in the course of representing a client, learns about information leading to a transaction. The third sentence of the Model Rule Comment was revised to avoid the suggestion that the lawyer must be engaged in the

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	Explanation of Changes to the ABA Model Rule
[CONTINUED…]	investment products or services to ~~existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent~~a client.	business of selling goods and services related to the practice of law in order for the Rule to apply and to clarify that the Rule applies to any sale of law-related goods or services. The fourth sentence of the Model Rule Comment was deleted because such transactions are currently prohibited under Rule 4-300.
[…COMMENT [1] CONTINUED] [1] It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.	[~~1~~4] ~~It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the~~This Rule does not apply to standard commercial transactions ~~between the lawyer and the client~~ for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, ~~for example~~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 ~~or~~and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. ~~In such~~ 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. This Rule also ordinarily would not apply where the lawyer and	Comment [4] is an expansion of the sixth and seventh sentences of Comment [1] to the Model Rule. It is intended to include all of the types of transactions that California authorities have recognized are not covered by the Rule and to explain the reason why the Rule does not apply to the types of transactions. The first sentence of Comment [4] was added to introduce the concept that the Comment addresses. The second sentence combines the basic concepts in the two Model Rule Comment sentences in order to states the general rule. The Commission concluded that stating the general rule at the outset would assist lawyers in understanding the examples that follow. The third sentence of the Comment is a slightly modified version of the examples given in the Model Rule Comment. The fourth sentence includes examples of standard commercial transactions identified in State Bar Formal Opinion 1995-141. The Comment was drafted to explain the reason why the types of transactions described are not subject to the Rule. The fifth and sixth sentences are derived from the second paragraph of the Discussion to current Rule 3-300. The Commission expanded the discussion to clarify the circumstances in which this exception applies.

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	Explanation of Changes to the ABA Model Rule
	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 ~~restrictions in paragraph (~~lawyer's client makes the same investment on the same terms. When a~~) are unnecessary~~ lawyer and ~~impracticable~~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 [Rule 4-200]. 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	Comment [5] is based on both the fifth sentence of Comment [1] to the Model Rule and the first paragraph of the Discussion to current Rule 3-300. The first sentence is derived from the Discussion to the current California Rule. With respect to agreements by which a lawyer is retained by a client, the first sentence states what has been the general rule in California for some time. The Commission concluded that with respect to agreements by which the lawyer is retained by a client, the language in the Discussion to the current California Rule is a clearer statement than the Model Rule Comment and that changing to the Model Rule language might suggest a substantive change in the standard that is not intended. The first sentence expands on the Discussion in the current California Rule by adding a reference to modifications to agreements by which a lawyer is retained by a client. The

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	Explanation of Changes to the ABA Model Rule
	Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.	reference was added because the Discussion in the current California Rule is unclear, the Office of Chief Trial Counsel informed the Commission that it considered modifications to agreements by which a lawyer is retained by a client subject to Rule 3-300, and, Commission concluded that the legal profession should be informed regarding the scope of the Rule in light of the first two considerations. The inclusion of a reference to modifications to agreements by which a lawyer is retained by a client was the subject of considerable debate at the Commission. A majority of the Commission concluded that modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the risk of overreaching and misuse of confidential information found in other types of transactions. Modifications can benefit a client and may even be requested by a client, such as when a client borrows from a lawyer. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.

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		A minority of the Commission maintains that an agreement to retain a lawyer is outside the Rule because it is an arms-length transaction that occurs before the lawyer-client relationship commences. The minority believes that once a lawyer-client relationship is formed, all of the circumstances that would trigger application of the Rule exist. The minority also maintains that the law is still evolving in this area and that the application of the Rule should be left to the courts. The third sentence is adapted from the Model Rule Comment, with changes to conform to the terminology used in the rest of the Comment. The fourth sentence is new. It clarifies that an advance deposit for fees and costs is not an ownership, possessory, security or other adverse pecuniary interest. The Commission concluded that the addition was warranted because the current California Rule is silent on the subject, and an advance for fees and costs could be construed as taking an interest in the client's property. The Commission concluded that adding the sentence would clarify the scope of the Rule. The last sentence clarifies that a contingency fee agreement is not subject to the Rule. The current California Rule does not address whether a contingent fee is an ownership, possessory or security interest in the client's property. In light of the fact that a contingent fee agreement has characteristics that could be construed as such an interest and the benefit such arrangements offer for clients, the Commission concluded that clarification was warranted.

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	[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 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].)	Comment [6] was added to clarify that while modifications to agreements by which a lawyer is retained by a client are not subject to the Rule, lawyers still have professional responsibilities to clients with respect to such modifications. The Comment is intended to alert lawyers about the existence of such duties and to direct lawyers to examples of current law on the subject.

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	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].) An adverse pecuniary interest 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 B*ar (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].)	Comment [7] has no counterpart in the Model Rule. The Comment explains what constitutes an adverse pecuniary interest under the Rule. The Comment also helps clarify that the new Rule does not abrogate existing law on the subject.

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	Explanation of Changes to the ABA Model Rule
	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.	Comment [8] does not have a counterpart in the Comment to the Model Rule. The proposed rule includes the Model Rule requirement that the disclosure be transmitted "in a manner that reasonably can be understood by the client." The Model Rule's Comment addresses other elements of the Rule, but does not address this element. The Commission concluded that because this is an important element of the Rule, it should be discussed in the Comment. The Comment alerts lawyers that the application of this element of the Rule will depend on the circumstances.
[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition	[~~2~~9] Full disclosure under Paragraph (a) requires ~~that~~a lawyer to provide the client with the same advice regarding the transaction ~~itself be fair~~or acquisition that the lawyer would provide to the client ~~and that its essential terms be communicated to the client, in writing,~~ in a ~~manner that can be reasonably understood. Paragraph (~~transaction with a~~)~~ third party. *Beery v. State Bar* (~~2~~1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires ~~that~~a lawyer to inform the client ~~also be advised, in writing,~~of all of the ~~desirability~~terms and all relevant facts of ~~seeking~~ the ~~advice~~transaction or acquisition, including the nature and extent of ~~independent legal counsel~~the lawyer's role and compensation in connection the transaction or acquisition. It also requires ~~that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that~~ the lawyer ~~obtain the client's informed consent, in a~~	Comment [9] addresses what the full disclosure element of the Rule requires. The Commission rejected most of Comment [2] to the Model Rule. Model Rule Comment [2] largely restates the requirements of the Model Rule with little elaboration. The Commission concluded that discussion in the Model Rule Comment regarding disclosures to the client are vague, limited and incomplete and lack reference to the principles governing disclosure in general. California has a well developed body of law in this area, which better explains the nature of the duty than the Model Rule Comment.

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of informed consent).	~~writing signed by~~to fully inform the client~~, both to the essential terms~~ of the ~~transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material~~ risks of the ~~proposed~~ transaction~~, including any risk presented by the lawyer's involvement,~~ or acquisition and facts that might discourage the ~~existence of reasonably available alternatives and should explain why~~client from engaging in the ~~advice of independent legal counsel is desirable~~transaction or acquisition. (See ~~Rule 1.0~~*Rodgers v. State Bar* (~~e~~1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (~~definition of informed consent~~1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836].) Except in a disciplinary proceeding, 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].	

ABA Model Rule Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	Explanation of Changes to the ABA Model Rule
[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.	[~~3~~10] The risk to a client is ~~greatest~~heightened when the client expects the lawyer to represent the client in the transaction ~~itself~~ or ~~when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7~~acquisition itself. Under ~~that~~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. ~~Moreover~~ Because the lawyer has an interest in the transaction or acquisition, the lawyer must ~~obtain the client's informed consent~~also comply with Rule 1.7(d). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from ~~seeking~~representing the ~~client's consent to~~client in the transaction or acquisition.	Comment [10] is adapted from Comment [3] of the Model Rule. The Commission changed the reference in first line of the Model Rule Comment from "greatest" to "heightened." The Commission concluded that the reference to "greatest" was an overstatement and could be misconstrued to suggest that the Rule had less application in all other situations or that all other situations do not pose comparable risks, which is not the case. Although the second part of the first sentence of the Comment to the Model Rule is deleted in this Comment, its subject is addressed in Comments [11] and [12] The remaining changes are to conform the Comment to the terminology in the draft Rule, which distinguishes between business transactions and acquisitions of adverse pecuniary interests. The terminology was added in order to clarify that the Comment applies to both. The sentence regarding the applicability of Rule 1.7(d) was revised to account for differences between the Model Rule and the proposed new California Rule, which does not require a client's informed consent.

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	[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. Before entering into the transaction or making the acquisition, 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) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.	Comment [11] addresses considerations when the lawyer continues to represent a client after entering into the transaction or acquisition. The Comment elaborates on the a more limited discussion of this subject in Comment [2] to the Model Rule and is directed to situations where the lawyer continues to represent the client with respect to the transaction or acquisition or the client expects the lawyer to do so. In addition, the Comment accounts for a decision by the State Bar Court and other authorities that hold that a lawyer's disclosure obligations under the current California Rule includes discussing the possible effect of a transaction or acquisition on the lawyer-client relationship. The Commission concluded that Comment [2] to the Model Rule does not clearly include disclosure of the effect of the transaction or acquisition on the lawyer-client relationship as part of the Rule's disclosure requirement. Including such disclosure in the Rule affords greater client protection because of the broad scope of the disclosure requirement in the proposed Rule and because the disclosure would be part of a protocol that includes the opportunity for review by independent counsel. At the same time, the Commission determined that lawyers are still required to comply with Rule 1.7, when that Rule applies. In light of these considerations, the Comment also addresses a lawyer's disclosure obligation when the lawyer knows or reasonably should know that the client expects the lawyer to continue representing the client with respect to the transaction or acquisition after the transaction or acquisition is consummated. The Comment clarifies that the lawyer has an affirmative obligation to disclose either that the lawyer will not represent the client or the risks of the lawyer's dual role when the lawyer will continue to represent the client.

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	[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) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.	Comment [12] expands on the discussion at the end of Comment [10] above, which, in turn, is derived from Comment [2] to the Model Rule. It addresses the situation in which the lawyer continues to represent the client in matters other than with respect to the transaction or acquisition. As in the case of Comment [11], the Comment incorporates a requirement that the lawyer disclose the effect of the transaction or acquisition on the lawyer's representation of the client in other matters as part of the Rule's disclosure obligation. It also clarifies that the lawyer also is required to comply with Rule 1.7 where applicable.

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	Full Disclosure and Consent *Opportunity to Seek Advice of Independent Counsel* [13] 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 (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.	Comment [13] addresses the requirement that a lawyer encourage the client to seek the advice of independent counsel. Since the California Rule departs from the Model Rule in this regard and imposes a more client protective standard, the Commission concluded that the requirement should be addressed in the Comment. The Comment also clarifies what constitutes independent counsel, which the Model Rule does not address. The elements described in the Comment are derived from California court decisions.
[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.	[414] ~~If~~A lawyer is not required to advise the client ~~is independently represented in~~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 the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under paragraph (a)~~(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for~~ to make full disclosure ~~is satisfied either by a written disclosure by~~to the ~~lawyer involved~~client in writing of all material facts related to	Comment [14] is an adaptation of Comment [4] to the Model Rule. It reiterates the limitation of the lawyer's duty to advise a client to seek the advice of independent counsel when the client is represented by such counsel. However, the Commission narrowed the limitation to only the advice to seek independent counsel. The Model Rule exempts the lawyer from all of the requirements of paragraph (b) of the Rule, which would include the duty to afford a client a reasonable opportunity to obtain the advice of independent counsel. The Commission also modified the portion of the Comment dealing with a lawyer's obligation to provide legal advice to the client when the client is represented by independent counsel. The Model Rule Comment states that the full disclosure

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	the transaction or ~~by~~acquisition when the ~~client's independent counsel~~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 ~~agreement was~~terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a)~~(1) further~~ requires.	requirements in the Rule are satisfied either by written disclosure by the lawyer in the transaction or by independent counsel. The Commission modified the Comment to state that the lawyer in the transaction is not required to give legal advice to the client when the client has independent counsel, but must disclose all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the client has been informed of such facts. A majority of the Commission concluded that the language in the Model Rule Comment is too broad in that it potentially would exempt a lawyer from disclosing material facts that are not known to the client if independent counsel has provided a disclosure to the client in writing. The Commission modified the Comment to require the lawyer who is subject to the Rule to disclose all material facts the lawyer knows or reasonably should know are not known to the client. However, a majority of the Commission also considered the reference to disclosure by either the lawyer in the transaction or independent counsel unworkable. As a result of the lawyer-client privilege between the client and the client's independent counsel, the lawyer subject to the Rule will lack information regarding what the client and independent counsel discuss, which, in turn, could limit the value of the advice the lawyer could give the client. The lawyer-client privilege in the client's relationship with independent counsel would prevent the lawyer subject to the Rule from knowing the content of the disclosure or the advice the client is receiving form independent counsel. Requiring the lawyer subject to the Rule to give the client legal advice when the client is already receiving advice from independent counsel interferes with the client's relationship with independent counsel and may

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		invade the confidential relationship between the client and independent counsel. In addition, the Rule exists because the lawyer in the transaction or acquisition has a conflict of interest as a result of the lawyer's interest in the transaction or acquisition. One of the purposes of the Rule is to afford a client the protection of advice from a lawyer who is free of the conflict of interest. When the client is represented by independent counsel, the client receives that protection. In the view of a majority of the Commission it does not make sense to require the lawyer who has a conflict to continue to advise the client, when the client is being advise by a lawyer who does not have the conflict. As a result, the Commission voted not to require the lawyer in the transaction or acquisition to provide legal advice to the client when the client is represented by independent counsel in the matter. The foregoing modification was the subject of considerable debate at the Commission. A minority of the Commission believe that the lawyer in the transaction should be required to make full disclosure to the client, including providing legal advice, when the client is represented by independent counsel. The minority maintains that not limiting the lawyer's disclosure obligation assures that the client receives full disclosure. It assures that the client does not suffer if the independent lawyer fails to advise the client properly. In this situation, the client has two lawyers and is entitled to advice from, the loyalty of, and candor, from both of them.

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* * * *Imputation of Prohibitions* [20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.	* * * ~~*Imputation of Prohibitions*~~ ~~[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.~~	Comment [20] of the Model Rule is deleted. The subject of this Comment is addressed in proposed Rule 1.10.

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

(Commission's Proposed Rule – Clean Version)

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 and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or 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 that 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) [Rule 3-310(B)(4)].

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 the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.

[4] 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. 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 [Rule 4-200]. 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 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].) An adverse pecuniary interest 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 B*ar (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] Full disclosure under 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 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].) Except in a disciplinary proceeding, 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].

[10] The risk to a client is heightened 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. Because the lawyer has an interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(d). In some cases, the lawyer's interest may be such that Rule 1.7 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. Before entering into the transaction or making the acquisition, 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) 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) 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
Opportunity to Seek Advice of Independent Counsel

[13] 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 (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.

[14] 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 the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; 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.

TOTAL = 9 Agree = 1 Disagree = 4 Modify = 4 NI =

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M			Comment [7] needs to better define “adverse pecuniary interest” to prevent the term from including all modifications of fee agreements.	The Commission did not make the requested revision. The Comment is taken directly from Fletcher, which states: ”Fletcher and the Court of Appeal have misread *Hawk*, which nowhere criticized Ames and instead acknowledged explicitly that "[w]e have also said that an attorney who has obtained an interest in the property of a client where it is reasonably foreseeable that his acquisition may become detrimental to the client, even though his intention is to aid the client, has acquired an interest adverse to a client." (*Hawk*, *supra*, 45 Cal.3d at p. 599; see also *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1057.) That standard was triggered, we explained, when an attorney's " 'personal financial interest was in conflict with [his client's] interest in obtaining full repayment of its loan' " (*Hawk*, *supra*, at p. 599), when counsel had "acquired an interest in the subject matter of the litigation for which they had been retained" (id. at p. 600), and when a secured note "can be used to summarily extinguish the client's interest in the property." (Ibid.) Fletcher's proposed test would define only the last of these transactions as adverse. Plainly, the single

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
						sentence seized on by Fletcher merely described the adverse interest presented in that case. It did not purport to define what makes an interest adverse in all circumstances." The Comment refers to a lawyer's interest in property. The first sentence refers to an acquisition of an interest in the client's property. The second sentence refers to when the lawyer's personal financial interest conflicts with the client's interest in the property. The same concept is included in the discussion in Comment [5]. The qualifying language in Comments [5] and [7] addresses COPRAC's concern.
					Comment [13] should include case citations or a more detailed description of potential factual scenarios explaining when this type of conflict would be nonwaivable.	The Commission did not make the requested change. The Comment was deleted.
2	Langford, Carol M.	D			Disagrees with Comments [5] and [6] which exclude modifications of fee agreements from the rule.	The Commission revised both Comments. Although the Commission does not agree that the Comments create a potential conflict between fiduciary duties and ethics, it has nevertheless provided an avenue for discipline in Rule 1.5 by adding paragraph (f), which requires that a lawyer advise the client to seek an independent lawyer and give the client a reasonable opportunity to do so when there is a material modification of a fee agreement that is adverse to the client's interests, regardless of whether it confers on the lawyer an adverse pecuniary interest or security interest.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					Modifications of fee agreements should qualify as adverse pecuniary interests. Modifications that increase attorney fees clearly represent a monetary loss on the part of the client that he did not agree to at the start of the representation. Modifications should also be considered business transactions.	The Commission did not make the requested revision. Neither the business transaction paradigm nor the adverse pecuniary interest paradigm squarely addresses the amendment to a fee agreement. If the initial fee agreement is not a business transaction, it is difficult to see how the modification of the relationship which did not start as a business transaction becomes a business transaction. The comment distinguishes these situations based on the existence of the fiduciary relationship after the fee agreement is first signed, but the rule does not recognize such a distinction. There are similar problems with classifying a modification as an adverse pecuniary interest. It would require a broad construction of "adverse pecuniary interest" to include merely entering into a contract. Comment [5] currently provides as an example of an adverse pecuniary interest with respect to a fee agreement or modification of a fee agreement that is directed to situations "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." To fit a fee agreement modification into the adverse pecuniary interest framework would involve a much broader conception of adverse pecuniary interest that is not consistent with how the term has been used in case law.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					The "unconscionable" standard of rule 1.5 is not enough protection for clients; modifications should be subject to the "fair and reasonable" standard. Proposed rule conflicts with case law establishing the lawyer's fiduciary duty to his client.	Commission did not make the requested revision. Comments [5] and [6] do not limit client protection to Rule 1.5. Rather, Comment [3B] to Rule 1.5, which has been moved intact from Rule 1.8.1, provides specific guidance that other law – case law, statutes, and rules – may apply. Commission did not make the requested revision but instead has provided an avenue for discipline in Rule 1.5. See discussion, above.
3	Lewis, Steve	M			Lack of clarity between Comments [5] and [7] about whether the Rule applies to a contingent fee in a civil case that has a charging lien. Comment [5] states in last sentence that the rule is not intended to apply to an agreement with a client for a contingent fee in a civil case but Comment [7] references that it does apply 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, which could apply to a charging lien in a contingency fee. Comment [15] should require the lawyer to communicate with the independent counsel about the matter and should cross-reference Rule 4.2 Comment [8].	The Commission did not make the requested revision. Comment [5] states that the Rule does not apply to an agreement by which a lawyer is retained by a client, unless the agreement confers on ownership, possessory, security or other adverse pecuniary interest. Comment [5] clarifies that a contingent fee in itself is not an adverse pecuniary interest. Comment [7] generally describes what constitutes an adverse pecuniary interest. It does not address whether a charging lien in a contingency fee agreement is an adverse pecuniary interest. The Commission did not make the requested revision. Since the lawyer entering into the transaction also represents the client, requiring the lawyer to communicate only with independent counsel could interfere with the lawyer's representation of the client.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
4	Los Angeles County Bar Association (Toby J. Rothschild)	M			Second sentence of Comment [3] should be rewritten to read: "This Rule also applies to lawyers engaged in the sale of goods or non-legal services, such as when a lawyer acting as such sells insurance, brokerage or investment products or services to a client." The current comment goes beyond incorporating Model Rule 5.7 because it does not clearly distinguish between "law related services" and services that are related to legal services because the provider is also serving as a lawyer.	The Commission did not make the requested revision. The proposed Rule states that it applies only when the goods or non-legal services are sold to a client. It, therefore, cannot reasonably be read as applying when the lawyer has not represented the buyer. In addition, the requirement that the sale be "concurrent" with the provision of legal services would weaken the rule by excluding transactions between a lawyer and the client on the basis that the lawyer was not rendering legal services at the moment that the lawyer engaged in the transaction. Commission discussion regarding this Comment did result in revisions to the second sentence of Comment [3] to clarify that the rule applies to the provision of non-legal services that are related to the practice of law.
					Court in *Fletcher v. Davis* failed to apply the well accepted rule that only security arrangements that allow the lawyer to summarily extinguish the client's interest in property implicates the duty to comply with rule 3-300. Comment [7] should adopt a distinction between lien provisions which are coupled with a true summary security interest, from a contractual lien that requires judicial action for enforcement (the latter should not require compliance with this rule).	Commission did not make the requested revision. While the commenter may believe that *Fletcher v. Davis* was wrongly decided, it is the most recent statement from the Supreme Court regarding what constitutes an adverse pecuniary interest. In that regard, it cannot be ignored. *Fletche*r is cited with respect to the discussion of what constitutes an adverse pecuniary interest, rather than with respect to the specific holding in the case.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					Last sentence of Comment [9] should be deleted because it incorrectly states the burden of proof in attorney disciplinary proceedings.	In response to this Comment, the Commission revised the last sentence of the Comment to add the words "Except in a disciplinary proceeding" at the beginning of the sentence.
					Comment [10] should say "The risk to a client is heightened when the client expects..."	Agree with the change. Comment revised accordingly.
					Discussions of conflicts of interest in Comments [10], [11], and [12] are confusing because rule 3-300 addresses the separate concept of the attorney's financial interest in property of the client.	Commission did not make the requested revision. The effect of a transaction or acquisition on the lawyer client relationship is a required element of a lawyer's disclosure to a client. (See *Matter of Lane* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735.) The Commission believes that there needs to be a robust discussion of this subject in the Comment
					Delete Comment [13]. Conflict-based impairment is not a competency issue and the issue of attorney faithfulness to the client's interests is already sufficiently addressed in Comment [12].	Agree with change. Comment deleted.
5	Orange County Bar Association (Trudy Levindofske)	A			Recommends the following revisions to Comment [5]: This Rule ~~is not intended~~ may apply to an agreement by which a lawyer is retained by a client, or to the modification of such an	Commission did not make the requested revision. The proposed modification would say that the rule "may" apply to both the initial fee agreement and modifications. It would have the Comment say that in that regard, fee agreements and fee agreement

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					agreement, ~~unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client~~ involving the payment of the lawyer's fees. In this regard, if the agreement, or modification of the agreement, 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), then this Rule does apply. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5 [Rule 4-200]. Generally, 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.	modifications are subject to the rule if they confer an ownership, possessory, security or other adverse pecuniary interest. It would also state that an agreement for an advance payment "generally" is not a ownership possessory, security or other adverse pecuniary interest. The proposed language does not add clarity and would introduce ambiguities into the Comment. The proposed first sentence would make the rule potentially applicable to all fee agreements and modifications. The second sentence does not exclude the possibility that a fee agreement or modification also could be construed as a business transaction. The current formulation is clear and does not require modification. The OCBA comment does not discuss any particular problem with the current wording to warrant the revision. The second part of the OCBA proposal also would introduce ambiguities into the Comment. It would suggest that advance fees may be subject to the rule without identifying circumstances when the rule would apply. The OCBA comment does not suggest a rationale for when the rule should apply to an advance fee and when it should not. The language in the Comment is clear. The OCBA comment does not state a reason to change the language

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					Delete last sentence of Comment [15] because whether client is represented by independent counsel is not relevant to whether the terms of the transaction are fair and reasonable.	Commission did not make the requested revision. The Comment is consistent with the Model Rule Comment. Since one purpose of the Rule is to assure the client has independent advice, the fact that the client receives that advice is a relevant consideration.
6	Sall, Robert K.	D			Deleting a requirement to advise the client to seek the advice of independent counsel weakens the rule and may result in the client not receiving advice the client should have.	The Commission did not agree with the comment. The comment was directed to paragraph (b), which simply states that the lawyer is not required to advise a client to obtain the advice of independent counsel if the client is already represented by independent counsel. Not requiring a lawyer to advise a client to seek the advice of independent counsel, when the client is represented by independent counsel does not lead to a situation where the client is not receiving advice from independent counsel.
					Fee modifications should be subject to the rule.	Commission did not make the requested revision. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
						where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client. However, the Commission has recommended revisions to Model Rule 1.5 that would require compliance with that rule for material modifications that are adverse to the client's interests. See Response to Langford, above.
7	San Diego County Bar Association (Heather L. Rosing)	M			1.8.1(a) fair and reasonable requirement should apply at the time of the transaction or acquisition. Also, change Comment [9] to reflect this.	Commission did not make the requested revision. Paragraph (a) tracks the current rule, which has been in place for years. The recommended change would be a substantive revision. It cannot be said that the consideration whether a transaction is fair and reasons cannot account for what transpired in the transaction. The comment does not offer a rationale that would justify this change.
					Add sentence at end of Comment [4] that states: "However, the rule may apply if the lawyer has, or should have, any reason to	Commission did not make the requested revision. The last sentence in Comment [4] states that the exception applies "when the lawyer does not advise, influence or solicit the client with respect to the

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					believe the client is investing, in part, because of the client's confidence in the lawyer's judgment." Comment [5]: delete words "or to the modification of such an agreement" in line 2 and the words "and modifications to such agreements" in line 6.	transaction…" The quoted language adequately addresses the concern raised in the comment. Commission did not make the requested revision. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					Comment [6]: first two sentences (including citation to Seltzer) are misleading because some courts have not found negotiation of a retainer to be an arms-length transaction.	Commission did not make the requested revision. The first two sentences in the Comment correctly state the law. However, the Commission did move the substance of Comment [6] to Rule 1.5.
					Add sentence at end of Comment [8] that states: "However, a lawyer who has reason to believe that the client does not understand the disclosure must explain the issues further."	Commission did not make the requested revision. The reference to "objectively reasonable *under the circumstances* addresses the concern raised in the comment. No further change is required**.**
					Revise of the first two sentences of comment [9] as follows: 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.	Commission did not make the requested revision. The proposed revision does not accurately state the law. The first sentence of the draft comment is an accurate statement.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					Comment [10] should say "the lawyer must also comply with Rule 1.7(b) and 1.7(d)." (Not only 1.7(d)).	Commission did not make the requested revision. However, the Commission added the following language at the beginning of the sentence: "Because the lawyer has an interest in the transaction or acquisition…" The language was added in order to clarify why citation to Rule 1.7(d) is appropriate.
					Requests for improved clarification that the Commission insert "before the transaction or acquisition is completed" after "must" in the fourth sentence: "The lawyer must before the transaction or acquisition is completed either (i) inform the client …" and also substitute "1.7" for "1.7(d)" in the last sentence of the Comment.	The Commission agrees with the first of the two requested changes and added the following words at the beginning of the fourth sentence "Before entering into the transaction or making the acquisition…" The Commission did not make the second requested change. Rule 1.7(d) is the appropriate rule to cite with respect to a lawyer's interest in the subject matter of a representation.
					Delete Comment [13] entirely.	Agree with change. Comment deleted.
					Since the ABA Rule has a comment on imputation, the Commission should add a Comment [16] which would read as follows: "The obligations imposed under this rule apply to lawyers associated in a firm with the lawyer who represents the client directly. These lawyers must make all of the required disclosures before entering into a business transaction with or acquiring an interest adverse to the client."	Commission did not make the requested revision. Comment [16] has been deleted.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
8	State Bar of California Office of the Chief Trial Counsel (OCTC)	D			OCTC disagrees with the proposed rule to the extent that it exempts modifications of fee agreements.	Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client. However, the Commission did make extensive revisions to Rule 1.5 that will subject material modifications that are adverse to the interests of the client to the requirements of that rule. See Response to Langford, above.

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
5	Zitrin, Richard (and California Legal Ethics Educators)	D			Unlike 3-300, Comments [5] and [6] specifically exclude fee contract modifications yet Comment [6] also acknowledges that lawyers do have "other fiduciary principles [that] might apply." This creates a potential conflict between common law principles of fiduciary duty and ethics rules themselves because any subsequent modification of a fee agreement with a client is done under circumstances where the lawyer has already taken on ongoing fiduciary duties to the client.	Commission did not make the requested revision. The Commission does not agree that the Comments create a potential conflict between fiduciary duties and ethics. The Rule sets forth a standard to be used in lawyer discipline. Neither case law nor ethics opinions to date have applied the rule to that extent. Making the rule applicable to modification of fee agreement would be a change in the law. Comments [5] & [6] are consistent with the standards stated in cases and ethics opinions. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to

Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client. [Sorted by Commenter]						
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
						engagement agreements in cases where the modification would benefit the client. However, the Commission did make extensive revisions to Rule 1.5 that will subject material modifications that are adverse to the interests of the client to the requirements of that rule. See Response to Langford, above.
					Rule states that if client is already represented by independent counsel then no notice need be given under 1.8.1(b). Read together with Comments [14] and [15], this diminishes client protection.	Commission did not make the requested revision. The Rule and Comment do not diminish client protection. One of the purposes of the Rule is to afford a client the protection of advice from a lawyer who is free of the conflict of interest the lawyer subject to the proposed Rule has as a result of that lawyer's involvement in the transaction or acquisition. It does not make sense to require the lawyer who has a conflict to continue to advise the client when the client is being advised by a lawyer who does not have the conflict.
					Unlike ABA 1.8(a)(3), the proposed CA rule does not require that the contracting lawyer disclose the "transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."	Agree with change. The Commission revised paragraph (c) to include client consent to the lawyer's role in the transaction or acquisition and whether the lawyer is representing the client in the transaction or acquisition.

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

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.1 is highlighted.)

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

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

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

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

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

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

And Rule 4-210 provides in part as follows:

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

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

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

> (4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.
>
> (5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.
>
> For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

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

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

> exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:
>
> (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
>
> (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
>
> (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

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

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

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

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

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

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

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

> (ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
>
> (iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

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

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

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

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

> (2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .
>
> (3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

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

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if "the lawyer does not maintain professional liability insurance" of at least $100,000 per occurrence and $300,000 in the aggregate "or if the lawyer's professional liability insurance ceases to be in effect."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
>
> (1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

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

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

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

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MEMO

To: RRC

From: Ellen Peck
Bob Kehr

Re: The application of Rules 1.8.1 (lawyer-client business transactions) and 1.5 (illegal and unconscionable fees) to the modification of fee agreements

Date: December 13, 2009

An earlier version of the Memo addressed only the application of Rule 1.8.1 to the modification of fee agreements. At the Commission's 12/11 – 12/12/09 meeting, the Commission at the direction of Board members drafted a limited protocol that would require lawyers, before entering into certain fee modifications, to provide written notice to the client of the right to independent counsel and to give the client the time to obtain independent legal advice. For organizational reasons, this proposed requirement was drafted as part of Rule 1.5. The Commission voted against the adoption of this proposed modification to Rule 1.5 but will send it on to the Board.

While the earlier Memo applies to a considerable extent to the new Rule 1.5 proposal, and we therefore have retained the earlier Memo below, we have added as an Introduction comments on the proposed Rule 1.5 changes.

Introduction regarding Rule 1.5: The apparent principle beyond the requested addition to Rule 1.5 is that clients would be protected by requiring lawyers to advise their clients of the right to seek independent counsel, and if lawyers were to give clients the time to obtain independent advice, before entering into any fee modification. To the contrary, we don't believe any meaningful protection would be provided by imposing these additional obligations on lawyers. Here are three examples that demonstrate our reasoning:

> Example One: A lawyer bludgeons a client into increasing the lawyer's contingency fee by threatening to abandon the client at a critical moment in a lawsuit. Under this duress, the client agrees to increase the lawyer's contingency compensation. That lawyer would be disciplined under current law for an act of moral turpitude under Bus. & Prof. C. § 6106. Depending on the amount of the new contingency, the lawyer also might be subject to discipline under Rule 1.5 for entering into an agreement to charge an unconscionable fee. The new requirement would not protect the client because the client in effect has been blackmailed and had no meaningful opportunity to consult or take the advice of independent counsel, and the lawyer already is subject to easily available discipline.
>
> Example Two: Another contingency lawyer has agreed to represent a client on a standard 40% contingency. The client receives a "final" settlement offer during last-minute settlement negotiations, but the client refuses the offer because the client believes it would result in an insufficient net recovery. The lawyer agrees to reduce his

or her contingency to 37.5% in order to induce the client to accept the settlement offer, and the client does so. The lawyer cannot comply with the written notice and timing requirement. The lawyer later is sued by the client on the theory that the settlement offer was not truly a "final offer", that the lawyer's offer to reduce the contingency fee was insufficient, that the lawyer was motivated by the lawyer's own interest rather than the client's interest, that the fee reduction and the settlement therefore were not in the client's interest, and that independent counsel would have been able to convince the first lawyer to reduce the fee to a far greater extent and to achieve better gross and net results. The client also reports the lawyer to the disciplinary authority based on the theory that the fee reduction was not for the client's benefit, and that the lawyer therefore is subject to discipline.

Example Three: A sophisticated law firm enters into hourly fee agreements with clients. The fee agreements provide for the firm to increase hourly rates by some form of notice to the clients as is permitted by existing law. See *Severson & Werson v. Bolinger*, 235 Cal. App.3rd 1569, 1673 (1991). These lawyers are not subject to discipline under proposed Rule 1.5(f), and their billing rates are legally enforceable. An unsophisticated lawyer is not aware of the trap created by proposed Rule 1.5(f) and lacks the protection of the carefully prepared fee agreement. This unsophisticated lawyer increases a billing rate (for example, because of inflation or because a young lawyer has become more experienced and has been given more responsibility), or the lawyer adds a billing rate (for example, because another lawyer is hired). These changes probably are for the benefit of the lawyer and therefore are within the scope of proposed Rule 1.5(f). The unsophisticated lawyer is subject to discipline and to civil claims for breach of fiduciary duty.

In the heinous Example One, the client received no protection. In Example Two, the lawyer becomes a target for a client's later civil and disciplinary claims. Example Three shows that proposed Rule 1.5(f) will create unexpected civil and disciplinary risks for lawyers.

It is our view that the effort to address fee modifications is a solution in search of a problem. Clients already are thoroughly protected by existing legal standards, and the attempt to find new solutions endangers lawyers in general and unsophisticated lawyers in particular.

<u>Our original November 29, 2009 Memo</u>:

The purpose of this Memo is to explain to the Commission our view that the current draft of Rule 1.8.1 is correct that the modification of a fee agreement generally should not be governed by Rule 1.8.1. We believe that to reverse the current draft, and to require lawyers to comply with Rule 1.8.1 in all fee modifications, would violate common sense, would be inconsistent with the Model Rules, and would be inconsistent with long-standing California law and the Restatement. This Memo will address each of these in turn.

If the Commission retains its current draft as we hope it will, this Memo with minor modifications also could serve as an explanation to the Board of the Commission's action.

We believe that the audio recording of the recent RAC meeting demonstrates that the comments made in favor applying Rule 1.8.1 to all fee modifications was based on misunderstandings as to the current state of the law and the consequences that would flow from changing current law.

Common sense:

Anyone who advocates the application of Rule 1.8.1 to all agreements between lawyers and clients that have the effect of altering an existing fee agreement presumably has in mind a situation in which a lawyer takes advantage of the client's circumstances in order to trick or force the client into a new arrangement that benefits the lawyer but not the client, and that furthermore does not pass muster at some visceral level. However, the general application of Rule 1.8.1 to fee modifications also would cover at least the following:

- Substantive changes that are for the benefit of the client but not the lawyer.

    - Contingency fee example --- lawyer accepts a representation, but at a 50% contingency because there is a lack of case authority to support the client's position in the proposed lawsuit, and the lawyer reasonably believes there is a substantial risk that the contingency will not occur Some time later, the lawyer reports to the client the happy news of the publication of a supportive appellate decision. The client replies by asking the lawyer to reduce the fee. The lawyer is a *mensch*, agrees to reduce the fee to 40%, but does not comply with Rule 1.8.1. If the Rule were to apply to fee modifications, that logically should include a fee reduction as well as a fee increase even though the lawyer had a binding fee agreement and had no legal obligation to entertain the client's request (Should the lawyer have recommended to the client that a better figure would be 35%? Would an independent lawyer have advocated 35%?). This lawyer is subject to professional discipline, is subject to the threat of discipline if the client later demands the lawyer reduce the fee still further, and the lawyer arguably might lose the entire fee.

    - Hourly fee example --- client suffers a financial reversal and requests a reduction in the billing rate. The lawyer has various legitimate alternatives, including among others, terminating the representation and leaving the client without representation (because of the client's inability to perform the fee agreement), humiliating the client by demanding that he borrow from relatives (or sell his wife's wedding ring, *etc*.), and keeping the current billing rate with a portion of the accumulating fee to be accrued with interest. The lawyer rejects all these alternatives and agrees to a reduction as requested by the client; the consequences are the same as in the contingency example. Should the fee reduction have been greater? Should the timing of payment been changed in some way? Should the lawyer have advised the client of these and other reasonably identifiable alternatives to the fee reduction requested by the client?

- Non-substantive changes that are for the benefit of the client but not the lawyer. Lawyer and client enter into an hourly fee agreement that requires the client to pay fees within 30 days after receipt of each monthly bill. The lawyer accedes to the client request for a short delay in the payment of a single statement. Again, the lawyer is subject to discipline, to the threat of discipline, and potentially to the loss of the entire fee.

- The negotiation with a current client of a new fee agreement for a new matter in which the current client seeks to retain the lawyer. If the existence of a lawyer-client relationship is the watershed event, then logically any fee negotiation between lawyer and a current client should be included, even if it is in a new matter. Nothing in principal distinguishes a new matter from an existing matter.

- The agreement between lawyer and client to apply an existing fee agreement to a new matter. Again, if the existence of a lawyer-client relationship is the watershed event, then the client would be entitled to all the protections of Rule 1.8.1 when discussing the application of an existing fee agreement to a new matter. Should the price or terms be different because the two matters are not the same, because the lawyer's level of experience in the second matter is less, or for some other reason?

- Billing rates provided for in an initial fee agreement. Example --- Lawyer agrees to represent a client in what is hoped to be (and turns out to be) a long-term relationship not limited to a single matter. Because hourly billing rates increase with time due to factors such as inflation and the increasing skill of young lawyers, and to avoid Rule 1.8.1, the lawyer's initial fee agreement states that the client will be billed at each lawyer's and each paralegal's normal billing rates. The lawyer's firm provides a notice of new rates that is sufficient to satisfy the standard of *Severson & Werson v. Bolinger*, 235 Cal. App.3rd 1569, 1673 (1991). The lawyer arguably would be subject to discipline under Rule 1.8.1.

We do not believe that the application of Rule 1.8.1 to any of these situations is supportable, and we are not aware of any authority for doing so. As appears from the opinion in the *Severson & Werson* case, the enforceability of the fee agreement is based on contract principles (which is consistent with the Restatement), and without any suggestion that the validity of the fee agreement has any connection with Rule 1.8.1.

Applying Rule 1.8.1 to all fee agreement modifications would be inconsistent with Model Rule 1.8(a):

ABA Model Rule 1.8(a), Comment [1], excludes the application of Rule 1.8(a) to "ordinary fee arrangements between client and lawyer ...." Presumably because of the consequences outlined above, the Model Rule fee agreement exception applies to *all* ordinary fee agreements without regard to whether they are fee agreements with new clients, modifications of existing fee agreements, or new fee agreements with existing clients.

The plain meaning of the Model Rule is understood and accepted. See *Mauzy v. Edward Kraemer & Sons, Inc.*, 2004 U.S. Dist. LEXIS 5098 (D. Minn. 2004) ["The assignment was a modification [of] a pre-existing fee agreement which did not encompass a loan or exchange of property which would justify characterization as a business transaction. Consequently, the plaintiff attorney was not required to comply with the writing and disclosure provisions of Minn. R. Prof. Cond. 1.8(a)."]; *Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 743-44 (2007) [this involved a fee agreement that conveyed to the lawyer a deed of trust on real property, a transaction that would be covered by all versions of the Rule, but the court before the section dealing with Rule 1.8(a) effectively repeated the content of California Probate Code § 16004(c) in saying: "A fee agreement between a lawyer and a client, revised after the relationship has been established on terms more favorable to the lawyer than originally agreed upon, may be void or voidable unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated."]; *Cotton v. Kronenberg*, 111 Wn. App. 258, 272 (2002) [This is consistent with the Restatement's contract approach (see below), saying: "We note that our Supreme Court has held that any modification of a fee agreement after an attorney-client relationship has been established is subject to 'particular attention and scrutiny' [citations omitted]. If renegotiation after commencement of the attorney-client relationship results in greater compensation for the attorney than that under the initial agreement, courts may refuse to enforce the renegotiated fee unless it is supported by new consideration (citation omitted).] Cf. *In the Matter of Thayer*, 745 N.E.2d 207 (Ind. 2001) [at 211, n. 3, the Court stated: "The present situation differs from typical contingent fee negotiations between lawyers and their clients because here the contingency of the fee had expired with conclusion of the settlement negotiations – the insurer had offered to settle for $11,000 and the client had advised the respondent to accept the offer. In effect, the respondent attempted to increase his contingency fee arrangement with an unsophisticated client after the contingency no longer existed. These unique circumstances activated the need for the protections required for lawyer-client business transactions provided in Prof.Cond.R. 1.8(a). By this holding today, however, we do not mean to require that all modifications to contingency fee agreements under any circumstances be subject to the client protections contained in Prof.Cond.R. 1.8(a)." Query whether the Court would have come to the same conclusion if the Respondent had not agreed that he violated Rule 1.8(a) as discipline was possible in other ways, for example, under Rule 1.5, which Respondent also was found to have violated].

<u>Applying Rule 1.8.1 to all fee agreement modifications would alter current California law</u>:

California Probate Code § 16004(c) provides:

> A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. **<u>This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.</u>** (emphasis added)

The Law Revision Commission Comment states:

> Subsection(c) restated the second sentence of former Civil Code Section 2235 without substantive change. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Walton v. Broglio (1975) 52 Cal.App.3d 400, 403-404,125 Cal.Rptr. 123, understood that the final sentence of former section 2235, now Probate Code section 16004(c) applies to a modification of a fee agreement with an existing client, and stated:

> Plaintiff contends on appeal that the presumption of invalidity codified in section 2235 of the Civil Code does not apply. We agree.
>
> In contracting with his client, where there is a pre-existing attorney-client relationship, the attorney is charged with a rebuttable presumption of undue influence and thus invalidity of the contract. (*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 272 P.2d 11; *Denton v. Smith* (1951) 101 Cal.App.2d 841, 226 P.2d 723.) This rule is based on section 2235 of the Civil Code, which reads as follows:
>
> > 'All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence. The presumptions established by this section do not apply to the provisions of an agreement between a trustee and his beneficiary relating to the hiring or compensation of the trustee.'
>
> The last sentence was added in 1963. By its terms, it broadly excludes all agreements relating to hiring or compensation, including those made after the fiduciary relationship is established. Prior law had created an exception only where there was no pre-existing fiduciary relationship. Thus, in *Setzer v. Robinson* (1962) 27 Cal.2d 213, 216, 18 Cal.Rptr. 524, 526, the Supreme Court said: 'The presumption of 'insufficient consideration' and 'undue influence' created by Civil Code, section 2235, is not applicable to a contract by which the relation of attorney and client is originally created and the attorney's compensation is fixed. 'The confidential relation does not exist until such contract is made, and in agreeing upon its terms the parties deal at arm's length.' (*Cooley v. Miller & Lux*, 156 Cal. 510, 524, 105 P. 981; see also *Cooley v. Miller & Lux*, 168 Cal. 120, 131, 142 P. 83; *Youngblood v. Higgins*, 146 Cal.App.2d 350, 352, 303 P.2d 637; 5 Am.Jur., Attorneys at Law, s 189, p. 375.) . . . No attorney could safely or reasonably negotiate any fee agreement with a prospective client without some preliminary investigation of the facts of the case and a disclosure to the prospective client of the legal steps which in his judgment must be taken. If by the very fact of such investigation and disclosure

> the relationship of attorney and client would thereby be created, the attorney would be placed in the impossible position of becoming the prospective client's attorney while he was attempting to reach an agreement with him as to whether he should become his attorney or not.'
>
> None of the cases since the 1963 amendment have directly construed it. Three cases, *Gold v. Greenwald* (1966) 247 Cal.App.2d 296, 55 Cal.Rptr. 660; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 64 Cal.Rptr. 915; and *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 69 Cal.Rptr. 568, 442 P.2d 648, dealt with events that occurred before the amendment became effective and thus did not discuss it. The fourth, *Baron v. Sarlot* (1975) 47 Cal.App.3d 304, 120 Cal.Rptr. 675 found the amendment was not 'significant' on the particular facts alleged. **We hold that the amendment, properly construed, prevents the application of the presumption to any agreement relating to fees, even where there is a pre-existing attorney-client relationship.** (emphasis added)

This case was decided after the 1974 amendments to the Rules of Professional Conduct, including the predecessor to rule 3-300 [former rule 5-101] were adopted. After *Walton v. Broglio* was decided, the Legislature adopted section 16004(c) with the stated intent of adopting section 2235 and the case law interpreting it.

Therefore, the policy of the State of California is that the fiduciary obligations of a trustee should not apply to an initial compensation agreement **or a modification of that agreement** respecting compensation. This legislative policy applies to every fiduciary relationship, including the attorney-client relationship.

Rule 3-300's discussion, sentence one, stated:

> Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. . . ."

Thus, the foregoing discussion sentence in rule 3-300 stated language substantially similar to the last sentence of section 16004(c) [which applies to modifications as well as initial agreements], excepting terms and conditions of a retainer agreement involving an ownership, possessory, security, or other pecuniary interest adverse to the client consistent with *Ames v. State Bar* and its progeny.

Ramirez v. Sturdivant, (1994) 21 Cal.App.4th 904, 917, 26 Cal.Rptr.2d 554, 560-561, again considered whether section 16004(c) applied to a second, different fee agreement by a lawyer resuming an attorney-client relationship in the same litigation matter and found that there was no duty to advise the client to seek the advice of independent counsel:

> It was generally understood that Civil Code section 2235 applied to the attorney-client relationship (e.g., *Walton v. Broglio* (1975) 52 Cal.App.3d 400, 403, 125 Cal.Rptr. 123), and we see no reason why Probate Code section

16004 also should not apply to that relationship. The statute, however, does no more than affect the burden of proof. In other words, under it, the trustee/attorney has the burden of proving that the transaction at issue did not violate a fiduciary duty. (Evid.Code, § 606.) Where, as here, the trustee/attorney produces evidence that the transaction was conducted at arms-length with an intelligent, experienced and sophisticated client, the trial court is entitled to conclude that the burden of proof has been met. In reviewing that conclusion, our only duty is to determine whether or not that conclusion is supported by substantial evidence. (*Priester v. Citizens Nat. etc. Bank* (1955) 131 Cal.App.2d 314, 317, 280 P.2d 835.) In addition, the last sentence of this provision specifically exempts from the presumption of undue influence any agreement relating to the "hiring or compensation" of the trustee/attorney. This exemption has been held to apply "even where there is a pre-existing attorney-client relationship." (*Walton v. Broglio, supra*, 52 Cal.App.3d at p. 404, 125 Cal.Rptr. 123; and see *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519, 198 Cal.Rptr. 725: "A contingency fee contract may be modified by the parties at any time during the subject litigation.")

In all events, and contrary to Ramirez's contentions, substantial evidence supports the conclusion that Sturdevant did not take unfair advantage of Ramirez in negotiating the supplemental retainer agreement. Ramirez already had changed attorneys twice in the action and was perfectly aware that she could do so again. Prosecuting an appeal is a proceeding discrete from proceedings in the trial court, and often is accomplished by someone other than the trial attorney. Sturdevant, as we have discussed, was entitled to withdraw from the case, and thus was entitled to negotiate the terms under which he would continue. Ramirez's interest in continuing with Sturdevant may have caused her to agree to terms she otherwise would have refused, **but that fact does not by itself translate into duress or a breach of fiduciary duty**. **Finally, we can see no reason why, under the circumstances present here, the supplemental agreement should be struck down simply because Sturdevant did not advise Ramirez that she should seek advice of other counsel in negotiating with him. Counsel could only have explained that Sturdevant was certainly entitled to insist on reimbursement of advanced fees and that $150,000 was a reasonable settlement figure.**

Thus, California's leading published appellate decision, which has not been reversed or overruled, refused, in the civil context, to strike down a modification of a fee agreement on the basis that the client was not advised to seek independent counsel. Instead, the Court held that a modification should be scrutinized, as are initial fee agreements, to ensure that it is reasonable and fair to the client.

In *In re Silverton* (2005) 36 Cal.4th 81, 29 Cal.Rptr.3d 766, the Supreme Court stated:

The Review Department determined that the arrangement involving a compromise of the medical bills was a business transaction, in that "the authorization to compromise constituted an immediate transfer from the Hous of

> both the ownership and possessory interest in all funds remaining after payment to the Hous of their distributive share of the settlement proceeds and the payment of attorney's fees as called for in the original retainer agreement" in exchange for an upfront payment by the attorney. The transaction was therefore barred unless Silverton could show that [he complied with rule 3-300] . . . (Rule 3-300; see generally *Fletcher v. Davis* (2004) 33 Cal.4th 61, 69-70, 14 Cal.Rptr.3d 58, 90 P.3d 1216.) The Review Department determined that Silverton (1) failed to disclose to the Hous information necessary for a reasonable understanding of the transaction, (2) failed to provide the Hous with written notice of their right to seek independent legal counsel, and (3) failed to discharge his burden to show the transaction was fair and reasonable to the Hous. In particular, Silverton failed to share with his clients, as he had with cocounsel Watson, his confidence that the medical bills could be compromised at a lower amount. (See *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1369, 62 Cal.Rptr.2d 27.)

Thus, the Supreme Court did not find that rule 3-300 applied to any modification of a fee agreement or a new agreement with an existing client. Rather, it applied rule 3-300 to a modification consistent with the discussion sentence. Rule 3-300 applied to Silverton's agreements only because the fee agreement negotiated during the course of the relationship if the agreement amounts to a business transaction between lawyer and client or grants to the lawyer an adverse pecuniary interest on the lawyer. **We are aware of no reported authority holding that a lawyer is required to comply with rule 3-300 in all fee modifications.**

To the contrary, it generally is accepted that § 16004(c) applies to the renegotiation as well as the original negotiation of a lawyer's fee agreement. In addition to the authorities cited above, see L.A. County Bar Ethics Opn. 521 (2007) and Opn. 496 (1998); Brandon, *Burning Issues: The Representation of Insureds Under Burning Limits Policies Raises a Host of Ethical Issues*, 27 L.A. Lawyer 30, 33 n.37 and accompanying text (2004); Family Law Practice & Procedure 2d Ed at §61.02 (Matthew Bender); and California Forms of Pleading and Practice §215.81 (Matthew Bender).

The Restatement Approach: The Restatement Third, The Law Governing Lawyers is consistent with *Walton* and with the Model Rule because it does not suggest at any place that we can locate that any conflict of interest rule applies to ordinary fee arrangements. Its position is expressed in §18, Comment *e*, and is based squarely on contract principles: "*e. Contracts entered into during a representation*. Client-lawyer fee contracts entered into after the matter in question is under way are subject to special scrutiny (cf. Restatement Second, Contracts § 89(a) (promise modifying contractual duty is binding if fair and equitable in view of circumstances unanticipated when contract was made)). A client might accept such a contract because it is burdensome to change lawyers during a representation. A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good. ..." Section 89(a) to which it refers states: "A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; ...."

Thus, as suggested in the first portion of this Memo, the Restatement categorizes together all lawyer-client contracts entered into during the existence of the relationship, which would include modifications of existing fee agreements and new fee agreements on new matters.

The Burden of Compliance: It was stated at the November 2009 RAC meeting that applying Rule 1.8.1 to fee modifications would require the lawyer only to give written notice to the client that the client should obtain independent counsel. This is wrong, as we will explain in a moment, but we first will follow the logic of this assertion. The logic is that there would be some material benefit to the client from the mere recitation of the client's right to independent counsel. We believe this makes no sense in the situation where the client most needs protections – where, to use the facts of the *Van Sickle* case cited below, the client has a young child, a house in foreclosure, and a car that is going to be foreclosed. More fundamentally, it simply is wrong to say that, if every fee agreement with an existing client is labeled as a business transaction, the lawyer's only additional duty would be the recommendation to seek independent counsel.

The comment at the November 2009 RAC meeting that the only added burden of compliance would be for the lawyer to give the client advice to seek independent counsel is wrong for a second materials reason. Rule 1.8.1 requires that the advice to seek independent counsel must be in writing, and the lawyer must give the client a reasonable opportunity to seek that advice. Consider those two requirements within the common context of the settlement of a contingency case that takes place at the last moment or even during trial, where the lawyer agrees to reduce the contingency fee in order to obtain the client's consent to the settlement.

In the Absence of A Provision in 1.8.1 Concerning Special Requirements For Fee Modifications, Lawyers' Fee Modifications Are Still Heavily Regulated and California Consumers of Legal Services Are Protected Adequately By Existing Law

Lawyers' fee modifications are still heavily regulated without the need for any change to rule 1.8.1, and California consumers of legal services are adequately protected by existing law.

First, Communication about fee modifications: A lawyer who enters into any business transaction with a client bears the heavy burden of providing the same advice to the client as the lawyer would have if not a party to the transaction. As our Supreme Court stated in *Felton v. LeBreton*, 92 Cal. 457, 469 (1891) (emphasis added):

> "While an attorney is not prohibited from having *business transactions with his client*, yet, inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of or intimately connected with the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and *are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect*; and in any attempt by the attorney to enforce an agreement on the part of the client growing out of such transaction, the

> burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised. (*Kisling* v. *Shaw*, 33 Cal. 440; 91 Am. Dec. 644; *Brock* v. *Barnes*, 40 Barb. 533; *Howell* v. *Ransom*, 11 Paige, 542; *Ford* v. *Harrington*, 16 N. Y. 289; *Evans* v. *Ellis*, 5 Denio, 643; *Dunn* v. *Dunn*, 42 N. J. Eq. 437; 1 Story's Eq. Jur. 310, 311.) In the words of Lord Eldon, he must make it manifest that he gave to his client 'all that reasonable advice against himself that he would have given him against a third person.' (*Gibson* v. *Jeyes*, 6 Ves. 278.)."

This remains the law of California. See, *e.g.*, *Beery v. State Bar*, 43 Cal.3d 802, 812 (1987). Also see *Ball v. Posey*, 176 Cal. App.3d 1209, 1214 (1986), where the court stated that the lawyer's burden of demonstrating that the client was fully informed on all matters related to any transactions between them is based on the fiduciary duty of full and unbiased disclosure described in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand,* 6 Cal.3d 176, 188-89 (1971).

Second, modifications to fee agreements must be fair and reasonable to the client: See discussion of *Ramirez v. Sturdevant, supra.* Moreover, a client can compel scrutiny of a fee modification for fairness and reasonableness through MFAA fee arbitration or by initiating a civil law suit.

Third, if the fee modification involves a security interest or a business transaction, the lawyer must comply with current rule 3-300: See e.g., current Rule 3-300 Discussion paragraph 1 and discussion of *Silverton, supra***.**

Fourth, if the process of obtaining a fee modification involves fraud, overreaching or duress, the lawyer is still subject to disciplinary investigation and potentially to professional discipline: See e.g., Bus. & Prof. C., 6106 [prohibiting fraud and dishonesty]; *Matter of Brockway* (Rev. Dept. 2006) 4 Cal.State Bar Ct. Rptr. 944, 959-960 [overreaching constituted moral turpitude where lawyer used complex legalese in fee agreement with clients, for whom English was a second language, to exempt himself from providing legal services of consequence to them]; *Goldstone v. State Bar* (1931) 214 Cal. 490, 498-499 and *Herrscher v. State Bar* (1935) 4 Cal.2d 399, 403 [fraud or overreaching by an attorney regarding fees is cause for discipline]; and *Matter of Shalant* (Rev. Dept. 2005) 4 State Bar Ct. Rptr. 829, 837-838 [the process by which modification negotiated was abusive to the client constituting moral turpitude[1]).

Fifth, the fee or cost in a modified fee agreement may not be unconscionable or illegal. See rule 4-200(A).

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[1] Shalant demanded the modification one business day before the client's deposition; faxed a letter to the client that insisted that a new fee arrangement needed to be worked out before the deposition; implied that the attorney would not provide his best efforts unless the client agreed to the modification; and had a staff member inform the client that it was impossible to postpone the deposition. While the attorney did appear at the deposition, the attorney insisted a few days later on the payment of a $25,000 nonrefundable fee to be credited against a contingent fee if there were any recovery. These discussions all took place approximately one week before the client was to travel out of state for extended medical treatment, leaving the client to worry about whether his case would be held in abeyance, and whether the client would need to find a replacement attorney. (*Id.*)

Conclusion: The Model Rule, the Restatement, and current California law have it right. Applying rule 1.8.1 to all fee agreements with current clients would sweep countless unintended situations into the area of possible discipline, and to the threat of discipline and the potential loss of all fees. Such a new requirement would be a trap for the unwary lawyer and would provide no meaningful benefit to the client. A lawyer who takes advantage of a client (or a potential client) through deceit or strong arm tactics already is subject to discipline under Rule 1.5 (unconscionable or illegal fee) and Bus. & Prof. C. § 6106. See, *e.g.*, *Matter of Van Sickle*, 4 Cal. State Bar Ct. Rptr. 980, 993 (Rev. Dept. 2006).

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

(Clean version of the rule prepared by the Commission at its December meeting.)

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 and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or 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 that 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 Comment [5], 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).

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 the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.

[4] 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. 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 does not 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 material modifications to such agreements that are adverse to the interests of the client, are governed in part by Rule 1.5. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other Rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].

[6] 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.

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].) An adverse pecuniary interest 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] Full disclosure under 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 with the transaction or acquisition. It also requires the lawyer to fully inform the client of 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].) Except in a disciplinary proceeding, 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].

[10] The risk to a client is heightened 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. Because the lawyer has an interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(d). In some cases, the lawyer's interest may be such that Rule 1.7 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. Before entering into the transaction or making the acquisition, 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) 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) 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
Opportunity to Seek Advice of Independent Counsel

[13] 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 (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.

[14] 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 the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; 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.

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

(Rule prepared by the Commission at its December meeting compared to the Commission's proposed rule presented to RAC on November 12, 2009.)

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 and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or 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 that 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 Comment~~s~~ [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~~) [Rule 3-310(B)(4)].~~).

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 the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.

[4] 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. 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~~does 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 material modifications to such agreements that are adverse to the interests of the client, are governed~~,~~ in part~~,~~ by Rule 1.5 ~~[4-200]~~. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other Rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].

[6] 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 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].)

An adverse pecuniary interest 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 B*ar (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] Full disclosure under 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 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].) Except in a disciplinary proceeding, 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].

[10] The risk to a client is heightened 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. Because the lawyer has an interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(d). In some cases, the lawyer's interest may be such that Rule 1.7 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. Before entering into the transaction or making the acquisition, 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) 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) 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
Opportunity to Seek Advice of Independent Counsel

[13] 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 (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.

[14] 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 the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; 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.

Rule 1.5: Fees For Legal Services

(Clean version of the rule prepared by the Commission at its December meeting.)

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

(b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute 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 or in-house expense are the following:

(1) the amount of the fee or in-house expense 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 involved 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) whether the client gave informed consent to the fee or in-house expense.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(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.

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

(1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

(f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer 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.

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, Montalbano, 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.)

[1B] 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. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

[2] 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.)

Modifications of Agreements by which a Lawyer is Retained by a Client

[3] Paragraph (f) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (f). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

[3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (f). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (f). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

[3B] 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]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (f). 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].) Depending on the circumstances, other Rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the 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.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule [1.16(e)(2)]) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1.

[5] 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

[6] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances past due under child or spousal support or other financial orders because such contracts do not implicate the same policy concerns.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (e)(1) or (e)(2), is subject to Rule 1.5(a) and may not be unconscionable.

[8] Paragraph (e)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). The written true retainer agreement should specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.

[9] Paragraph (e)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.

[10] If a lawyer and a client agree to a true retainer under paragraph (e)(1) or a flat fee under paragraph (e)(2) and the lawyer complies with all applicable requirements, the fee is considered the lawyer's property on receipt and must not be deposited into a client trust account. See Rule 1.15(f). For definitions of the terms "writing" and "signed," see Rule 1.0.1(n).

[11] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) of this Rule, the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

[12] A division of fees among lawyers is governed by Rule 1.5.1.

Rule 1.5: Fees for Legal Services

(Rule prepared by the Commission at its December meeting compared to the Commission's proposed rule presented to RAC on November 12, 2009.)

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

(b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute 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 or in-house expense are the following:

(1) the amount of the fee or in-house expense 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 involved 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) whether the client gave informed consent to the fee or in-house expense.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(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.

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

(1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

(f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer 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.

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, Montalbano, 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. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.*~~

[1B] *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. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

[2] 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.)

~~[3] With respect to modifications to the basis or rate of a fee after the commencement of the lawyer-client relationship, see Rule 1.8.1, Comments [5], [6].~~

Modifications of Agreements by which a Lawyer is Retained by a Client

[3] Paragraph (f) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (f). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

[3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (f). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (f). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

[3B] 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]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (f). 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].) Depending on the circumstances, other Rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

[3C] A modification is subject to the requirements of Rule 1.8.1 when the 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.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule [1.16(e)(2)]) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1.

[5] 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

[6] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances past due under child or spousal support or other financial orders because such contracts do not implicate the same policy concerns.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (e)(1) or (e)(2), is subject to Rule 1.5(a) and may not be unconscionable.

[8] Paragraph (e)(1) describes a true retainer, which is sometimes known as a “general retainer,” or “classic retainer.” A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). The written true retainer agreement should specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.

[9] Paragraph (e)(2) describes a fee structure that is known as a “flat fee”. A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.

[10] If a lawyer and a client agree to a true retainer under paragraph (e)(1) or a flat fee under paragraph (e)(2) and the lawyer complies with all applicable requirements, the fee is considered the lawyer's property on receipt and must not be deposited into a client trust account. See Rule

1.15(f). For definitions of the terms “writing” and “signed,” see Rule 1.0.1(n).

[11] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) of this Rule, the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

[12] A division of fees among lawyers is governed by Rule 1.5.1.

Proposed Rule 1.8.6 [3-310(F)]
"Payments Not From Client"

(Draft #8, 12/16/09)

Summary: This proposed rule follows Model Rule 1.8(e) and current RPC 3-310(F) in requiring client consent when a lawyer is paid by anyone other than the client. However, it expands on the Model Rule by requiring "informed written consent", and it expands on the Model Rule and the current RPC by moving the consent forward to before the lawyer enters an agreement with or charges the payor. See Introduction.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 3-310(F)
Statute	
Case law	

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption _10__
Opposed Rule as Recommended for Adoption _0_
Abstain _1_

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☑ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

California Commission on Access to Justice; Legal Aid Association of California

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.6* Payments Not From Client

November 2009
(Draft rule following consideration of public comment)

INTRODUCTION:

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

* Proposed Rule 1.8.6, Draft 8 (12/16/09).

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

* Proposed Rule 1.8.6., Draft 8 (12/16/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.6 Payments Not From Client	Explanation of Changes to the ABA Model Rule
(1) the client gives informed consent;	(a~~1~~) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;	**Revisions to Enhance Client Protection**. Paragraph (a) provides for client consent. However, it does so with two substantive variations from the Model Rule. *First*, paragraph (a) utilizes California's more client-protective requirement that the consent be written. This additional requirement adds a safeguard for the client by placing the lawyer's disclosure and the client's consent in a relatively permanent form that the client can review and discuss with others before giving consent, and the formality of the writing underlines the importance of the lawyer's request for consent. This provision also provides appropriate protection for the compliant lawyer by making it harder for a client to claim that the lawyer made an inadequate disclosure or that the client gave no consent. *Second*, paragraph (a) includes a timing requirement for obtaining the client's written consent. This is important for the client to be able to maintain supervision and control over the lawyer's conduct. **Other Revisions That Enhance Access to Justice**. In addition, as in the current California rule [3-310(F)], certain public agency representations are excluded from the Rule. This exclusion has been expanded in response to public comment to include lawyers who provide legal services through non-profit organizations. See Comment [2], below. **Approaches in Other Jurisdictions**. Montana has included the requirement of "written" consent, and a number of states have excluded insurance and in some cases other situations in which a third-person compensates the lawyer. These states include Connecticut, Louisiana, Ohio, Wisconsin, and perhaps Minnesota (its Rule and Comment do not make this clear, but it appears likely). The Commission recommends limiting the exclusions to the public agency, charitable, and insurance situations. The first

ABA Model Rule **Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules**	**Commission's Proposed Rule*** **Rule 1.8.6 Payments Not From Client**	**Explanation of Changes to the ABA Model Rule**
		two are included in the Rule itself because that can be done simply without altering the Model Rule syntax; the latter exclusion is included only in a Comment because this allows the Rule to adhere more closely to the lay out of the Model Rule, and the Comment that is proposed is similar to the language in the Discussion to California's current rule, language that appears already to be well understood. See proposed Comment [4].
~~(2)~~(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	~~(2)~~(b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	No change in the Model Rule language is proposed for this paragraph.
(3) information relating to representation of a client is protected as required by Rule 1.6.	~~(3)~~(c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).	**Revision Identifying California's Unique Confidentiality Statute**. Paragraph (c) identifies the duty of confidentiality as a special concern. The proposed version broadens the Model Rule's reference to Rule 1.6 to include California's unique and vital statutory duty of confidentiality.

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

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.6 Payments Not From Client Comment	Explanation of Changes to the ABA Model Rule
	a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (~~prohibiting~~ concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).	
	[2] Despite the risks described in Comment [1], paragraph (a) contains two exemptions from compliance with its requirements. These exemptions reflect policy decisions to not interfere with the functioning of public agencies that provide legal services to other public agencies or the public, or of non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt from compliance with paragraph (a) nevertheless must comply with paragraphs (b) and (c).	The Commission in response to public comment added an exception for lawyers when providing legal services through non-profit organizations. New Comment [2] has been added to clarify the reason for the exceptions to the Rule.
	[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.	Comment [3] clarifies the application of this Rule in a common situation that could prove confusing. Because a settlement agreement or court order obligating someone other than the client to pay the lawyer's fees would come at or near the end of the lawyer's representation of the client in the matter, the concerns addressed by this Rule either do not exist or are highly attenuated.

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.6 Payments Not From Client Comment	Explanation of Changes to the ABA Model Rule
	[4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [35].	Comment [4] clarifies the application of this Rule in the insurance context when the insurer appoints counsel to represent an insured. Under a large and well-developed body of California case law, this Rule normally will not apply to the arrangement under which an insurance company compensates counsel for its insured. This Comment also clarifies that, although this Rule normally does not apply in the appointed counsel situation, there are circumstances in which the appointed counsel will have a potential or actual conflict of interest and, if so, the lawyer must comply with Rule 1.7. A similar comment can be found in the Discussion to current rule 3-310.
	[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.	As noted, the Commission has expanded paragraph (a) to include a timing requirement that states when a lawyer must obtain the client's written consent to the lawyer's fee arrangement with another person: either before the lawyer enters the fee arrangement or as soon thereafter as is reasonably practicable. Comment [5] provides a common example of when the lawyer might not be able to obtain client consent before entering the fee arrangement. Under those circumstances, the lawyer may obtain client consent "as soon thereafter as is reasonably practicable." In response to public comment, the Commission has added a second example of when a lawyer might not immediately be able to comply with the Rule's timing requirements.

Rule 1.8.6 Payments Not From Client

(Commission's Proposed Rule – Clean Version)

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

(a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

(b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).

Comment

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

[2] Despite the risks described in Comment [1], paragraph (a) contains two exemptions from compliance with its requirements. These exemptions reflect policy decisions to not interfere with the functioning of public agencies that provide legal services to other public agencies or the public, or of non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt from compliance with paragraph (a) nevertheless must comply with paragraphs (b) and (c).

[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.

[4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [35].

[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.6 Third Party Payors.
[Sorted by Commenter]

TOTAL = 8 Agree = 3
Disagree = 0
Modify = 5
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice	M			CACJ believes that the proposed rule fails to recognize that parents and other family members commonly will retain counsel for a criminal defendant who is incompetent or otherwise and incapable of giving legal consent, either because of a mental condition or because he or she is a minor. We request that the proposed rule include the following comment: Comment [5] – In some limited circumstances, it may not be possible for a lawyer to obtain informed written consent from a client, for instance, in the case of incapacitation, or incompetency due to mental deficit or because the client has not yet reached the age of majority. When this occurs, paragraph (a) shall not apply. Representation will be permitted as long as the lawyer complies with all other provisions of this Rule.	The Commission disagrees and did not make the requested addition. If a client is unable to give consent, for example, because of minority or incompetence, the client will have acted through a representative in engaging the lawyer, and the representative can provide consent on behalf of the client. The same would be true with all other conflict rules, and there is no reason to single out this rule for special treatment.
2	California Commission on Access to Justice	M			We urge that this rule be amended by including in the exception non-profit charitable organizations which represent clients without a fee.	The Commission agrees. See the RRC response to the COPRAC letter.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.8.6 Third Party Payors.
[Sorted by Commenter]

TOTAL = 8 Agree = 3
Disagree = 0
Modify = 5
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	COPRAC	M		(a)	Concerned about the application of the proposed rule to lawyers employed by non-profit organizations to provide legal services to low-income clients. Suggests that the Rule exception for lawyers providing services on behalf of public agencies be broadened in order to exclude lawyers who provide legal assistance to low-income clients through non-profit organizations. The letter points for comparison to recently-adopted Rule 1-650, which covers lawyers who provide legal services "under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization." Concerned about the application of the proposed rule to lawyers representing clients in certain commercial transactions. Suggests that Comment [4] be amended to identify the types of transactions where consent may be difficult to obtain before a fee agreement is signed.	The Commission agrees with this concern. It has modified paragraph (a) so as to exempt lawyer while rendering services through a non-profit organization and has added a new Comment [2] to discuss the exemption. The Commission agrees with this concern and has included in what now is Comment [5] a reference to certain commercial transactions.
4	Legal Aid Association of California	M		(a)	This Association's comment parallel's the first COPRAC comment	The Commission agrees. See the RRC response to the COPRAC letter.
5	OCTC	A			OCTC advises that payors often complain to it that the lawyers do not communicate with	The Commission disagrees and did not make the requested addition. While OCTC's suggestion for

Rule 1.8.6 Third Party Payors.
[Sorted by Commenter]

TOTAL = 8 Agree = 3
Disagree = 0
Modify = 5
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					them, and it requests the addition of a Comment suggesting to lawyers that they advise in writing both the client and the payor that the lawyer's duty requires the lawyer to communicate only with the client.	lawyers is valid, the Commission has avoided wherever possible further burdening the already lengthy Comments with practice pointers of this sort. The Comments are intended to explain the Rules to which they are attached.
6	Sall, Robert K.	M			Concerns about the impact of third party payments on loyalty, confidentiality, and independent judgment can be handled by oral disclosure and oral consent. The requirement of informed written consent adds nothing to the principles we are truly trying to protect with this rule.	The Committee disagrees and has not made the requested change. The requirement of informed written consent is in current rule 3-310(F), and the Commission is not aware of it working any hardship. Further, the Committee believes that the requirement that the lawyer's disclosure be in writing, and that the client consent in writing, emphasizes to the client the importance of the payment arrangement and provides a potentially permanent reminder to the client of how the lawyer might be affected by the arrangement.
7	San Diego County Bar Association Legal Ethics Committee	A			Approves of the new rule.	No reply required.
8	Santa Clara County Bar Association	A			The Santa Clara County Bar Association believes that the proposed changes to this rule are important changes for public protection reasons.	No reply required.

Rule 1.8.6: Payments Not From Client

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2008 Ed.) by Steven Gillers and Roy D. Simon. The text relevant to proposed Rule 1.8 is highlighted)

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

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

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

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

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

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

And Rule 4-210 provides in part as follows:

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

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

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

> (4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.
>
> (5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.
>
> For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

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

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

> exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:
>
> (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
>
> (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
>
> (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

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

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

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

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

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

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

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

> (ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
>
> (iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

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

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

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

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

> (2) if the client is an organization. any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .
>
> (3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

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

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if "the lawyer does not maintain professional liability insurance" of at least $100,000 per occurrence and $300,000 in the aggregate "or if the lawyer's professional liability insurance ceases to be in effect."

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

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

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

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

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

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

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

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

New York has no specific counterpart to Rule l.8(k), and New York's counterpart to Rule l.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

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

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

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

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

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

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

> (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
>
> (1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

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

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

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

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Proposed Rule 1.8.7 [3-310(D)]
"Aggregate Settlements"

(Draft #8, 12/14/09)

Summary: Proposed Rule 1.8.7 carries forward the Model Rule and current California concept that a lawyer has a conflict when jointly represented clients are asked to approve an aggregate settlement of their claims or liabilities. This proposal includes the informed written consent requirement normally found in California's conflict rules but otherwise is substantially the same as the Model Rule.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 3-310(D)
Statute	
Case law	

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __8___
Opposed Rule as Recommended for Adoption __3___
Abstain __0__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

There was public comment received that criticized the requirement of informed written consent, which requirement also appears in current rule 3-310(D).

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.7* Aggregate Settlements

December 2009
(Draft rule following consideration of public comment)

INTRODUCTION:

ABA Model Rule 1.8(g) and proposed Rule 1.8.7 both treat as a potential conflict of interest a lawyer's representation of two or more clients in arranging a settlement of claims, whether civil or criminal. Proposed Rule 1.8.7 largely tracks the first sentence of Model Rule 1.8(g). The only substantive difference is the substitution of California's more client-protective "informed written consent" requirement. That requirement also appears in current California Rule 3-310(D) and the Commission determined that it should be carried forward into proposed Rule 1.8.7. The Commission has slightly modified the second sentence of Model Rule 1.8(g) because it is an incomplete statement of the disclosure necessary to obtain informed client consent. In addition, the proposed comment expands upon Model Rule 1.8, cmt. [13] and includes a more robust discussion of the disclosure necessary under this Rule, increasing the likelihood of lawyer compliance with the Rule and enhancing client protection.

Minority. A minority of the Commission objects to the higher "informed written consent" that the Commission recommends be adopted. The minority takes the position that, while laudable, requiring an informed written consent, which itself requires written disclosures, will likely result in the demise of the last minute settlements that often take place at the court house, with resulting prejudice to the clients involved. They take the position that the Model Rule's standard of a "informed consent, in a writing signed by the client," provides adequate protection to clients. See the complete dissent, below.

Variation in Other Jurisdictions. Every state has adopted some version of Model Rule 1.8(g). See Explanation of Changes for the Rule for a brief discussion of some variations. See also selected STATE VARIATIONS excerpt, below.

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* Proposed Rule 1.8.7, Draft 8 (12/14/09).

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

* Proposed Rule 1.8.7, Draft 8 (12/14/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.7 Aggregate Settlements	Explanation of Changes to the ABA Model Rule
		from the Rule. Concerning the requirement of "informed consent," most jurisdictions follow the Model Rule consent language, but there are a number of jurisdictions that provide less client protection than does the Model Rule. Some of these jurisdictions do not require that the consent be in a writing signed by the client, and some even do not require that the consent be in any writing. For example, Illinois has "consents after disclosure" and N.J. requires "informed consent after consultation". N.D. retains the 1983 Model Rule language that the client "consents after consultation", as do Georgia, Mississippi, and Virginia (which have not revised their rules since the Ethics 2000 revisions were published). Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer. Connecticut requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client."

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

* Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Comment to Rule* Rule 1.8.7 Aggregate Settlements Comment	Explanation of Changes to the ABA Model Rule
Comment * * * **Aggregate Settlements** [13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.	**Comment** * * * ~~**Aggregate Settlements**~~ ~~[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.~~	

ABA Model Rule Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Comment to Rule* Rule 1.8.7 Aggregate Settlements Comment	Explanation of Changes to the ABA Model Rule
	[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).	

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

ABA Model Rule **Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment**	**Commission's Proposed Comment to Rule*** **Rule 1.8.7 Aggregate Settlements Comment**	**Explanation of Changes to the ABA Model Rule**
[No corresponding provision]	[5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).	There is no Model Rule counterpart for proposed Comment [5]. The Commission added this Comment in response to public comment, with which the Commission agrees, to clarify that a court's record of client approval of the terms of a settlement is a "written" disclosure and consent, as the Rule requires.

Proposed Rule 1.8.7 Aggregate Settlements

Minority Dissent

This Rule requires “informed, written consent” to any aggregate settlement. The idea behind this Rule is noble, but its implementation in many instances will be very problematical; and if literally enforced, the Rule will preclude many settlements.

It must be common ground for all experienced civil litigators -- and probably in multi-person criminal cases as well -- that while ideally, settlements are arranged prior to trial call or its immediate time frame, in fact many settlements are made literally at the courthouse door. Not always are all of multiple clients -- especially multiple plaintiffs -- in immediate attendance. While it is an ideal concept that both the amount and the internal allocation (which is exempt from the Rule's requirement) of a settlement be discussed in detail with all clients in advance, the fact is that these last minute settlements do occur and often involve different terms from those recently discussed, and that in virtually all cases they satisfy the litigants. Experienced lawyers will have had thorough discussions with their clients about the range of possible settlements beforehand and will be acting with their clients' advance general authorization -- i.e., authorization which involves a range of options. But the facts of life are that there may be unanticipated last minute developments, both about the case itself and about a changing settlement picture, which frequently result in settlements. And those settlements will relate to just one of several options which the lawyer may have discussed with his/her clients: Is the lawyer to provide multiple versions of the informed written consent, encompassing all authorized or desired options?

While it is surely the intent of the Rule that the “informed written consent” can be provided orally by the clients on the court record, this is not always possible. First, not all clients may be present in court. Second, the settlement may take place away from a court reporter and in circumstances which do not lend themselves to a full on-the-record report. Third, the “informed” part of the consent picture (a) requires disclosure of often privileged, confidential information which cannot and should not be spread on a record, and (b) would be of enormous benefit to the opposition by disclosing the weaknesses and evaluations of the parties' case, which could be greatly abused if for any reason the settlement failed. Indeed, upon hearing such a candid disclosure, the opposing party may have second thoughts and may try to scuttle the settlement: such things have happened before.

An “informed” written consent, in the experience of this minority, commonly requires numerous pages of written exposition, which should be carefully prepared and reviewed before signing. That is not something that can be done quickly; but settlements are often done in the twinkling of an eye.

We understand that it is the intent of this Rule that in class action settlements, only the named class

representatives must provide their informed written consent, though we do not see that in the Comments, where it should be stated.

Adoption of this Rule will surely have one of two serious negative consequences, perhaps both: Last minute settlements, or settlements which require quick acceptance to “seize the moment,” will disappear; and the Rule will almost surely lead to non-compliance and violations. Neither is good for the profession or for the clients it serves.

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

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

COMMENT

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).

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

[5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of “written” in Rule 1.0.1(n).

Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]

TOTAL =__ **Agree = _1_ Disagree = _1_ Modify = _8_ NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice	M			CACJ believes that the proposed rule fails to accommodate situations in which a settlement proposal is made by a prosecutor or by the court with an urgent time line for acceptance or rejection, during the course of a hearing, pretrial conference or at trial. In such circumstances, it will frequently be impossible or impractical to obtain the client's written informed consent. The proposed rule should be modified to permit, in criminal cases, the client's informed consent to an aggregate settlement be made "on the record" in court. While multiple representation in criminal cases is rare, it does occur and often finalization of a settlement is made in court, perhaps on the day of trial. In such circumstances, obtaining written consent would be difficult and time consuming. The purpose of the rule can be fulfilled by having the Court accept the consent on the record. CACJ requests that the first sentence of the proposed rule be modified to include the bold, italicized language below: "A lawyer who represents two or more clients	The Commission agrees. See RRC response to the Orange County comment, item 5 above. The Commission does not believe it is necessary to alter the Rule to accomplish the goal sought.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]

TOTAL = __ **Agree =** _1_ **Disagree =** _1_ **Modify =** _8_ **NI =** __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere please, unless each client gives informed written consent ***or verbally consents on the record.***"	
2	California Commission on Access to Justice	M			Urges that this Rule be modified to permit attorneys to obtain clients' prior approval to an aggregate settlement with follow-up notification within a reasonable amount of time after the settlement is finalized.	It is correct that this Rule will prevent the resolution of some disputes and could as a result cause harm to some clients. The Commission has been troubled by this and discussed it at length. This risk also has troubled others, including the New Jersey Supreme Court. See *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 187 N.J. 4 (2006) in which the Court referred this issue to its Commission on Ethics Reform [N.J. has not subsequently changed its corresponding Rule]. The Commission concluded, consistent with the Model Rule and California's current Rule, that the predominate concern should be to assure that lawyers do not interfere with their clients' control over settlement. See *People v. Davis*, 48 Cal.2d 241, 256-57 (1957) [it amounts to taking a position adverse to the client, and therefore violates the duty of undivided loyalty, for an attorney to surrender any of the client's substantial rights without the client's "...free and intelligent consent after full knowledge of all the facts and circumstances...." citing *Anderson v. Eaton*, 211 Cal. 113, 116 (1930)]; because doing so violates the lawyer's duty of undivided loyalty to each client].

Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]

TOTAL = __ **Agree =** _1_
Disagree = _1_
Modify = _8_
NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Chamberlain, Suzanne V.	M			Urges the Commission to consider the practicality of a written attorney disclosure as required by propose rule 1.8.7, and the difficulties that such would pose to settlement and to the attorney-client relationship. It is suggested that in connection with aggregated settlements, a lawyer be required to secure the informed written consent of each client to the settlement, but that such informed consent may be effectuated by way of the member's oral disclosure.	The Commission disagrees and did not make the requested change. See the response, below, to the comment from the L.A. County Bar.
4	COPRAC	A			Recommends specific language to clarify Comment [4].	The Commission agrees, and has adopted language suggested by COPRAC.
5	Legal Aid Assoc. of Cal.	D			Urges adoption of the Model Rule in lieu of the Commission's proposal because it believes the proposal likely will lead to fewer settlements in aggregate litigation.	See the RRC response to the comment of the California Commission on Access to Justice, item 3 above. In addition, although Model Rule 1.8(g) does not say when the lawyer must make disclosure to the clients and obtain their consent, Model Rule [13] makes it clear that this must be before the lawyer accepts the settlement. The Commission believes that most and perhaps all jurisdictions have read the Model Rule that way, and it therefore does not provide the flexibility the commenter apparently found in it.
6	Los Angeles County Bar Association, Professional Responsibility and Ethics	M			The proposed rule should recognize an exception for multi-party cases (such as multidistrict litigation) where there is active	The Commission disagrees and did not make the requested change. The Commission is unable to identify any predictable method for distinguishing

Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]

TOTAL =__ **Agree = _1_ Disagree = _1_ Modify = _8_ NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
	Committee				judicial supervision of the settlement. In cases where there are hundreds (or perhaps thousands) of individual litigants, it is impracticable to seek written consent from each client. Where such settlements are crafted under active judicial supervision, the onerous written consent requirement is unnecessary, just as it is unnecessary in class action cases. This issue has been recognized by the American Law Institute in its recently approved Principles of Aggregate Litigation, Topic 3, "Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" (Proposed Final Draft at 264). An aggregate settlement may be reached when it is simply impossible to get the informed written consent of each client after full written disclosure in a timely manner. For example, the case may be called for trial, but a settlement reached at the last minute. Not all of the clients are present – some may be at work or unavailable due to conflicting obligations. The settlement is discussed by phone, and the clients agree to accept the settlement.	multi-party cases except for those that proceed as class actions. No distinguishing rule language was proposed, and the Commission is not aware of any such language in any other jurisdiction. The Commission was closely divided as to whether the informed written consent standard is appropriate here. See the minority statement in the Introduction and a separate minority statement that was filed.

Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]

TOTAL =__ Agree = _1_ Disagree = _1_ Modify = _8_ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	OCTC	M			OCTC criticizes Comment [4] without suggesting any correction except to say that the Rule should state the right of lawyers to assist clients in agreeing to the use of a third-party neutral to determine the allocation of an aggregate settlement.	The Commission disagrees and did not make the requested change. Comment [4] explains that the scope of the Rule includes only the settlement with adverse parties, not the allocation of the benefits or burdens of a settlement among jointly-represented clients. This explanation of the limits of the Rule is the proper subject of a Comment. See the COPRAC comment, item 1 above, and the RRC response.
8	Orange County Bar Association	M			Commission should consider whether a separate exception should be delineated in the Comment for oral settlements on the record that include full disclosure of the terms. OCBA proposed specific Comment language for this purpose.	The Commission agrees and has added new Comment [5].
9	San Diego County Bar Association Legal Ethics Committee	M		Rule	The second sentence of the Rule states: "The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." SDCBA criticizes "among other things" as being vague and not specifically defining exactly what must be covered in a disclosure. It then recommends says that the entire sentence is unnecessary and likely to cause confusion and should be removed. It points out the need for a conforming change to Comment [3] if the second sentence is removed.	The Commission disagrees and did not make the requested change. The phrase "among other things" is an addition to the Model Rule language that does not change its meaning and is intended only to emphasize, as is true of the Model Rule, that information described in the sentence is not intended to be exclusive. On the broader point, removing the sentence would not alter the lawyer's ability to make a disclosure sufficient to obtain "informed written consent", but doing so would leave the lawyer without any guidance as to what needs to be disclosed to obtain "informed written consent". Including the Model Rule sentence does provide some guidance.

Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]

TOTAL = __ **Agree = 1**
Disagree = 1
Modify = 8
NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
10	Santa Clara County Bar Association	M			SCCBA supports the changes to this rule, in particular, the change to add "written" to the informed consent requirement. However, the SCCBA recommends that an exception be made for public agencies. This rule should not apply to public agencies that are required by law to defend and indemnify their officers and employees for claims or actions arising out of acts or omission occurring within the scope of their employment with the public agency. Requiring the public agency to obtain the written consent of named officers and employees but who have not participated in the litigation could unnecessarily complicate the settlement of these cases and, in some cases, the public agency may not have current contact information for the named employee.	The Commission disagrees and did not make the requested change. This interesting suggestion regarding public agencies is novel so far as the Commission is aware and raises two threshold issues: (i) the Commission is not aware that any such problem has arisen with public agencies that requires that they be treated differently than are other employers who indemnify their employees; and (ii) any such special rule might suggest that lawyers in this situation don't owe the same set of duties to employees of public agencies that lawyers owe to other clients.

Rule 1.8.7: Aggregate Settlements

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2008 Ed.) by Steven Gillers and Roy D. Simon. The text relevant to proposed Rule 1.8 is highlighted)

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

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

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

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

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

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

And Rule 4-210 provides in part as follows:

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

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

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

> (4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.
>
> (5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.
>
> For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

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

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

> exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:
>
> (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
>
> (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
>
> (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

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

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

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

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

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

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

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

> (ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
>
> (iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

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

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

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

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

> (2) if the client is an organization. any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .
>
> (3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

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

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if "the lawyer does not maintain professional liability insurance" of at least $100,000 per occurrence and $300,000 in the aggregate "or if the lawyer's professional liability insurance ceases to be in effect."

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

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

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

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

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

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

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

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

New York has no specific counterpart to Rule l.8(k), and New York's counterpart to Rule l.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

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

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

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

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

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

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

> (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
>
> (1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

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

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

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

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Proposed Rule 1.8.10 [RPC 3-120]
"Sexual Relations With Client"

(Draft #7, 09/12/09)

Summary: Proposed Rule 1.8.10 substantially adopts ABA Model Rule 1.8(j), which prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship pre-dated the lawyer-client relationship. The proposed Rule differs from the Model Rule in adding a definition of "sexual relations" in paragraph (b), which is imported verbatim from existing California Rule of Professional Conduct 3-120.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-120
Statute	Bus. & Prof. Code §§ 6106.8 & 6106.9
Case law	

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Fewer than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __7___
Opposed Rule as Recommended for Adoption __6___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Dissenting Position Included on Model Rule Comparison Chart ☑ Yes ☐ No

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☑ Very Controversial – Explanation:

See Introduction.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.10* Sexual Relations With Client

December 2009
(Draft rule revised following consideration of public comment and direction from a board committee)

INTRODUCTION:

Proposed Rule 1.8.10 substantially adopts Model Rule 1.8(j), which prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship pre-dated the lawyer-client relationship. As the comparison chart illustrates, unlike current California rule 3-120, the Commission has proposed a rule that follows Model Rule 1.8(j) which effectively bans, rather than limits, sexual relations between lawyers and their clients. The Commission's proposed rule differs from the Model Rule in that the proposed rule includes a definition of "sexual relations", which is derived from current California rule 3-120 and Business and Professions Code § 6106.9.

The version of the Rule that was originally circulated for public comment closely followed current California rule 3-120 in that it limited, but did not ban, virtually all sexual relationships. The Commission originally passed this version of the rule by a vote of 8 to 1.

The Commission received four written public comments in favor of a broad Model Rule–type ban and two written comments in favor of the narrower limitation in the current California rule. Also, an attendee at the public hearing spoke in favor of the direction of the Model Rule. After reviewing the public comment, the Commission voted 7 to 6 not to retain the Rule as sent out for public comment. Instead, the Commission voted 8 to 6 to adopt a rule that is identical to Model Rule 1.8(j) in prohibiting all sexual relationships between lawyer and client except for consensual relationships that predate the lawyer-client relationship. At its September 2009 meeting, the Commission confirmed this decision by a 7 to 6 vote.

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* Proposed Rule, Draft 8 (11/30/09).

INTRODUCTION (Continued):

In considering the alternatives, the majority observed that the professions of medicine and psychology have absolute bans similar to the Model Rule, and there is no suggestion that these bans have caused any of the personal or constitutional problems raised by the minority. There also is no suggestion of any such problem in any of the other jurisdictions that have adopted the Model Rule ban. The proponents of the Model Rule ban also argued that a ban would foster public trust in the legal system and that, whether or not one can fairly say that the lawyer-client relationship almost always is unequal, the public naturally will assume the worst about the lawyer's conduct whenever a lawyer engages in a sexual relationship that would be banned by the Model Rule.

The majority also notes that the minority's reliance on the argument that the proposed Rule will conflict with Business and Professions Code § 6106.9 and thus is "a denigration of the legislative process," is misplaced. The Supreme Court can impose a higher standard on lawyers than the legislature has done. Thus, there is no "conflict" with § 6106.9 merely because the proposed Rule and the statute would impose different standards of conduct. There is no need, as the minority asserts, to go to the Legislature to "fix" the statute.

Those members of the Commission who adhered to its original 8-1 recommendation to retain the concepts underlying current rule 3-120 argued that a virtual ban like that in Model Rule 1.8(j) conflicted with Business and Professions Code § 6106.9, which limits, but does not ban, sexual relations between lawyers and clients. Current rule 3-120 is consistent with § 6106.9. At the public hearing, it was suggested by a member of the public that the Legislature "does not really understand how the rule works," and that it can "fix" the statute to conform to the rule. The Commission minority disagrees and considers this a denigration of the legislative process. However, the fact remains that adoption of 1.8(j) would expand on, and in the view of some members of the Commission, conflict with existing state law.

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

INTRODUCTION (Continued):

The minority also notes that the proper focus of the ethical rules is the regulation of conduct of individuals as lawyers. The present Rule quite properly prohibits the abuse of a lawyer's "power position" over a client by demanding or obtaining sexual favors; but not every lawyer-client relationship is of such a nature. For example, if an actuary working on employee benefits becomes romantically involved with a lawyer working for the same company on like matters, the power relationship is likely to be equal; or if the chief executive and the chief counsel of a public corporation become romantically involved before their eventual marriage, how is that the business of the Bar? But unlike the present rule, the proposed rule would ban both of these – and many other – relationships, which are clearly not the business of the Bar. We are not the bedroom police. Outside the context of having a deleterious effect on a lawyer-client relationship, the social habits of lawyers that do not reach the level of moral turpitude should not be the subject of disciplinary action by the State Bar. Concern properly arises where such a relationship occurs under circumstances where the professional relationship is compromised. Current rule 3-120 addresses this problem.

The minority notes the same criticism can be leveled at the unsupported claim by the State Bar's Committee on Professional Responsibility and Conduct ("COPRAC") that making it easier to prove a violation would also have a salutary effect by inhibiting attorneys from entering into such relations. Apparently, the thinking is that making enforcement incrementally more difficult encourages lawyers to have sexual relations with clients. However, inhibiting lawyers and clients from exercising the right to choose their personal and sexual partners is not necessarily a good thing. There is more than a trivial public interest furthered in not over-regulating consenting sexual relationships between attorneys and clients. For every non-coerced sexual relationship that does not produce a deleterious effect on the attorney's representation, a client is making a choice that presumably is enhancing his or her life. In some cases it may turn out that the personal relationship that develops ultimately between client and attorney transcends in importance the professional relationship. To the extent clients benefit from having the freedom to choose to engage in a sexual relationship with an attorney that does not result in actual harm to their legal matter, a bright-line ban similar to that in Model Rule1.8(j) will have a chilling effect on that freedom.

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

INTRODUCTION (Continued):

As noted, the COPRAC letter concludes with approving references to ABA commentary developed during the discussion concerning Model Rule1.8(j). Comments such as "the attorney-client relationship is almost always unequal," and that "it is unlikely a client can provide informed consent due to the 'client's own emotional involvement,'" appear to some Commission members to be hyperbolic, overly simplistic conclusions offered to explain complex social interactions, as well as being unduly paternalistic. To the extent these conditions exist in a given relationship resulting from the use of coercion, quid pro quo demands, or causing harm to the attorney-client relationship, current rule 3-120 bans the conduct.

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

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

A Note on the Rule Number. As noted, the Rule appears in the Model Rules numbered as 1.8(j). The Commission has not proposed that California follow the Model Rules construct of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within current client, former client, or government lawyer conflict situations addressed in Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier to locate and use, the Commission has recommended that each rule in the 1.8 series be given a separate number. Thus, the Commission's proposed sex with a client rule appears as a stand-alone rule, numbered 1.8.10, to correspond to Model Rule 1.8(j).

ABA Model Rule Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.10 Sexual Relations With Client	Explanation of Changes to the ABA Model Rule
(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.	(ja) A lawyer shall not ~~have~~ engage in sexual relations with a client unless a consensual sexual relationship existed between them when the ~~client~~ lawyer-client relationship commenced.	Paragraph (a) is nearly identical to MR 1.8(j). The only changes are 1) to substitute "lawyer-client" for the Model Rules' "client-lawyer" rubric to conform the phrase to the style used in California statutes, e.g., "Lawyer-Client Privilege," Evid. Code §§ 950-962, and in typical judicial opinions; and 2) to change "have" to "engage in" so that, when considered in conjunction with Comment [1], the Rule will apply to sexual relations that are initiated by the lawyer or the client and that are an exploitation by the lawyer in the course of a professional representation. The change from "have" to "engage in", together with the sentence at the end of Comment [1], was added in response to the Board Committee on Regulation and Admissions' consideration of 1.8.10 on November 12, 2009.

* Proposed Rule 1.8.10, Draft 8 (11/30/09).

ABA Model Rule Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.10 Sexual Relations With Client	Explanation of Changes to the ABA Model Rule
	(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.	The Model Rule does not define "sexual relations." Paragraph (b) adds a definition of "sexual relations" imported verbatim from California rule 3-120(A) and Bus. & Prof. Code § 6106.9(d). Following the Board Committee on Regulation and Admissions' review of proposed rule 1.8.10 in November 2009, the existing definition of "sexual relations" in rule 3-120(A) was reconsidered by the Commission, along with a broader definition and no definition at all. A broader definition that applies equally (whether the lawyer initiates the sexual relations or is the recipient of advances from the client) runs the risk of subjecting a lawyer to discipline for being the recipient of client conduct that is for the client's sexual arousal, gratification, or abuse. No definition would be consistent with Model rule 1.8(j), but would cause uncertainty as to what definition to apply to rule 1.8.10 cases. The Commission stayed with recommending Bus. & Prof. Code § 6106.9(d) the existing definition in rule 3-120(A), which is consistent with the statutory definition in Bus. & Prof. Code § 6106.9(d).

ABA Model Rule Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	Commission's Proposed Rule Rule 1.8.10 Sexual Relations With Client Comments	Explanation of Changes to the ABA Model Rule
Client-Lawyer Sexual Relationships [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.	~~Client-Lawyer Sexual Relationships~~ ~~[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.~~	See Explanation of Changes for Comment [1].

ABA Model Rule Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	Commission's Proposed Rule Rule 1.8.10 Sexual Relations With Client Comments	Explanation of Changes to the ABA Model Rule
	[1] This Rule prohibits 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. The paragraph (a) prohibition applies equally whether the lawyer is the	Comment [1] replaces Model Rule 1.8, cmt. [17]. While repeating some of the core ethical principles that inform the proposed Rule, Comment [1] cites to California case law supporting the referenced principles. In response to the Board Committee on Regulation and Admissions' consideration of 1.8.10 on November 12, 2009, a sentence is added at the end of Comment [1] stating that the prohibition in this Rule applies whether it is the client or the lawyer who initiates the sexual relations.

ABA Model Rule Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	Commission's Proposed Rule Rule 1.8.10 Sexual Relations With Client Comments	Explanation of Changes to the ABA Model Rule
	moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.	
[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).	[~~18~~2] ~~Sexual relationships that~~ This Rule is not applicable to ongoing consensual sexual relations which predate the ~~client~~ initiation of the lawyer-client relationship ~~are not prohibited. Issues~~ because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the ~~client~~ lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be ~~materially limited~~ adversely affected by the relationship. See ~~Rule~~Rules 1.7(~~a~~d) (~~2~~conflicts of interest), 1.1 (competence) and 2.1 (independent judgment).	Comment [2] is based on Model Rule 1.8, cmt. [18]. The active voice replaces the passive in the first sentence to conform to California rule drafting convention. The term "adversely affected" has been substituted for the Model Rule's "materially limited" because the Commission has not adopted that term in its proposed Rule 1.7.
[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.	[~~19~~3] When the client is an organization, ~~paragraph (j) of~~ this Rule ~~prohibits~~is applicable to a lawyer for the organization (whether inside counsel or outside counsel) ~~from having a~~who has sexual ~~relationship~~relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See Rule 1.13.)	Comment [3] is based on Model Rule 1.8, cmt. [19]. No change in meaning is intended by the changes. The cross-reference to Rule 1.13, concerning the organization as client, refers the lawyer to that Rule for further guidance on the intricacies of representing an organization. The minority argues that the proposed Comment contradicts the rationale underlying the Rule. See Introduction, ¶. 12.

Rule 1.8.10 Sexual Relations With Client
(Commission's Proposed Rule – Clean Version)

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

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

COMMENT

[1] This Rule prohibits 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. The paragraph (a) prohibition applies equally whether the lawyer is the moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.

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

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

Rule 1.8.10 Sexual Relations With Client.
[Sorted by Commenter]

TOTAL = 6 **Agree = 1**
Disagree = 4
Modify = 1
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Crockett, Michael	D	N		The current rule should be continued without any changes.	Commission revised the rule to be a broad prohibition.
2	Gupta, Steve	M	N		The rule should provide for a per se violation and hold lawyers to the same standard as physicians.	Commission revised the rule to be a broad prohibition.
3	Konig, Alan	D	N		The rule is too narrow, the prohibition should not be limited to those situations where competent representation is at risk.	Commission revised the rule to be a broad prohibition.
4	Langford, Carol M.	D	N		The rule should be more of a bright line standard and generally prohibit sex with clients.	Commission revised the rule to be a broad prohibition.
5	Los Angeles County Bar Association	A	Y		Supports as drafted.	Contrary to the public comment proposal supported by the commentator, the Commission revised the rule to be a broad prohibition.
6	San Francisco, Bar Association of	D	Y		This should be a bright line prohibition, a client's case may not be prejudiced and an attorney may have acted competently, but the client may still feel violated Violations are difficult to prove where consent to sexual relations is invariably asserted by the attorney.	Commission revised the rule to be a broad prohibition.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.8.10: Sexual Relations With Client

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew Perlman. The text relevant to proposed Rule 1.8.10 is highlighted)

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

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

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

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

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

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

And Rule 4-210 provides in part as follows:

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

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

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

> (4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.
>
> (5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.
>
> For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

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

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

> exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:
>
> (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
>
> (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
>
> (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of

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the client cause the lawyer to render incompetent representation.

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

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

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

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

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

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

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

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

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

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be "advised in writing of the desirability of seeking" independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client's consent be "in a writing signed by the client." Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

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

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

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

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

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if "the lawyer does not maintain professional liability insurance" of at least $100,000 per occurrence and $300,000 in the aggregate "or if the lawyer's professional liability insurance ceases to be in effect."

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

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

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diligent and competent representation to either the public entity or the client.

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

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and client only if "they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client." If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client "consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction." DR 5-104 does not govern acquisition of "an ownership, possessory, security or other pecuniary interest adverse to a client."

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

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

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

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

New York has no specific counterpart to Rule l.8(k), and New York's counterpart to Rule l.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

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

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

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

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

Texas: Rule 1.08(c) provides that prior to the conclusion of "all aspects of the matter giving rise to the lawyer's employment," a lawyer shall not make or negotiate an agreement "with a client, prospective client, or former client" giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

> (d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
>
> (1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

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

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

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

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Proposed Rule 1.15 [4-100]
"Handling Funds and Property of Clients and Other Persons"

(Draft #17, 12/12/09)

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

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 4-100
Statute	
Case law	

☑ State Rule(s) Variations (See provided excerpt of selected state variations.)

Fifteen states have created their own rule or substantially amended ABA Model Rule 1.15; twelve states have made substantive amendments to the Model Rule. (See Introduction, at par. 6.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __9__
Opposed Rule as Recommended for Adoption __2__
Abstain __0__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart ☑ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

State Bar Office of the Chief Trial Counsel and local bar association ethics committees (see public commenter chart)

☑ Very Controversial – Explanation:

Local bar association ethics committees have differing views on whether Model Rule 1.15 is preferable to the proposed rule. Also, the Los Angeles County Bar Association believes that advance fees should not be required to be held in a client trust account until earned. However, the State Bar Office of the Chief Trial Counsel takes the opposite position on advance fees and favors a requirement that advance fees be held in a client trust account until earned.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

December 2009
(Draft rule to be considered after public comment.)

INTRODUCTION:

Proposed Rule 1.15 is a complete rewrite of the general language of the ABA Model Rule to provide detailed standards for client protection and guidance of lawyers. The proposed Rule largely codifies existing California law rather than changing it. The existing California law, especially the case law, is complex and the proposed rule reflects that complexity. Codifying the existing law in a comprehensive rule promotes compliance by organizing within a rule structure otherwise disparate and inaccessible trust accounting duties. Parts of the proposal also reject some ABA policies because they are inconsistent with statutes (Business & Professions Code §§ 6091.1 and 6210-6228), violate access to justice concepts, and would impair disciplinary enforcement.

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

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

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* Proposed Rule, Draft 17 (12/12/09).

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

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

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

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

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

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

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

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

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

Proposed Rule 1.15:

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

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

(a) standards concerning the handling of electronic financial transactions;

(b) requirements with respect disciplinary audits; and

(c) identification of alternatives to keeping disputed property in trust (when a third party and a client dispute distribution of funds or property and do not want the lawyer to maintain the funds) that are available to the lawyer, such as by the use of interpleader.

Minority:

9. A minority believe that Model Rule 1.15 is a much more understandable and workable rule on safekeeping property for California lawyers than this very complex rule for the reasons stated by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee. In addition, California should provide the same level of public protection provided in the Model Rule and in the rule followed by most jurisdictions by requiring advance fees to be deposited in a client trust account. Having such a requirement would greatly simplify this rule and would reconcile this rule with proposed rule 1.5.

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

* Proposed Rule, Draft 17 (12/12/09). Redline/strikeout showing changes to the ABA Model Rule

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

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

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

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

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

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

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

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

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

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

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

ABA Model Rule Rule 1.15 Safekeeping Property	Commission's Proposed Rule* Rule 1.15 Handling Funds and Property of Clients and Other Persons	Explanation of Changes to the ABA Model Rule
	(6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and (7) promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.	Subparagraph (k)(6) has been added to protect the public in disciplinary proceedings to require lawyers to comply with State Bar Court ordered audits. This concept does not exist in Model Rule 1.15 and is needed for greater public protection. Subparagraph (k)(7) restates Model Rule 1.15(d), sentence 2 ("Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive...") The Commission has opted for a request of the client or other person as a trigger to the duty to distribute funds or property, because it is clearer and because it empowers the client or other person. The proposed rule has been clarified that only "undisputed" funds or property may be distributed by the lawyer.
	(l) **Scope and Application of Rule.** This Rule does not apply to the following: (1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).	This paragraph clarifies application of this Rule to multijurisdictional practice. In particular, subparagraph (l)(4) has been added to help assure accountability and recordkeeping when funds are held in a non-Californ ia bank or financial institution. The language used in subparagraph (l)(4) was drafted with input from a representative of the Office of the Chief Trial Counsel.

ABA Model Rule Rule 1.15 Safekeeping Property	Commission's Proposed Rule* Rule 1.15 Handling Funds and Property of Clients and Other Persons	Explanation of Changes to the ABA Model Rule
	(2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California. (3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest. (4) At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (l)(1) and (2) shall provide information respecting the lawyer's or law firm's non-California bank or financial institution account holding client or third party funds, including, but not limited to, requested bank or financial institution records.	

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

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

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

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

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

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

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

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

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

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

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

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

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

(Commission's Proposed Rule – Clean Version)

(a) Duty to deposit entrusted funds in trust account. A lawyer shall deposit all funds that the lawyer receives or holds for the benefit of a client or other person in connection with the performance of a legal service or representation by the lawyer, including an advance for costs and expenses, in one or more trust accounts in accordance with this Rule.

(b) Approved depositories for trust accounts. Except as provided in paragraph (l), or as expressly ordered by a tribunal, all trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.

(c) Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.

(d) Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:

(1) subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and

(2) if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.

(e) Duties concerning maintenance and use of trust funds. A lawyer shall maintain inviolate all funds on deposit in a trust account and all property entrusted to the lawyer for the benefit of a client or other person until distributed in accordance with this Rule.

(f) Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:

(1) funds reasonably sufficient to pay bank charges;

(2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;

(3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;

(4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or

(5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.

(g) Duties when lawyer's entitlement to funds or property becomes fixed or the lawyer's entitlement is disputed. In the case of property, or funds held in a trust account, that belong in part to a client or other person and in part to the lawyer, the lawyer shall withdraw or distribute the

portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:

(1) the client or other person may still dispute that the lawyer is entitled to the funds or property;

(2) when the right of a lawyer to receive a portion of entrusted funds or property is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not distribute the disputed portion until the dispute is finally resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order;

(3) a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds or property in the circumstances of paragraph (g)(2); and

(4) if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.

(h) Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order, except that the lawyer shall make any distribution required by paragraph (k)(7).

(i) Duties when entitlement to funds or property is disputed by third party. When the right of a client or other person to receive a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the lawyer shall not distribute the disputed portion until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order. Nevertheless the lawyer shall distribute any undisputed entrusted funds or property, as required by paragraph (k)(7).

(j) Credit card, debit, or other electronically transferred payments. A lawyer may establish a relationship with a merchant bank or electronic payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.

(k) Management, recordkeeping and accounting for funds and property held in trust. A lawyer shall:

(1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;

(2) identify and label securities and property of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, segregate any securities or property from the lawyer's own securities or property of the same character, and notify the client or other person of the location of the property;

(3) maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;

(4) account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;

(5) preserve records of all entrusted funds or property for a period of no less than five years after final appropriate distribution of such funds or property;

(6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.

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

(1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).

(2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.

(3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.

(4) At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (l)(1) and (2) shall provide information respecting the lawyer's or law firm's non-California bank or financial institution account holding client or third party funds,

including, but not limited to, requested bank or financial institution records.

(m) Board of Governors' Standards. The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

Definitions

[1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.

[2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. (See, e.g., Business and Professions Code section 6106.)

[3] As used in this Rule "client" means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.

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

[5] As used in this Rule, "advance for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf.

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

Application of Rule

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

Paragraph (a) – Application to true retainer fees

[8] Because a true retainer fee, as defined in Rule 1.5(f), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].)

[9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.) When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

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

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

Paragraph (e) – Duty to hold funds inviolate

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

Paragraphs (g) – (i) – Disputed fees

[12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.

[13] A lawyer may not withhold the undisputed portion of a client's or other person's funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 240–241 [266 Cal.Rptr. 632].)

[14] A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.

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

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

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

Other Guidance

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

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]

TOTAL = 9 **Agree = 2**
Disagree = 2
Modify = 5
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Bach, James A.	A			Whole-heartedly endorse and recommend the proposed rule that would permit accepting advance fees outside of the trust account, and requiring deposit into the trust account only if those fees are disputed.	No comment necessary.
2	COPRAC	M			Among the unanswered questions before this proposed rule was the propriety of transferring disputed trust funds to court by way of interpleader. We support the Commission's recommendation in favor of this dispute resolution device. We urge only that this provision, now in Comment [14], be included as part of the Rule itself. In addition, we subscribe to the importance of establishing definitions of key terms, and we in accord with the definitions developed by the Commission. We urge only that these definitions be incorporated into the Rule itself.	Consistent with this recommendation, a majority of the Drafting Team recommends moving the concept of interpleader into the black letter rule. Paragraph (g)(2) has been changed accordingly. [2] Because of the length of this proposed Rule, the Commission recommends that definitions which apply to this particular rule only, should remain in the comments.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

[2] Ms. Peck and Mr. Sapiro recommend that the concept of interpleader be in the black letter rule; Mr. Kehr recommends that it remain in the comment and that the comment be clarified. See fn.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 2 Modify = 5 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					Finally, we ask the Commission to clarify the status of the "standards" heretofore promulgated by the Board of Governors for purpose of the existing Rule 4-100. We recommend that the proposed Rule 1.15 call for the continued efficacy of those standards pending Board of Governors review to determine whether changes are in order once proposed Rule 1.15 is adopted.	The Commission agrees. For this reason, it has proposed the continued authority of the Board of Governors to adopt the standards. (See proposed Rule 1.15(m).) The Commission recommends that: (1) upon completion of a proposed Rule 1.15, that the Board of Governors authorize the appropriate committee or other entity to review and update the standards for review and adoption by the Board of Governors; (2) that the current standards remain fully applicable to proposed rule 1.15 as they are to current rule 4-100; (3) the current Standards be republished with any new effective rule as of the effective date of the new rules, unless the Supreme Court otherwise orders; and (4) the current Standards remain in effect unless and until the Board of Governors adopts new or revised standards.
3	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M			ABA Model Rule 1.15 is superior in form and function to proposed Rule 1.15.	The Commission has adopted all of the concepts in Model Rule 1.15, except the requirement to place advance fees in a trust account, as LACBA PREC has suggested.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]

TOTAL = 9 Agree = 2, Disagree = 2, Modify = 5, NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Although no one argues with the Commission's observation that a strong rule may deter misconduct, proposed Rule 1.15 is not a strong disciplinary standard but, rather, an impossibly detailed trap for the unwary. This rule should be published as a guideline, as part of the State Bar's official publication on client trust accounts (which the state bar currently publishes, and which it could easily place online or email to each of its active members), rather than as a disciplinary rule.	The Commission has concluded that ABA Model Rule 1.15, which does not even provide for the establishment of a trust account, does not provide adequate public protection and does not provide adequate guidance to lawyers concerning their fiduciary duties to clients and other persons or the handling, management, recordkeeping and accounting for entrusted funds and properties. As other states have done before California, the Commission has concluded that a recitation of these duties as they now exist in California is the best means of protecting clients and other persons from a breach and to notify lawyers of the minimum standards required of them.
					A majority of our members agrees with the Commission that, based on longstanding and well understood California law, costs must be deposited into the client trust account, but advanced fees may or may not be. We have no objection to including a recommendation in the State Bar's publication, to the effect that advanced fees should be safeguarded against the possibility that, if the services are not completed, the lawyer will be ethically required to refund the unearned portion of the fees. However, it ought not to be a disciplinary offense if a California lawyer follows the traditional rule and does not	The Commission agrees with LACBA's position that advance fees are not required to be deposited in a client trust account. It disagrees that the proposed rule 1.15(d) should be omitted from the rule, but rather should be in a State Bar publication. If, as LACBA asserts, this has been the law in California, the Commission believes that the proposed rule should reflect the law for the guidance of lawyers, the Courts, clients and the public.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 2 Modify = 5 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					deposit the advanced fee in the trust account, particularly where the services were fully performed and the fee fully earned. We recommend that ABA Model Rule 1.15 be adopted, except that the word "fees" be deleted from Model Rule subpart (c); or alternatively, that current Rule 4-100 be retained as is, and simply renumbered as Rule 1.15.	The Commission disagrees. Public protection and lawyer guidance require greater specificity and greater direction than afforded in Model Rule 1.15.
4	Medina, Michael	D		1.15(j)	My office does bankruptcy filings. Federal rules required all cases be filed electronically, including fee payments. State bar rules require that court costs and fees be deposited in Attorney-Client trust accounts. Financial institutions will not issue debit cards or credit cards on IOLTA accounts, i.e.: Attorney-Client Trust Accounts. Therefore, the only way to service our clients is to transfer funds from Trust accounts to General Accounts and electronically submit fee payments. I can have the clients give me a waiver, but, I think, as to a non-waivable provision.	The Commission agrees that electronic payments are the way of the future and that the rule must be flexible enough to provide for electronic deposits and payments. The Commission disagrees that the rule prohibits electronic payments or receipts or that there are not commercial means of both protecting a client trust account from intrusion and control by third party financial institutions which may result in loss of client funds and receiving and making payments for the benefit of a client. Assuming arguendo that no financial institution will issue a credit card or debit card on an attorney-client trust account, which is not our experience, there are still other means of making electronic payments (e.g., by making an electronic payment from the general account first and then reimbursing the general account from the trust account).

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 2 Modify = 5 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					I believe in the future most business will be conducted electronically. State Bar rules need to recognize this legitimate way of doing business. Moreover, Federal Courts are not going to change their procedures to accommodate individual state rules for attorneys.	Improving commercial means of making electronic payments by lawyers is outside of the scope of the Commission. The Commission urges the Board of Governors to refer this issue to the appropriate standing committee or request the assistance of an appropriate section for study, report and recommendations.
5	Office of Chief Trial Counsel ("OCTC"), State Bar	M			1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this	No comment. The Commission disagrees. The Commission has concluded that Rule 1.15 should not require advances for fees to be placed in a client trust account, as previously reported and as is the state of the law at the present time. The Commission has not received reports of confusion or complaints about lack of consistency concerning the current rule . Accordingly, the risk of confusion or perceived inconsistency is unlikely. The Commission disagrees with the alternative suggestion that no fees should be placed in a trust

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 2 Modify = 5 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					proposal is adopted, it may require a change to Comment 10.	account. In appropriate circumstances, placing advances for fees in a client trust account provides greater client protection. The OCTC proposal contravenes current required deposits of advances for fees in a trust account even where the advances may have been initially held in a general account. (See *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.)
					2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).)	The Commission has clarified subparagraph (g), in order to prevent confusion.
					OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 - 14.	The Commission disagrees that it should not deviate from ABA Model Rule 1.15 for the reasons stated in its initial report.
					3. OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.	The Commission disagrees that the word “inviolate” should be removed. The duty to maintain inviolate client and third party funds and property has been a part of the California trust account rule since 1927. “Maintaining” funds and property in trust without the word “inviolate” may be ambiguous (implying a duty as to the depository only). The word “inviolate” clarifies the ambiguity, and has been interpreted to mean that the amount in the account is not permitted to dip below the amount to be held. The danger in removing “inviolate” is that some may interpret a change in policy.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 2 Modify = 5 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.1 5(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.	The Commission disagrees. The Commission reordered ABA Model Rule 1.15 and placed duties with respect to property primarily in proposed subparagraph (k)(2). The Commission agrees that subparagraph (k)(2) should be clarified to include the concept of the first sentence of Model Rule 1.15(a). The Commission shares the concern that there should be no diminution of the fundamental prohibition against commingling. The Commission disagrees that listing the five recognized exceptions to the prohibition in the rule undermines the commingling prohibition. The exceptions set forth in (f)(1) and (4) and (5) have been part of California's rule since 1975, although (f)(4) and (5) have been amplified with the addition of "other person" to the rule. Omitting these traditional exceptions would suggest that there is a change in policy and that they are no longer exceptions. The exceptions set forth in (f)(1)and (2) are important public protection issues which prioritize prompt restitution to consumers when loss occurs. This policy was set by the California Supreme Court in *Guzzetta v. State Bar* (1987) 43 Cal.3d 962. The Commission has concluded that this is good policy for consumer protection.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 2 Modify = 5 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4'h 430, 439; *Obrien v. Jones* (2000) 23 Cal.4'h 40, 48. See also *In re Accusation a/Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.	The Commission disagrees that subparagraph (k)(6) was intended to or does limit the authority or jurisdiction of Supreme Court or other court to issue an order for an audit. Proposed subparagraph (k)(6) is limited to lawyer discipline for failing to comply with an audit ordered by the State Bar Court pursuant to the Rules of Procedure, since the State Bar Court is not otherwise empowered through sanction, contempt or other authority to enforce its orders for audit. The Commission does believe that it should provide a separate rule requiring a lawyer to comply with a court order, since Business and Professions Code section 6103 already covers the duty and provides for suspension or disbarment for failure to comply with that duty. Because of the case law that OCTC cites, because (k)(6) has been part of the rules since at least 1983, and because Business and Professions Code section 6087 provides that the State Bar's promulgation of Rules of Professional Conduct does not limit or alter the powers of the Supreme Court, the Commission did not believe that any explanatory comment was needed.
					6. OCTC is concerned that the language of rule 1.15(1) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This	The Commission has clarified this in new comment [16a]. OCTC's desire to obtain jurisdiction to subpoena financial records from California lawyers who are

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 2 Modify = 5 NI = 0
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)	outside of the State Bar's subpoena power outside of California cannot be cured by adoption or rejection of proposed Rule 1.15. Perhaps it may be approached in a different forum (e.g., the Legislature or the California Supreme Court, through a California Rule of Court). The Commission continues to monitor conformance between this rule and proposed rule 8.5.
6	Orange County Bar Association	M			The OCBA recommends for consistency purposes that the definition appear in the body of the Proposed Rule, rather than in the Comments. The OCBA also recommends that a definition of the term "fixed," as used in subsection (g), be included in order to provide useful guidance to the membership with regard to their duties under the Proposed Rule.	Because of the length of this proposed Rule, the Commission recommends that definitions which only apply to this particular rule should remain in the comments. The Commission agrees that a definition of "fixed" would be useful. The Commission has nevertheless concluded that there are too many facts and circumstances in individual cases which may affect [3] when a fee is fixed to provide any useful definition.

[3] Ms. Peck and Mr. Kehr recommend that no further attempts at defining "fixed" be pursued. Mr. Sapiro believes we should discuss whether we should attempt to define it.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]						
						TOTAL = 9 **Agree = 2 Disagree = 2 Modify = 5 NI = 0**
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
7	San Diego County Bar Association Legal Ethics Committee	A			Approve the rule in its entirety.	No further comment.
8	Santa Clara County Bar Association	M			The SCCBA believes that the proposed rule does not adequately account for the differences and distinctions between advance payment of fees; true retainers and flat fees. The proposed rule speaks to advanced payment of fees and true retainers but does not explain the treatment of flat fees. In fact, the definition and discussion of advanced fees and true retainers in Comments [5], [8], [9] and [10] should be clearer in defining these three categories of fees. For example, in Comment [5], it uses the word "retainer" in defining an "advance for fees." We recommend that the word "retainer" be deleted so that the practitioner does not confuse it with a "true retainer." In addition, a flat fee needs to be defined and distinguished from a true retainer. The definition and discussion of a "true retainer" does not make clear that it is not the same as a flat fee, a common mistake made by many practitioners.	Consistent with this recommendation, comment [5] has been clarified. The Commission disagrees that comments [8], [9] and [10] should be clarified further. The definitions of a true retainer is set forth in 1.5(f) as cross-referenced here. The comments distinguish between a true retainer and an advance fee. Further clarification can be developed in the State Bar Trust Account Manual.[4] The Commission agrees and has amended comment [5]. The Commission disagrees. A discussion of the distinction between a flat fee and a true retainer, if one is needed, should be in rule 1.5 rather than this rule. Alternatively, rather than lengthen the rule further, the distinction can be made in the State Bar Trust Account Manual.

[4] Mr. Kehr and Ms. Peck do not recommend further clarification of comments [8] – [10]. Mr. Sapiro recommends that we discuss whether the comments should be clarified. He has observed that if the comments are not clear to the Santa Clara County Bar Association commenters, it is likely that they are not likely to be clear to the membership.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons. [Sorted by Commenter]

TOTAL = 9 Agree = 2, Disagree = 2, Modify = 5, NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	Smith, Paul W.	D		1.15(j)	I believe subparagraph (j) regarding the method of accepting credit card payments should be modified. As proposed it ignores the economic realities of accepting payments by credit card, at least as to small firms or sole practitioners. The service providers I have used have two charges. A monthly service fee and a percentage of the transaction. For a large majority of us that only have a few trust account transactions a month it is not justifiable to be paying $30-$45 per month just for the privilege of accepting cards which is duplicated if we accept them in the general account. Also, I understand that very few providers will deposit the funds in one account and take the charges out of another one. This rule ignores that reality. It would be just as safe and much more practical to allow the initial funds to be credited to the general account and when cleared, moved to the trust account. What is the "safety" difference from having a physical check in my hand which I manually deposit in the trust account verses moving funds electronically or writing a check from the general to the trust account? Many of us will continue to refuse to accept trust fund deposits because of this. It is form over substance and ignores the realities of business. Please reconsider.	The Commission agrees that commercial resources catering to the special needs of lawyers serving fiduciaries are limited. Accordingly, it has urged the Board of Governors to refer this issue to the appropriate standing committee or section for further study, report and recommendations. The Commission disagrees with the solution recommended by the commenter. After careful and serious study, the Commission concluded that providing a short window of time within which a lawyer may permit an advance credit card cost payment to be deposited into a non-client trust account for immediate transfer to a client trust account was not good public protection policy. Any period of commingling of a lawyer's funds with those of the client creates a risk of loss of client funds to a lawyer's third party creditors, asset freezing or institutional closure without federal insurance (since a general account need not be in a FDIC insured bank). These dangers plus the availability of other commercial means of handling advance costs payments outweigh creating a special exception to the commingling policy in the rule.

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

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2008 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

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

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

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

> [2] The overdraft agreement requires that all overdrafts be reported to the Office of General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust account particularly in exchange for the institution's promise to delay or not to report an overdraft....
>
> [3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Proposed Rule 3.3 [5-200]
"Candor Toward the Tribunal"

(Draft #10, 12/14/09)

Summary: Proposed Rule 3.3, which is based on Model Rule 3.3, sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The Rule replaces current Rule 5-200 (Trial Conduct), which is narrower in scope than Model Rule 3.3. The Rule imposes on lawyers the same duties as the Model Rule to avoid conduct that undermines the integrity of the adjudicative process, with several significant differences. See Introduction & Explanation of Changes.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☑ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules: RPC 5-200

Statute:

Case law: *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82 n.9.

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption ___7__
Opposed Rule as Recommended for Adoption __1___
Abstain __1__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

The Rule imports into the disciplinary rules several duties that are not expressed in current rule 5-200, but which are established in case law.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.3* Candor to the Tribunal

December 2009
(Draft rule following consideration of public comment)

INTRODUCTION:

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

Minority. A minority of the Commission believes that, aside from the changes made to the Model Rule to conform the proposed Rule to California's policy of strictly limiting disclosures of confidential information and certain other clarifying changes, most of the revisions to the Model Rule that the Commission is recommending are unwarranted. In particular, the minority takes the position that the change the

* Proposed Rule 3.3, Draft 10 (12/14/09).

Commission has implemented to paragraph (c) concerning the duration of the duties under this Rule runs counter to prevailing authority in every other jurisdiction and threatens to undermine the integrity of the judicial process. See Minority Statement in Explanation of Changes for paragraph (c). See also Explanation of Changes for Comment [6].

A separate minority takes issue with subparagraph (a)(2). See Explanation of Changes for subparagraph (a)(2).

Variations in Other Jurisdictions. Every jurisdiction has adopted a version of Model Rule 3.3. See Selected State Variations excerpt, below.

ABA Model Rule **Rule 3.3 Candor Toward The Tribunal**	**Commission's Proposed Rule*** **Rule 3.3 Candor Toward the Tribunal**	**Explanation of Changes to the ABA Model Rule**
(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	Subparagraph (a)(1) is identical to Model Rule (a)(1).
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or	(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; ~~or~~	Subparagraph (a)(2) is identical to Model Rule (a)(2). The Commission determined that the Model Rule comports with California law. See, e.g., *Batt v. City and County of San Francisco*, 155 Cal.App.4th 65, 82n. 9 (2007). However, see Comment [4], which notes that this requirement might implicate constitutional concerns when a lawyer is engaged in the defense of a criminal defendant. Minority. A minority view is that the requirement to disclose adverse authority that is not disclosed by opposing counsel where opposing counsel is present is contrary to California law, citing, *Schaefer v. State Bar*, 26 Cal.2d 739, 747-748 (1945).
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary,	(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures , including, if necessary, disclosure to the	Subparagraph (a)(3) is similar to Model Rule 3.3(a)(3) except that it does not require disclosure of the false evidence to the tribunal if the disclosure is prohibited by Business and Professions Code § 6068(e). The paragraph reflects the rule in California that a lawyer's duty of candor to a tribunal is circumscribed by the lawyer's duty under section 6068(e) to preserve client confidential information.

* Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 3.3 Candor Toward The Tribunal	Commission's Proposed Rule* Rule 3.3 Candor Toward the Tribunal	Explanation of Changes to the ABA Model Rule
disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.	tribunal, unless disclosure is prohibited by Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false~~.~~; or	
	(4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.	Subparagraph (a)(4) has no counterpart in the Model Rule. It continues the prohibition in current California rule 5-200(D) against citing invalid authority. However, it goes beyond the current California rule in requiring a lawyer to correct an invalid citation previously made to the tribunal. There is no counterpart in Model Rule 3.3.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.	(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures~~, including, if necessary, disclosure~~ to the ~~tribunal~~extent permitted by Business and Professions Code section 6068(e).	Paragraph (b) imposes a special obligation on lawyers to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. See Comment [12]. Paragraph (b) follows Model Rule 3.3(b), except it substitutes the clause, "to the extent permitted by Business and Professions Code section 6068(e)" for the phrase "if necessary, disclosure to the Tribunal" at the end of the paragraph. See the Explanation of Changes to paragraph (a)(3).
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires	(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first	Paragraph (c) is a significant departure from Model Rule 3.3(c) in two respects. First, unlike the Model Rule that imposes an obligation through the conclusion of the proceeding, paragraph (c)

ABA Model Rule Rule 3.3 Candor Toward The Tribunal	Commission's Proposed Rule* Rule 3.3 Candor Toward the Tribunal	Explanation of Changes to the ABA Model Rule
disclosure of information otherwise protected by Rule 1.6.	~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6~~.	provides that the obligations set forth in paragraphs (a) and (b) should end either with the termination of the representation or the conclusion of the proceeding. The Commission determined that the lawyer lacks standing after termination of the lawyer's employment and that the lawyer should not have a duty to be involved in a time-consuming controversy after the lawyer has been discharged which could abrogate the lawyer's loyalty to a former client. Second, paragraph (c) deletes the clause "and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." See the Explanation of Changes to paragraph (a)(3). Minority. A minority of the Commission opposes the first departure from the Model Rule for a number of reasons: (1) a lawyer who has been terminated or has withdrawn does not lack standing to correct the lawyer's false statement of material law or fact under paragraph (a); (2) the lawyer would not interfere with the relationship between the former client and the client's new lawyer by advising the new lawyer of relevant facts including the existence of criminal or fraudulent conduct in the proceeding or urging that corrective action be taken (see Comment [10]); (3) the lawyer may only take remedial measures under paragraph (a)(3) and (b) to the extent permitted under Business and Professions Code §6068(e); (4) the proposal would allow lawyers to circumvent paragraphs (a) and (b) by simply withdrawing from the representation; and (5) no known state variation limits paragraph 3.3(c) as proposed.

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

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule ~~1.0~~1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	Comment [1] is identical to the Model Rule counterpart, except that the reference for the definition of tribunal is to Rule 1.0.1, which is the number assigned to the Terminology section in the Proposed Rules.
[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.	[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently~~ However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause~~;~~, the lawyer must not ~~allow the tribunal to be misled by~~make false statements of law or fact or present evidence that the lawyer knows to be false.	The first two sentences in Comment [2] are identical to the Model Rule counterpart. The third sentence in Model Rule Comment [2] is deleted because the lawyer's duty of confidentiality under Business and Professions Code § 6068(e) is not qualified by the lawyer's duty of candor to the tribunal. The final sentence is the same as the ABA counterpart, except for several grammatical changes and to clarify that the lawyer's obligation is to not make false statements of law or fact or present evidence the lawyer knows to be false rather than ensuring that the tribunal will not be misled.

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

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
Legal Argument [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.	**Legal Argument** [4] ~~Legal argument based on~~Although a ~~knowingly false representation of law constitutes dishonesty toward the tribunal. A~~ lawyer is not required to make a disinterested exposition of the law, ~~but must recognize the existence of pertinent~~ legal ~~authorities~~argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. ~~Furthermore, as stated in paragraph~~ A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2)~~, an advocate has~~ requires a ~~duty~~lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. ~~The underlying concept is that legal argument is a discussion seeking to determine~~ Legal authority in the controlling jurisdiction may include legal ~~premises properly applicable~~authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the	The first sentence of Comment [4] is derived from the first sentence in Comment [4] of the comments to the New York Rules of Professional Conduct. The sentence, in effect, reverses the first and second sentences in the Model Rule comment without changing the meaning. The second sentence is new and helps explain the reason for the obligation to disclose applicable law. The third sentence largely tracks its Model Rule counterpart, except that it substitutes "lawyer" for "advocate," and adds the requirement that the legal authority be known to the lawyer. The fourth and fifth sentences provide guidance on what constitutes "legal authority in the controlling jurisdiction." The sixth sentence is new and was added in response to public comments that raised concerns that imposing on a criminal defense lawyer the obligations of subparagraph (a)(2) might implicate constitutional principles of due process and effective assistance of counsel. The final sentence is new and provides guidance concerning the lawyer's obligations under paragraph (a)(4) of the Rule, a provision that has no counterpart in the Model Rule.

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the ~~case~~tribunal.	
Offering Evidence [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	**Offering Evidence** [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes~~. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence~~. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	The first sentence in Comment [5] is identical to the Model Rule counterpart. The second sentence in the Model Rule Comment has been deleted. The final sentence in Comment [5] is identical to the Model Rule counterpart.
[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.	[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit ~~or otherwise~~	The first and second sentences in Comment [6] are identical to the Model Rule counterpart. The third sentence has been added to point the reader to Comment [7], which provides relates to a lawyer's duties concerning testimony by a criminal defendant. The fourth sentence diverges from its Model Rule counterpart in two respects. First, it provides additional guidance that a lawyer may not base arguments to the trier of fact on the evidence known to be false. Second, the clause, "or

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	~~permit the witness to present~~ the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.	otherwise permit the witness to present testimony that the lawyer knows to be false," has been stricken. The Commission believes that clause lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. Because the lawyer was not offering the evidence for the purpose of establishing its falsity, see Comment [5], or was in a position to "prevent" or not "otherwise permit" the evidence because of its unexpectedness, the lawyer could be subject to discipline merely by having called the witness. *Minority*. A minority of the Commission disagrees. The minority takes the position that reading the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) assuages the concerns of the Commission and public commenters.
[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].	[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. ~~In some jurisdictions, however, courts have required counsel to present the accused as~~ If a ~~witness or to give a narrative statement if~~criminal defendant insists on testifying, and the ~~accused so desires, even if counsel~~lawyer knows that the testimony ~~or statement~~ will be false~~. The obligation of~~, the ~~advocate under~~lawyer may offer the ~~Rules~~testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of ~~Professional Conduct is~~conduct	The first sentence in Comment [7] is identical to the Model Rule counterpart. The second sentence in the Model Rule Comment has been replaced because California and Ninth Circuit law permits defense counsel to ask a criminal defendant client to testify in the "narrative" fashion as explained in the second sentence and in the cases cited in the proposed comment. The third sentence provides adds a reference to the State Bar Act, which also regulates a lawyer's conduct before tribunals. The reference to Comment [9] has been deleted because the

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v Jennings* (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to ~~such requirements. See also Comment [9]~~applicable constitutional provisions.	Commission recommends deletion of Model Rule 3.3, cmt. [9].
[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	Comment [8] is identical to the Model Rule counterpart.
[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of	~~[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of~~	Model Rule Comment [9] has been deleted because it does not provide useful guidance and is not consistent with current California law.

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].	~~evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~	
Remedial Measures [10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the	**Remedial Measures** [~~10~~9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. ~~In such situations, the advocate's~~ The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the ~~advocate~~lawyer must take further remedial ~~action. If withdrawal~~	The first sentence in Comment [9] is identical to the first sentence in Model Rule Comment [10]. The second sentence is identical to its Model Rule counterpart. The third sentence is identical to the third sentence in Model Rule Comment [10]. The fourth sentence is derived from the fourth sentence in Model Rule Comment [10]. The proposed Comment replaces "advocate's" with "lawyer's", since advocate is not a defined term in the rules and expands on the remedial measures to be taken to include advising the client of the consequences of providing perjured testimony. The fifth sentence combines the fourth and fifth sentences in Model Rule Comment [10]. It changes "advocate" to "lawyer" and clarifies that remedial measures may require seeking

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.	~~from~~measures (see Comment [10]), and may be required to seek permission to withdraw under Rule 1.16(b), depending on the ~~representation is not permitted or will not undo the effect~~materiality of the false evidence~~, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing~~.	permission to withdraw depending on the materiality of the false evidence. The sentence departs from the ABA counterpart which obligates a lawyer to reveal information that would otherwise be protected by the lawyer's duty of confidentiality. Thus, the fifth and sixth sentences of the Model Rule Comment have been substantially revised.
[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.	~~[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~	Model Rule Comment [11] is not included because the State Bar Act and California case law obligate a lawyer to protect the client's confidential information, which duty is not superseded by the lawyer's obligation of candor toward a tribunal. See Business and Professions Code § 6068(e).

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).	Comment [10] has no Model Rule counterpart and is intended to provide guidance on what constitutes "reasonable remedial measures" under paragraphs (a)(3) and (b).
	[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.	Comment [11] has no Model Rule counterpart and is intended to clarify that the obligation to take "reasonable remedial measures" under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question and that the duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to investigate or represent a person concerning that person's conduct in the prior proceeding.

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

ABA Model Rule Rule 3.3 Candor Toward The Tribunal Comment	Commission's Proposed Rule Rule 3.3 Candor Toward the Tribunal Comment	Explanation of Changes to the ABA Model Rule
	for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.	A fourth sentence has been added to clarify that there may be obligations that go beyond the rule, citing, for example, Rule 3.8 on duties of prosecutors.
Ex Parte Proceedings [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.	~~**Ex Parte Proceedings**~~ ~~[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~	Model Rule 3.3, Comment [14] is not included in the comments to proposed Rule 3.3.
Withdrawal [15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may,	**Withdrawal** [~~15~~14] ~~Normally, a~~A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's ~~disclosure~~taking reasonable	The first sentence in comment [14] is similar to the first sentence in Model Rule Comment [15], except "disclosure" is replaced with "taking reasonable remedial measures" to make the comment consistent with the wording of the proposed Rule.

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

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

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false; or

(4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Business and Professions Code section 6068(e).

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows, or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

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

evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. (*Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].) There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. (*Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].) The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

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

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal

defendants, see comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v Jennings* (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. (See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671].) A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

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

[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures

do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).

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

Preserving Integrity of Adjudicative Process

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

Duration of Obligation

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

Withdrawal

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

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0**
Disagree = 1
Modify = 6
NI = 2

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Public Defenders Association	M		(a)(2)	CPDA believes that Section a(2) should be deleted from Proposed Rule 3.3 As the Proposed Rule is currently written, it deprives a defendant of effective assistance of counsel in a criminal case. It would force counsel to abandon the duty of loyalty to the client in favor of disclosing harmful information to the court. The adversarial nature of the criminal justice process would be destroyed if the attorney for the accused cannot serve as an advocate for the accused and as an adversary of the prosecution. It is also clear that the proposed revision contradicts existing California law. In *Schaefer v State Bar*, the court held that the then-existing California Rules of Prof. Conduct did not support the discipline of an attorney who had failed to cite contrary authority to the court when opposing counsel was present at the hearing. CPDA believes that because a prosecutor will be present to urge the Government's position in court, the judge will be afforded access to whatever authority the prosecution believes is germane to the case, because the	The Commission does not agree with CPDA's or Michael Judge's objections (see below) to proposed paragraph (a)(2) as applied to criminal defense counsel and recommend that the paragraph not be deleted from the Rule. The distinction between disclosing harmful information to the court and having to advise the court of the controlling law is long standing and applies to all lawyers including defense counsel in criminal cases. There is no known authority, and none is cited, that requiring a criminal defense counsel in presenting a matter to a tribunal to advise the court of known controlling authority that is directly adverse to the client constitutes ineffective assistance of counsel under *Strickland v. Washington*. Aside from whether the term "controlling" should modify "jurisdiction" or "authority" (discussed below), paragraph (a)(2) has been part of lawyer codes for many years without proof that it undermines defense counsel's duties under the 6th Amendment. Nor does the Rule contradict California law. The Supreme Court in Schaefer v. State Bar found there was an absence of evidence that the lawyer in that case had intentionally attempted to mislead the court (i.e. that the lawyer had to failed to disclose controlling legal authority "known to the lawyer to

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9	Agree = 0
	Disagree = 1
	Modify = 6
	NI = 2

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					prosecutor in a criminal case has "the responsibility of a minister of justice. . . ." (ABA Model Rule 3.8, Comment [1]) We support Michael Judge and Janice Fukai's reasoning and comments in opposition to this Rule as well.	be directly adverse to the position of the client and not disclosed by opposing counsel"). The lawyer in that case had written the court a letter after being apprised of his failure to cite the case that he believed in good faith that the relevant statement in the case was dictum and that it did not serve to overrule the case he had relied upon. *Schaefer* is a 1945 case applying Business and Professions Code §6068(d) and decided many years before the Model Code from which the current rule derives. *Schaefer* does not support the notion that the rule does not apply to lawyers in California. Nevertheless, the Commission added the following sentence to Comment [4]: Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules.
				Comment [4]	We have no objection to the first sentence of Comment [4] nor to the last sentence of Comment [4], but we do object to those sentences in between and feel they should be deleted.	The Commission agreed and made appropriate revisions to both Comment [4] and paragraph (a)(2) (see RRC Response to LACBA, below).

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9	Agree = 0
	Disagree = 1
	Modify = 6
	NI = 2

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [7]	CPDA disagrees with the portion of Comment [7] which requires that the attorney seek permission from the court to withdraw when the attorney believes that the client will be committing perjury and asks that that portion of the Comment be deleted.	CPDA appropriately raises the question whether the Rule should require that a lawyer must make a motion to withdraw so as not to give implied consent to the perjurious testimony. The cases in California on the narrative approach are not entirely consistent on whether seeking to withdraw is a prerequisite to permitting the narrative approach. *People v. Brown* says it is. *People v. Johnson* and *People v. Gadson* say that mandatory withdraw would not solve the problem. See the discussion in the Rutter Group Practice Guide: Professional Responsibility at ¶8:187 – 8:187.1. As a solution, the Commission added the following at the end of second sentence in Comment [7] to clarify that the duty to seek to withdraw in this situation is covered under Rule 1.16: "as required under Rule 1.16".
				Comment [8]	CPDA agrees with the first two sentences of proposed Comment [8]. However, CPDA believes that proposed sentences three and four should be deleted, and sentence five should be changed.	The Commission made no change to the third sentence in proposed Comment [8] which tracks the definition of "knows" in proposed Rule 1.0(f).
					Sentence five contains the phrase ". . . an obvious falsehood. . . ." This phrase should be changed: it does not specify to whom the falsehood must be obvious. The fifth sentence should read "a falsehood that is	The Commission made no change to the last sentence in proposed Comment [8]. The sentence tracks Model Rule Comment [8] and is sufficiently clear in view of the reference to the definition of "knows" referenced in the preceding sentence.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0**
Disagree = 1
Modify = 6
NI = 2

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					obvious to the lawyer," or, better and simpler, "a falsehood that is known to the lawyer." *People v. Bolton* states the correct standard, and simultaneously states the reason for CPDA's position on Comment [8]. "Criminal defense attorneys sometimes have to present evidence that is incredible . . . [B]ut, as long as counsel has no . . . factual knowledge of its falsity, it does not raise an ethical problem." We believe that the *Bolton* case should be cited in either Comment [7] or [8], to provide additional guidance to attorneys.	Comment [8] and paragraph (b) are consistent with *People v. Bolton*, which deals with evidence the lawyer suspects but does not know is false. The Commission added a citation to *People v. Bolton.*
2	COPRAC	M		3.3(c)	Regarding paragraph (c), we believe the minority position is the better one, regarding when a lawyer's obligations under paragraphs (a) and (c) should end. We are persuaded that a lawyer should not have a continuing obligation to oversee the course of a proceeding which the lawyer is no longer involved in, having been terminated or having withdrawn from representation. We believe a lawyer would lack standing to continue to be involved in proceedings regarding a former client and could potentially interfere with the relationship between the former client and his or her new lawyer. Accordingly, we believe the lawyer's duties should not continue to the conclusion of the proceeding, but to the conclusion of the representation, if such conclusion occurs earlier.	COPRAC refers to paragraphs (a) and (b). The Commission responded to COPRAC's concerns by revising paragraph (c) as follows: "continue to the conclusion of the proceeding <u>or the representation, whichever comes first</u>."

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0 Disagree = 1 Modify = 6 NI = 2**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.3(d)	In paragraph (d), regarding a lawyer's duty to inform the tribunal of necessary facts, we believe the language of the ABA Rule: "all material facts known to the lawyer that will enable the tribunal to make an informed decision," provides better guidance to practitioners than the Commission's proposed changes. We think it would be too difficult to opine on what facts a lawyer "reasonably should know are needed," as suggested by the Commission, particularly in retrospect, and the vagueness of this revised requirement could inure to the detriment of lawyers who are in good faith attempting to follow the Rule.	The Commission disagrees and recommends retaining the "knows or reasonably should know" qualifier, which creates an objective standard and should facilitate enforcement.
				Comment [7]	In proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the "narrative" approach is only available to the criminal defendant currently on trial.	The Commission agrees with COPRAC's suggestion and recommends that "criminal defense client" be changed to "criminal defendant."
				Comment [9]	COPRAC disagrees with proposed Comment [9] to the extent that it is intended to provide that a lawyer has no obligation to take remedial measures when opposing counsel elicits testimony the lawyer knows to	COPRAC, OCBA and SDCBA recommend that Comment [9] restore the following language from Model Rule Comment [10] at the end of the second sentence: "either during the lawyer's direct examination or in response to cross examination

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0 Disagree = 1 Modify = 6 NI = 2**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					be false from the lawyer's client or a witness. We believe the better position is that a lawyer should have a duty to take remedial measures whenever the lawyer knows that the lawyer's client or witness has testified falsely, regardless of which side elicited the false testimony. We believe that the following phrase found in ABA Comment [10] that was deleted from proposed Comment [9], "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer," should be reinserted in Comment [9]. We do not believe there is any legitimate rationale for the distinction established by the Comment [9], providing that a lawyer is obliged to take remedial measures if a client knowingly makes false statements during a deposition, but permitting a lawyer to forego such measures if a client makes false statements at trial.	by the opposing lawyer" and, thus, impose the obligation to take remedial measures under paragraph (b) regardless of who adduces the false evidence. The Commission agreed that Comment [9] should be changed to track Model Rule Comment [10] on this issue.
3	Judge, Michael P. Los Angeles County Public Defender	D			When counsel is faced with the dilemma of remaining silent or disclosing authority harmful to the client, a rule barring affirmative misstatements of law permits counsel to remain silent, thereby remaining loyal to the client. In contrast, the proposal would create a new rule which would require counsel to	No change is recommended. See response to CPDA's similar comment.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0 Disagree = 1 Modify = 6 NI = 2**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					volunteer to the court authority contrary to the position of the client. A rule which requires counsel to affirmatively offer case law harmful to the client undermines two critical core values of our criminal justice system in California. The first being counsel's duty of loyalty to his or her client. The second core value of our criminal justice system is the adversarial system. The critical value of an adversarial system is undermined when counsel for the party who had diligently researched an issue is requires to assist his or her opponent, who may have done nothing, by revealing the authority which requires the court to rule against that party.	
				Comment [4]	The proposed rule is very narrow, applicable only to "controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." However, this narrow articulation of the rule is undermined by Comment [4], which states, "the lawyer must disclose the authorities the court needs to be aware of in order to rule intelligently on the matter." The Comment also refers to "a tribunal that is fully informed." The narrow duty to disclose controlling authority articulated in the proposed Rule itself is thus undermined by the Comments which appear to impose on	The Commission agreed that proposed Comment [4] should be redrafted and made the appropriate changes. See below.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0**
Disagree = 1
Modify = 6
NI = 2

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					counsel a duty to ensure that the judge is fully informed and has all the authorities necessary to rule intelligently.	
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Subsection (b)	We support deleting the language in (b) "including, if necessary, disclosures to tribunal" at the end of the sentence. We suggest adding the phrase "consistent with Business & Professions Code Section 6068(e)" at the end of the sentence, however, in place of the deleted language to make the rule clear as to how to understand "reasonable remedial."	The Commission agreed and added the following to paragraph (b): "to the extent permitted under Business and Professions Code §6068(e)."
					We agree that a lawyer should correct a previously improperly cited authority, but believe (with a minority of the RRC) that the duty should end when the lawyer ceases to represent the client.	The Commission changed paragraph (c) to provide that the lawyer's obligations end with either "the conclusion of the proceeding or the representation, whichever comes first."
				Comment [4]	We are concerned that the language contained in Comment [4] ("Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter.") may be too general and broad a phrase in a disciplinary context, even though it is part of a Comment and not part of the Rule itself.	The Commission agreed that Comment [4] and paragraph (a)(2) should be reconsidered by the RRC in light of the comments received from CPDA, Mr. Judge and Ms. Fukai, LACBA, and Mr. Scofield (whose thoughtful memorandum is not reported in this chart). The comments received reveal that the distinction we have tried to draw between controlling authority that is directly adverse and directly adverse authority in the controlling jurisdiction is not sufficiently clear and will likely cause confusion such that it does not warrant departing from the standard in the Model

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0 Disagree = 1 Modify = 6 NI = 2**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Rule, which is followed in most jurisdictions. In view of the comments received, the Commission revised paragraph (a)(2) to track Model Rule paragraph (a)(2) and revised proposed Comment [4], including the following sentence: "Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules."
5	Office of Chief Trial Counsel ("OCTC"), State Bar	NI			OCTC is concerned that the Model Rule language is narrower than current rule 5-200 in that it requires candor only to a tribunal, while rule 5-200 provides that a lawyer "shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth." OCTC believes that provision should be included in the Rule.	The Commission disagrees. Proposed Rules 3.4 (Fairness to Opposing Party and Counsel) and 4.1 (Truthfulness in Statements to Others) cover the same ground with greater specificity.
					OCTC is concerned that the Rule's "knowingly" requirement would excuse gross negligence, contradicting *Matter of Harney* (Rev.Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280, and *Matter of Chesnut* (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.	The Commission disagrees. Both *Harney* and *Chesnut* were decided under Bus. & Prof. Code § 6068(d), and would not be affected by this Rule. Moreover, the definition of "know" in proposed Rule 1.0.1(f) (based on MR 1.0(f)) does not permit reckless disregard of the facts.
					OCTC is concerned that the Rule omits the term "artifice" as is currently found in rule 5-200(B). OCTC contends the word should	The Commission disagrees that removing "artifice" from the Rule will narrow OCTC's ability to charge lawyers. The word is found in Bus. & Prof. Code § 6068(d), so OCTC will not lose the ability to make

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0 Disagree = 1 Modify = 6 NI = 2**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					remain in the Rule so as to not narrow its reach.	such a charge.
				Comment [3]	OCTC is concerned that Comment [3] is incomplete because the Fed. Rules of Civil Procedure and Code Civ. P. 128.7 require that statements be made "after an inquiry reasonable under the circumstances".	The Commission disagrees. An inquiry is only required if reasonable under the circumstances. As Comment [8] recognizes, a "lawyer cannot ignore an obvious falsehood."
6	Orange County Bar Association	M		Comment [6]	The OCBA agrees with the minority that the language "or otherwise permit the witness to present testimony the lawyer knows to be false," is unclear, and should be deleted.	The Commission agreed and deleted that clause.
				Comments [6] and [7]	The OCBA recommends that the Commission use the phrase "criminal defendant" consistently, rather than the term "criminal defense client" used in Comment [7].	The Commission agreed. See above.
				Comment [9]	The OCBA recommends that the phrase, "either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer" be included in this Comment, consistent with the ABA. We believe that the lawyer's obligation to take remedial measures should apply to false testimony on cross-examination, just as the lawyer has an obligation to take remedial measures if false testimony is elicited in a deposition by the adverse party's counsel – which is another form of cross-examination.	The Commission agreed. See above.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0**
Disagree = 1
Modify = 6
NI = 2

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	San Diego County Bar Association Legal Ethics Committee	M		Subparagraph (d)	Agree with a Commission minority that there is "insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that [paragraph subdivision (d)] is unclear and would subject lawyers to being second-guessed on what facts were 'needed' to enable a tribunal to make an informed decision in a particular matter."	The Commission disagreed with SDCBA (see RRC Response to COPRAC, above).
				Comment [9]	The existing ABA Model Rule, making the lawyer take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing lawyer best serves the concept of "Candor Toward the Tribunal," and should remain intact. It should be noted that the "Explanation of Changes to ABA Model Rule" for Comment [6] notes that a Minority of the Commission believed the clause "or otherwise permit the witness to present testimony that the lawyer knows to be false," in the last sentence of Comment [6], "lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. . . ." The Majority believed the reading of the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) "assuages the	The Commission agrees with SDCBA (see RRC Response to COPRAC, above). The Commission believes the change will resolve the need to further explain the relationship between Comment [6] and Comment [9].

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0 Disagree = 1 Modify = 6 NI = 2**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Minority's concerns." SDCBA thinks a clearer explanation of the relationship between Comment [6] and Comment [9] would be helpful to guide the lawyer in applying the proposed rule.	
8	Santa Clara County Bar Association	M			We agree with the rationale that California should rigorously protect attorney-client confidentiality even when it prevents the attorney from making disclosures to the tribunal regarding a client's or witness's untruthfulness or regarding evidence that may not be accurate. However, we think it should be noted that a small, but strong minority of the SCCBA Task Force support the ABA Model Rule version based on the rationale that this rule is meant to protect the integrity of the judicial process and judicial decision-making and that policy is of greater importance in this circumstance than allowing a client's wrongdoing to be protected by attorney-client confidentiality. The minority further suggests that the fact that the California Supreme Court has never approached such a mandatory rule is irrelevant; if the approach is the correct approach, it should be adopted and presented to the Court.	No recommendation necessary.

Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]

TOTAL = 9 **Agree = 0**
Disagree = 1
Modify = 6
NI = 2

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	Scofield, Robert G.	NI		Comment [4]	Mr. Scofield is concerned with the ambiguity of Comment [4] to the Rule, which can be interpreted to impose a duty on California lawyers to cite to authority from outside of the state, which would most penalize those lawyers who diligently research the law on their clients' behalf. He believes it would be easy to remove the ambiguity: by providing examples of the kinds of cases to which a lawyer must cite and those that would lie outside the duty.	The Commission agrees. See Response to L.A. County Bar Ass'n, above.

Rule 3.3: Candor Toward the Tribunal

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2008 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. Rule 5-200 provides as follows:

In presenting a matter to a tribunal, a member:

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

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

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

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

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

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

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

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

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

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

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

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

Florida: Rule 3.3 provides that a lawyer shall not

> (a)(4) Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

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

> (5) participate in the creation or preservation of evidence when the lawyer knows or reasonably should know the evidence is false; ...
>
> (8) fail to disclose the identities of the clients represented and of the persons who employed the lawyer unless such information is privileged or irrelevant; ...
>
> (12) fail to use reasonable efforts to restrain and to prevent clients from doing those things that the lawyer ought not to do; [or]
>
> (13) suppress any evidence that the lawyer or client has a legal obligation to reveal or produce; ...

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

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

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

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

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

> (3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.
>
> (4) Knowingly use perjured testimony or false evidence.
>
> (5) Knowingly make a false statement of law or fact....

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

> (B) A lawyer who receives information clearly establishing that:
>
> (1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.
>
> (2) A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

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

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

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

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

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

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

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

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

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

(b) If a lawyer has offered material evidence and comes to know or its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

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

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

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

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

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

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

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

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

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

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Proposed Rule 3.6 [5-120]
"Trial Publicity"

(Draft #5, 12/12/09)

Summary: Proposed Rule 3.6 largely tracks Model Rule 3.6, which regulates lawyer conduct concerning pre-trial publicity. Proposed Rule 3.6 adopts the revised Model Rule with changes intended to facilitate construction of the Rule and to protect client confidentiality. See Introduction. The proposed Rule also retains some of the Discussion to rule 5-120, the current California counterpart to Model Rule 3.6, and most of the Model Rule comment. See Explanation of Changes.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 5-120
Statute	Bus. & Prof. Code §6103.7.
Case law	*Gentile v. State Bar of Nevada*, (1991) 501 U.S. 1030, 111 S.Ct. 2720, 115 L. Ed.2d 888

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

D.C. Rule 3.6.

☑ Other Primary Factor(s)

The history of adoption of the current Rule 5-120.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __8__
Opposed Rule as Recommended for Adoption __1__
Abstain __0__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☑ No

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

Two commenters, including the Santa Clara County Bar Association, believe the Rule should not be adopted.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.6* Trial Publicity

November 2009
(Draft rule following consideration of public comment)

INTRODUCTION:

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

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

Follow public comment, the Commission made three changes to the Rule. See Explanation of Changes for paragraph (b)(6) and Comment [4].

* Proposed Rule 3.6, Draft 5 (12/12/09).

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

* Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 3.6 Trial Publicity**	**Commission's Proposed Rule*** **Rule 3.6 Trial Publicity**	**Explanation of Changes to the ABA Model Rule**
thereto;	evidence and information necessary thereto;	
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and	(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public ~~interest~~ but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public ; and	Paragraph (b)(6) was revised to make clear that the exception applies only to the extent the dissemination is reasonably necessary to protect an individual or the public. In addition, the reference to "public interest" was changed to "public" to more clearly focus the exception on protecting health and safety.
(7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.	(7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.	

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

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

ABA Model Rule Rule 3.6 Trial Publicity Comment	Commission's Proposed Rule Rule 3.6 Trial Publicity Comment	Explanation of Changes to the ABA Model Rule
	~~safety and measures aimed at assuring its security. It also has a legitimate interest~~lawyers who are, or who have been involved in the ~~conduct~~investigation or litigation of ~~judicial proceedings~~a case, ~~particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate~~ and ~~deliberation over questions of public policy~~their associates.	
[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.	~~[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.~~	Comment [2] to the Model Rule was moved to Comment [8]. The Commission concluded that the Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.
[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.	~~[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.~~	Model Rule Comment [3] is incorporated into Comment [1]

ABA Model Rule Rule 3.6 Trial Publicity Comment	Commission's Proposed Rule Rule 3.6 Trial Publicity Comment	Explanation of Changes to the ABA Model Rule
[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	[42] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	Comment [2] adopts Model Rule Comment [4].
	[3] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or Rule 3.3; and (3) the timing of the statement.	Comment [3] is a modified version of the second paragraph of the Discussion to current Rule 5-120. It is proposed in place of Comment [5] to the Model Rule. The Discussion to the current rule includes a fourth factor which states, "whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings)." The Commission deleted this factor, because the subject matter is now covered by proposed Rule 3.4. The Commission also revised the first factor to insert the phrase "for the purpose of influencing a trier of fact about" in place of the phrase "for the purpose of proving or disproving a material fact in issue." The change was made to clarify that the focus of the Rule is on improper attempts to influence the trier of fact. In response to public comment, the Commission moved the reference from the end of the clause to clarify that the attempt to influence the trier of fact relates to the purpose of the statement.

ABA Model Rule Rule 3.6 Trial Publicity Comment	Commission's Proposed Rule Rule 3.6 Trial Publicity Comment	Explanation of Changes to the ABA Model Rule
[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:	~~[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:~~	Model Rule Comment [5] was not included in current California rule 5-120, when it was originally proposed to the Supreme Court. The Commission unanimously decided not to include the Comment in proposed Rule 3.6. Comment [5] is problematic in that it refers to subjects that "are more likely to have a material prejudicial effect on a proceeding;" however, the statements would be permissible under the proposed Rule in some circumstances. The Comment does not address when the subjects would not prejudice a proceeding. It does not give the practitioner any guidance regarding when it would be permissible to discuss the subjects. As a result, the Comment tends to chill speech in situations where the Model Rule would not prohibit it. The Commission believes that proposed Comment [~~4~~ 3] better addresses the issues by providing simple criteria for determining when the proposed Rule applies, while, at the same time, recognizing that there may be other factors.
(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;	~~(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;~~ ~~(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~	

ABA Model Rule Rule 3.6 Trial Publicity Comment	Commission's Proposed Rule Rule 3.6 Trial Publicity Comment	Explanation of Changes to the ABA Model Rule
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.	~~(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~ ~~(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;~~ ~~(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or~~ ~~(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.~~	
[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule	[~~6~~4] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule	Comment [4] adopts Model Rule Comment [6].

ABA Model Rule Rule 3.6 Trial Publicity Comment	Commission's Proposed Rule Rule 3.6 Trial Publicity Comment	Explanation of Changes to the ABA Model Rule
will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.	will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.	
[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.	[~~7~~5] ~~Finally~~Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may ~~have the salutary effect of lessening~~lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements ~~should~~must be limited to ~~contain only such~~ information ~~as is~~ necessary to mitigate undue prejudice created by ~~the~~ statements ~~made by~~of others.	These changes were made to conform the Comment to the proposed Rule. The reference to paragraph (c) is intended to orient the reader to the portion of the proposed Rule to which it pertains. It conforms to the form the Commission has adopted for other Rules. The Commission deleted the words "have the salutary effect of lessening" and replace them with the word "lessen." The Commission concluded that the deleted language could be read as promoting responsive statements and that a less supportive tone was more appropriate. The word "must" was substituted for the word "should" to conform to the text of paragraph (c) of the proposed Rule. The Model Rule Comment is inconsistent with paragraph (c). Since the text of the Rule governs over the Comment, the Commission concluded that the Comment language should be revised in order to avoid misleading lawyers who rely on the Comment, without realizing that it is inconsistent with the proposed Rule.
[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.	[~~8~~6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.	Comment [6] adopts Model Rule Comment [8].
	[7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with	This Comment [7] is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.

ABA Model Rule Rule 3.6 Trial Publicity Comment	Commission's Proposed Rule Rule 3.6 Trial Publicity Comment	Explanation of Changes to the ABA Model Rule
	such rules.	
	[8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.	This Comment is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.

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

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), and to the extent permitted by Rule 1.6, a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

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

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

[2] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[3] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or Rule 3.3; and (3) the timing of the statement.

[4] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[5] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.

[6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with such rules.

[8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

Rule 3.6 Trial Publicity.
[Sorted by Commenter]

TOTAL =__ **Agree = 1 Disagree = 2 Modify = 4 NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M		Comment [2]	We have concerns about Comment [2] which states paragraph (a) "applies to statements made by or on behalf of the lawyer." This comment is not in the ABA Rule and we believe it may cause problems for lawyer who may unknowingly have people speaking "on their behalf." We agree with the rationale for inclusion of this comment – to prevent lawyers from attempting to do indirectly what they cannot do directly under the proposed Rule. The problem with this language arises when non-lawyers are commenting on a lawyer's case without the lawyer's consent and often without his or her knowledge. This scenario comes up quite frequently in criminal cases, where it is not unusual for prosecutors to turn on the television and see a community spokesperson or a law enforcement official purporting to comment "on behalf of" the prosecutor. We would all agree it would be unfair to subject lawyers to potential discipline when they truly did not authorize or have knowledge of statements made	Change not made. The Commission does not believe that the phrase "by or on behalf of" the lawyer is unclear. The phrase refers to situations where the lawyer allows another person to make statements for the lawyer that would be subject to the Rule. The language COPRAC proposes would narrow the Rule to situations where the lawyer actually authorizes or ratifies the particular statement. However, the Rule is intended to apply without regard to whether the lawyer authorized the specific statement. Under the Rule, if a lawyer has placed someone in the role of speaking on behalf of the lawyer, the lawyer has the responsibility to assure that that person complies with the Rule.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.6 Trial Publicity.
[Sorted by Commenter]

TOTAL =__ **Agree = 1 Disagree = 2 Modify = 4 NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					purportedly "on their behalf." This concern could be cured by revising the proposed comment to state that paragraph (a) "applies to statements made, *authorized, or ratified* by the lawyer." (Proposed addition emphasized).	
				Comment [5]	We believe ABA Comment [5] provides important guidance for legal practitioners and therefore we recommend that the Commission retain Comment [5]. The Commission's explanation of changes to the section states that Comment [5] refers to subjects that "are more likely to have a material prejudicial effect on a proceeding." ABA Model Rule Comment [5] uses the language "more likely than not" to describe a list of potentially prejudicial statements that we believe is instructive to practitioners, some of whom may not be familiar with the likely effects of the types of statements listed.	Change not made. The Commission continues to believe that ABA Model Rule Comment [5] does not give clear guidance. The subjects that "are more likely than not to have a material prejudicial effect on a proceeding;" are not subjects that always will prejudice an adjudicatory proceeding. Depending on a number of factors, including those listed in Comment [4], there likely are circumstances where the statements would not violate the Rule. However, Model Rule Comment [5] would create a presumption of a violation that the lawyer making the statement would have the burden to rebut. The Commission does not believe that a lawyer who has made a statement that does not violate the Rule should have such a burden. By focusing on the content of the statement, rather than the factors that determine when the Rule applies, the Comment tends to chill speech in situations where the Model Rule would not prohibit it.
2	Genard, Gerald H.	D			The proposed rule has a chilling effect on free speech. The commentary about	The Commission did not accept the recommendation. Rule 5-120 was adopted in 1995

Rule 3.6 Trial Publicity. [Sorted by Commenter]						TOTAL =__ Agree = 1 Disagree = 2 Modify = 4 NI = __
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					statements which are not limited to admissible evidence is particularly troublesome. For example, if the speaker's opinion is that a trial is politically motivated or that corrupt governmental practices are being swept under the rug, a speaker should be entitled to voice that opinion for the benefit of the public even though there may be an inability to produce admissible evidence to support the opinion due to relevancy or otherwise. California procedural rules allow trial and appellate courts to decide many matters without written opinions and justifications. This, in itself, is bad enough because of the possibility of abuse, but to threaten discipline to a lawyer who tries to expose a potential case of abuse is contrary to the core of free speech and to the fundamental requirement of a free society.	in response to SB 254, which enacted Bus. & Prof. Code §6103.7. The statute directed the State Bar to submit to the Supreme Court a rule governing trial publicity and extrajudicial statements made by attorneys concerning adjudicatory proceedings. The statute contains legislative findings referencing extraordinary media coverage of "recent legal proceedings." The statute directed the Bar to review and consider Model Rule 3.6. Current Rule 5-120 was adopted in response to that legislative mandate. Proposed Rule 3.6 is a continuation of the existing Rule with modifications to account for changes in the ABA Model Rule. In light of the history leading up to the adoption of the current Rule, the Commission does not believe it would be appropriate to delete the Rule. In addition, as Comment [1] notes, Rule 3.6 attempts to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. The Rule is focused only on statements that a lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in a matter in which the lawyer is participating or has participated. The standard is reasonably focused on prohibiting statements that would interfere with the administration of justice on the part of lawyers who

Rule 3.6 Trial Publicity.
[Sorted by Commenter]

TOTAL =__ **Agree = 1 Disagree = 2 Modify = 4 NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						are involved in the matter.
3	Judge, Michael P. Los Angeles County Public Defender	M		(c) Comment [5]	The Proposed Rule seems fair and allows the defense leeway under Rule 3.6, subdivision (c), to make statements when necessary to protect a client from the prejudicial effect of recent adverse publicity. The Commission, however, does not include ABA Comment [5] which sets forth some examples of subjects more likely than not to prejudice a proceeding. I believe Comment [5] should be restored.	No Response Necessary. Change not made. The Commission continues to believe that ABA Model Rule Comment [5] does not give clear guidance. The subjects that "are more likely than not to have a material prejudicial effect on a proceeding;" are not subjects that always will prejudice an adjudicatory proceeding. Depending on a number of factors, including those listed in Comment [4], there likely are circumstances where the statements would not violate the Rule. However, Model Rule Comment [5] would create a presumption of a violation that the lawyer making the statement would have the burden to rebut. The Commission does not believe that a lawyer who has made a statement that does not violate the Rule should have such a burden. By focusing on the content of the statement, rather than the factors that determine when the Rule applies, the Comment tends to chill speech in situations where the Model

Rule 3.6 Trial Publicity.
[Sorted by Commenter]

TOTAL =__ **Agree = 1**
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Rule would not prohibit it.
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		(b)(6)	Proposed Rule 3.6(b)(6) permits counsel to issue "a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest . . . " Under some circumstances, Section (6) could be used by counsel to influence public opinion when a jury proceeding is or could be convened in the matter. Section (6) should require a counsel who raises an alarm about a participant in the judicial process to have a reasonable basis for the belief that the person's behavior presents a threat to public safety. Moreover, if the danger is limited to an individual, and not reasonably expected to affect the public interest, the warning should be, as best as possible, calculated to reach the ears of the relevant party only. The warning from counsel should not be issued to the public at large, when the public at large is not under a reasonable threat.	Rule revised to state: "(6) a warning of danger concerning behavior of a person involved only when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest ***and only when dissemination of the statement by public communication is necessary to protect the individual or public interest***."

Rule 3.6 Trial Publicity.
[Sorted by Commenter]

TOTAL =__ **Agree = 1**
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Orange County Bar Association	M		Comment [4]	Because the stated purpose of Comment [4] is to provide clearer guidance and avoid a chilling effect on permissible speech, the OCBA believes that broad language referring to "many" factors followed by only three narrow examples would inhibit lawful speech. Consequently, the OCBA believes the Comment should be revised to include as many additional factors as possible. Factor (1) in Comment [4] may be unclear as to which portion of the sentence the phrase "for the purpose of proving or disproving a material face in issue" is intended to modify. This affects the meaning of the factor as a whole. If, on the one hand, the Comment is intended to refer to the speaker's intent in making the extrajudicial statement – i.e., he or she presented it "for the purpose of proving or disproving a material fact in issue," that has one meaning. If, on the other hand, "for the purpose of proving or disproving a material fact in issue" only modifies "clearly inadmissible as evidence in the matter," then the factor has a different meaning in which the attorney's intent in making the statement is irrelevant, and the content of	No change made. The commenter does not suggest any additional factors. Because of the fact specific nature of the inquiry the Rule requires, the Commission does not believe that additional factors can be identified at this time. Comment [4] is revised to read: "(1) whether the extrajudicial statement ***is made for the purpose of proving or disproving a material fact in issue and presents information clearly admissible as evidence in the matter.***"

Rule 3.6 Trial Publicity. [Sorted by Commenter]						TOTAL =__ Agree = 1 Disagree = 2 Modify = 4 NI = __
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					the statement alone determines whether a potential violation of the Rule exists. Further, there needs to be an allowance for those instances in which public disclosure of a settlement agreement is required, although inadmissible as evidence in the matter. Factor (3), "the timing of the statement," is vague, providing no guidance as to what "timing" would or would not determine whether an extrajudicial statement violated the Rule. For example, is the Commission more concerned with statements made before jury selection, after the commencement of trial, during jury deliberations, or at some other phase? The OCBA recommends that factor (3) be clarified to define the specific timing the Commission intended to designate as a factor in a violation of this Rule.	No change made. Because of the fact specific nature of the inquiry the Rule requires, the Commission does not believe that it is possible to be more specific about timing as a factor. In what way time affects a determination of a violation will depend on looking at the totality of the circumstances and determining whether the statement will have a substantial likelihood of materially prejudicing an adjudicatory proceeding at the time it was made.
6	San Diego County Bar Association Legal Ethics Committee	A			Approve of the new rule in its entirety.	No action required.
7	Santa Clara County Bar Association	D			This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1st Amendment.	The Commission did not accept the recommendation. Rule 5-120 was adopted in 1995 in response Business. & Professions Code §6103.7. The statute directed the State Bar to submit to the

Rule 3.6 Trial Publicity.
[Sorted by Commenter]

TOTAL =__ **Agree = 1**
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Much of the conduct/speech that this rule attempts to proscribe is actually covered by other rules which are set in contexts that do not violate the 1st Amendment. For example, an attorney may not misrepresent the facts of a case or engage in conduct such as deceit, deception or fraud that undermines the ability of a litigant to receive a fair trial. The SCCBA understands that the California Supreme Court has previously adopted a rule substantially similar to proposed Rule 3.6. Notwithstanding that, this rule should be deleted.	Supreme Court a rule governing trial publicity and extrajudicial statements made by attorneys concerning adjudicatory proceedings. The statute contains legislative findings referencing extraordinary media coverage of "recent legal proceedings." The statute directed the Bar to review and consider Model Rule 3.6. Current Rule 5-120 was adopted in response to that legislative mandate. Proposed Rule 3.6 is a continuation of the existing Rule with modifications to account for changes in the ABA Model Rule. In light of the history leading up to the adoption of the current Rule, the Commission does not believe it would be appropriate to delete the Rule. In addition, as Comment [1] notes, Rule 3.6 attempts to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. The Rule is focused only on statements that a lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in a matter in which the lawyer is participating or has participated. The standard is reasonably focused on prohibiting statements that would interfere with the administration of justice on the part of lawyers who are involved in the matter.

Rule 3.6: Trial Publicity

STATE VARIATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New York: DR 7-107(A) provides that a lawyer participating in "or associated with a criminal or civil matter, or associated in a law firm or government agency with a lawyer participating in or associated with a criminal or civil matter," shall not make an extrajudicial statement that a "reasonable person" would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in that matter. New York also incorporates Rule 3.6(c) nearly verbatim into DR 7-107(A), but deletes the word "undue" before "prejudicial effect."

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

DR 7-107(C) provides that if a statement complies with DR 7-1 07(A), a lawyer "involved with the investigation or litigation of a matter" may state "without elaboration" the items enumerated in ABA Model Rule 3.6(b), which New York tracks verbatim, except that DR 7-107(C)(l) refers only to "the general nature of the claim or defense" DR 7-107(C)(7)(a) adds the word "age," and DR 7-107(C)(7)(c) permits a lawyer to state not only the "fact, time and place of arrest" but also "resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission, or statement." New York omits Rule 3.6(d).

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

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

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

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

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

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

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

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

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

Virginia: Rule 3.6 provides as follows:

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

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

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

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

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Proposed Rule 3.7 [5-210]
"Lawyer as Witness"

(Draft #7, 12/12/09)

Summary: The Commission has recommended much of the substance and language of ABA Model Rule 3.7(a). However, with the substitution of the more client-protective provision in current California rule 5-210(C) for Model Rule 3.7(a)(3), the Commission is recommending continued adherence to the more limited scope of the California rule.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules: RPC 5-210

Statute:

Case law:

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __7___
Opposed Rule as Recommended for Adoption __3___
Abstain ___0__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

One commenter, LACBA, urges the State Bar to drop the informed written consent of the client in favor of the ABA Model Rule approach.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.7* Lawyer as a Witness

December 2009
(Draft rule revised following consideration of public comment)

INTRODUCTION:

1. The Commission is recommending that much of the substance and language of ABA Model Rule 3.7(a) not be adopted. Instead, the Commission recommends continued adherence to the more limited scope of the California rule.

2. First, the Commission recommends carrying forward current rule 5-210's limitation of the Rule to jury trials. The Commission has concluded that any threat to of the trier of fact being confused by a lawyer's dual role as advocate and witness is substantially diminished in a bench trial. As a sophisticated evaluator of testimony and evidence, a bench officer would not be expected to be confused by the lawyer's dual role.

3. Second, the Commission recommends that Model Rule 3.7(a)(3) be deleted because it refers to principles of disqualification for substantial hardship to the client. Because authority over disqualification does not reside with the State Bar but rather with the courts, a disciplinary rule should not limit the right of judiciary to protect the fair administration of justice nor improperly intrude on the judicial function. Instead, the Commission recommends carrying forward current rule 5-210(C), which protects the client's autonomy by ensuring the client is fully informed to decide whether to consent to the lawyer's dual role. See Explanation of Changes for paragraph (a)(3).

4. Third, the Commission for the most part recommends rejecting the ABA Model Rule comments, which reflect the broader scope of the ABA Rule and thus are not pertinent to the proposed Rule, or which relate to disqualification issues. See Explanation of Changes for Model Rule 3.7, cmts. [1] – [6], below.

5. *Minority*. A minority of the Commission disagrees with the recommendation to carry forward current rule 5-210's limitation of the proposed Rule to jury trials and with the recommendation to carry forward Rule 5-210(C). The minority prefers Model Rule approach, which emphasizes protecting and ensuring the integrity of the judicial process. See Explanation of Changes for paragraphs (a)(1) and (a)(3), and Explanation of Changes for rejected Model Rule Comments [1] – [3], below. See also, a separately provided minority statement.

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* Proposed Rule 3.7, Draft 7 (12/12/09).

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

* Proposed Rule, Draft 7 (12/12/09). Redline/strikeout showing changes to the ABA Model Rule

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

ABA Model Rule Rule 3.7 Lawyer as a Witness	Commission's Proposed Rule* Rule 3.7 Lawyer as a Witness	Explanation of Changes to the ABA Model Rule
		and witness based only on the consent of a client who could likely be benefited by any confusion caused by the lawyer's dual role, poses a threat to the fair administration of justice. This minority believes that Model Rule 3.7(a)(3) provides the appropriate balancing of interests by permitting a lawyer to engage in such dual roles when the court has determined the client would otherwise suffer a hardship if the lawyer were disqualified.
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.	(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by [Rule 1.7] or [Rule 1.9].	Adopted the ABA Model Rule. Brackets have been placed around "Rule 1.7" and "Rule 1.9" pending the Commission's final recommendation concerning these rules.

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

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

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

ABA Model Rule Rule 3.7 Lawyer as a Witness Comment	Commission's Proposed Rule Rule 3.7 Lawyer as a Witness Comment	Explanation of Changes to the ABA Model Rule
though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."	~~though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."~~	
[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.	[~~7~~1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by [Rule 1.7] or [Rule 1.9] from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by [Rule 1.10] unless the client gives informed consent under the conditions stated in [Rule 1.7].	Adopted ABA Model Rule, Comment [7], with Rules 1.7, 1.9, and 1.10 bracketed, pending the Commission's final recommendation concerning.

ABA Model Rule Rule 3.7 Lawyer as a Witness Comment	Commission's Proposed Rule Rule 3.7 Lawyer as a Witness Comment	Explanation of Changes to the ABA Model Rule
	[2] This Rule is not applicable in proceedings before legislative, administrative or other entities when not acting as a tribunal. See Rule 3.9. For example, the Rule would not apply where a lawyer testifies on behalf of the client in a hearing before a legislative body concerning the adoption of legislation; but would apply to a lawyer's testimony in impeachment hearings before Congress.	Proposed Comment [2] has been added to clarify that the Rule is not applicable in legislative proceedings, when that body is not acting in a quasi-adjudicative role. This comment is carried over from current rule 5-210, Discussion ¶. 1.
	[3] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of "written" in [Rule 1.0.1(n)].	Proposed Comment [3] has been added to address circumstances where client consent is documented as a part of a transcribed proceeding. The comment clarifies that this transcription satisfies the requirement for written disclosure and consent.

Proposed Rule 3.7 Lawyer as a Witness
Rules Revision Commission – Minority Dissent

The majority eliminates important public protection from the advocate-witness rule. Model Rule 3.7 is the prevailing standard in the U.S. and is consistent with case law in California. No other jurisdiction limits the rule to jury trials, and for good reason, since the objectives of the rule also apply to bench trials. Annot. Model Rules at pages 359-360. The well recognized purpose of the rule includes protecting the fairness of the judicial process which includes the tribunal and the interests of other parties to the proceeding as well as addressing conflicts of interest. Hazard & Hodes, The Law Governing Lawyers § 33.6; Restatement Third, Law Governing Lawyers §108, Cmt. b and reporter's notes. Protecting the fairness of the judicial process is one of the stated purposes of the California rules. Proposed Rule 1.0(a); There are no comments explaining the limited purpose of paragraph (a) in contrast to the Model Rule comments (1) – (3). The advocate-witness rule has important applications in criminal cases. See, e.g., People v. Donaldson, 93 Cal. App. 4th 916 (2001)(citing Model Rule 3.7(a)); U.S. v. Edwards, 154 F.3d 915 (9th Cir. 1998) Consent of the client will not suffice in these situations. Conflicts under this rule are not limited to advocates testifying in jury trials. California's current rule 5-210 was adopted 30 years ago to overturn Comden v. Superior Court (1979) 20 Cal. 3d 907 and is outdated. The concern raised by that decision is adequately addressed in paragraph (b) of the proposed rule.

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

(a) A lawyer shall not act as an advocate before a jury in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue or matter;

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

(3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

[1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

[2] This Rule is not applicable in proceedings before legislative, administrative or other entities when not acting as a tribunal. See Rule 3.9. For example, the Rule would not apply where a lawyer testifies on behalf of the client in a hearing before a legislative body concerning the adoption of legislation; but would apply to a lawyer's testimony in impeachment hearings before Congress.

[3] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of "written" in [Rule 1.0.1(n)].

Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]

TOTAL = 7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Public Defenders Association	M			We believe that any proposed rule restricting an attorney from acting both as an advocate and as a witness should be limited to jury trials as is reflected in current Rule 5-120, and for this reason, we think that Proposed Rule 3.7 should be redrafted to limit its application to jury trials. We believe that when the court is the trier of fact, it can give appropriate consideration to the testimony of an attorney who is forced to serve as a witness in those few situations when that does occur. We agree with the position of a minority of the Commission that Comments {1] through [3] of the ABA Model Rules should be included with the Proposed Rule.	As indicated above, the Commission has revised the rule to track the scope of the existing California rule which applies only to proceedings before a jury. The Commission agrees that the trier of fact in a bench trial is capable of understanding a lawyer's dual role as advocate and witness.
2	COPRAC	A			Suggest a Comment be added that clarifies whether the term "trial" includes other trial-like evidentiary judicial and administrative proceedings. An appropriate definition would be "Any judicial or administrative proceeding over which a judicial or quasi-judicial officer presides where live testimony is offered from which facts will be found."	As indicated above, the Commission has revised the rule to track the scope of the existing California rule which applies only to proceedings before a jury.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]

TOTAL = 7 Agree = 2, Disagree = 0, Modify = 5, NI = 0

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M			We strongly recommend that the Proposed Rule be revised in subsection (a) to restore the concept from the current rule that this prohibition be applicable only to jury trials. The rationale behind the rule is not served by disciplining a lawyer for giving relevant testimony in a court trial or arbitration, where an attack on the lawyer's credibility as witness is far less likely to be prejudicial to the lawyer's client. Thus, we agree with the minority view of the Commission that the rule should be applicable only to jury trials.	As indicated above, the Commission has revised the rule to track the scope of the existing California rule which applies only to proceedings before a jury.
				Subsection (a)(1)	We are also concerned that there is ambiguity in the terminology "uncontested matter" in subsection (a)(1). An uncontested matter could be construed to refer to an issue in a proceeding or to an entire proceeding. To avoid ambiguity and prevent the language from being to limiting, it should be expanded to include an "uncontested issue or matter." This is also more in line with the ABA Rule.	The Commission agrees and has made this proposed change.
					Finally, we are concerned about the requirement that informed consent be obtained in writing. This is an unnecessary burden that is impracticable when it arises during trial where it is possible that not all of the clients are even present to sign a consent. It is sufficient if the client provides	The Commission disagrees. Informed written consent has been a part of the predecessor rule since 1989. Public protection requires that a client be advised in writing of the relevant circumstances and the actual and reasonably foreseeable consequences to the representation when a lawyer

Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]

TOTAL = 7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					informed consent, which is more than the ABA Rule requires. There is no need to depart from the ABA Rule by requiring a written consent. Documenting the client's consent in writing is an unnecessary burden that may not be feasible under the circumstances. It would be unfair to discipline a lawyer merely because he or she does not have a computer and printer in the courtroom to be able to type a letter, when the client has been adequately informed of the risks and provides an oral consent.	serves in the dual advocate/witness role and that the client give a knowing and intelligent consent. Because Courts may inquire into these matters, written documentation facilitates the process. The Commission is unaware that the informed written consent provision has created any problems for lawyers, clients or courts in the intervening twenty years.
4	Orange County Bar Association	M		Subsection (a)(1)	The OCBA suggests modifying the Rule as follows (Insertions are underscored and italicized): "(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to testify unless: (1) the testimony relates to an uncontested <u>*issue or*</u> matter; . . . " We believe that the use of both "issue" and "matter" would eliminate any possible confusion and ensure that a lawyer who is called to testify at a trial on an ***uncontested*** subject may do so under this Rule, in all circumstances.	The Commission agrees and has made this change.

Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]

TOTAL = 7 Agree = 2, Disagree = 0, Modify = 5, NI = 0

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	William Wesley Patton	M		3.7(a)	Proposed Rule 3.7 has several serious ambiguities that will either confuse attorneys or fail to provide them with sufficient guidance.	As noted below, Professor's Patton's concerns relate to how the rule may be applied in particular practices, which involve the application of the law in that field, not professional responsibility or ethics.
				3.7(a)	I agree that the rule should apply to both jury and bench trials.	After reviewing the public comment received, the Commission reconsidered and reversed its decision to recommend expanding the scope of California's existing rule to cover both jury and bench trials. The Commission now believes that any threat to of the trier of fact being confused by a lawyer's dual role as advocate and witness is substantially diminished in a bench trial. As a sophisticated evaluator of testimony and evidence, a bench officer would not be expected to be confused by the lawyer's dual role.
				3.7(a)	I am uncertain about the meaning of "testify." Is it being used in its technical sense of only "that evidence which comes from living witnesses who testify orally"? (*Mann v. Higgins* (1890) 83 Cal. 66, 69; *In re Jessica B.* 254 Cal.Rptr. 883 (1989). Or does it apply to more informal contexts in contested cases in which an attorney may provide the court with a recommendation, possibly based upon the attorney's personal knowledge?	The Commission believes that further clarification is unnecessary. The word "testify" is understood to apply to giving evidence under oath, whether given live, by electronic means, or in a writing. Professor Patton's second question concerns lawyer advocacy which is not testimony. Lawyer advocacy can be based upon a lawyer's knowledge of the facts and circumstances of a particular case, including in some cases, personal knowledge or observations of the lawyer . Advocacy of this nature is not within the scope of the rule. Other

Rule 3.7 Lawyer as Witness. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	**Commentator**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
						than this comment, the Commission knows of no case, ethics opinion, article or other commentary which has suggested a need to make a distinction between lawyer as witness and lawyer as advocate.
				3.7(a)	Under ABA Model Rule 3.7, the standard applies when an attorney "is likely to be a necessary witness. . . ." How exactly do the terms "witness" and "testify" differ? Which term provides clients with broader protection? What are the ramifications of this particular change?	The Commission revised the rule to delete "testify" and substituted the comparable Model Rule phrase "is likely to be a necessary witness."
				3.7(a)(3)	The rule does not address the frequent question of what happens when (1) the client is an incompetent adult or a child without the capacity to make a knowing choice among alternatives. For instance, if the adult client lacks capacity to consent, can the attorney merely use the attorney's substitute judgment that if the client were competent that the client would have consented? Or must the attorney for the incompetent adult seeks the appointment of guardian ad litem and then be bound by the guardian's decision regarding whether or not the attorney has consent to testify?	The Commission has concluded to make no changes to the rule to address this issue. The Commission recognizes that representing minors or other clients who may lack capacity to consent present special challenges to legal representation. However, whether consent can be obtained or by whom depends upon the facts and circumstances of the underlying procedural and substantive law in which the need for consent arises (e.g., in a personal injury matter, a Guardian ad Litem is appointed for the minor and the consent must be obtained from the GAL; in a parental termination proceeding, where the lawyer is appointed to represent the best interests of the child, a social welfare department representative may function as

Rule 3.7 Lawyer as Witness. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	**Commentator**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
						a GAL or the lawyer may seek consent from the appointing judge.) Because the determination of who can consent is so varied and depends upon law other than professional responsibility and ethics, trying to address consent issues in this rule could detrimentally interfere with existing established law.
				3.7(b)(1)	The proposed rule of testifying provides attorneys in each of these types of cases no guidance on the proper ethical procedure for determining whether and how an attorney can seek or determine whether there is sufficient informed written consent or substitute judgment to permit the attorney to testify.	The Commission has defined the elements of informed consent in the definitions set forth in rule 1.0.1, as did the ABA Model Rules. Proposed rule 1.0.1 was not published concurrently published with this rule. With the defined term, the Commission has concluded that no further change is needed.
				Comment [1]	Rule 3.7(b)(1) eliminates the ABA language regarding the potential conflict of interest between the client and the testifying attorney. However, as discussed above, in many types of California cases, especially where there is a debate regarding the client's capacity to consent, there is a real potential for a conflict of interest developing. Therefore, the Committee should retain the ABA language regarding the potential for conflicts of interest.	The Commission has concluded that the issues of conflicts raised by this comment are adequately covered by Comment [1]. The Commission declined to create a competing conflict of interest rule other that those set forth in 1.7 – 1.11, which apply to the conflict raised by this commenter.

Rule 3.7 Lawyer as Witness. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 5 NI = 0
No.	**Commentator**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
				Comment [2]	Comment [2] states that the rule "is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body." The Committee's explanation is that this addition is to clarify that the Rule "is not applicable in legislative proceedings." The language is ambiguous as it is not known what constitutes a "non-adversarial proceeding" and from whose vantage point is that term defined? Because of the ambiguities inherent in the term "non-adversarial", the Committee should either replace that term with the term "contested by any party" or define in a comment that the term "non-adversarial" applies only to proceedings where no party "contests a matter."	The Commission agrees that the term "non-adversarial" proceeding is ambiguous and has amended Comment [2] to clarify this issue. The Commission agrees and has redrafted Comment [2] to delete "non-adversarial" and illustrate when the rule applies to proceedings before a legislative body not acting as a tribunal.
6	San Diego County Bar Association Legal Ethics Committee	M		3.7(a)	Propose adding the word "jury" before the word "trial" in the first line of part (a) of the new rule. Add a Comment illustrating that the rule is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body.	

Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]

TOTAL = 7 Agree = 2
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	Santa Clara County Bar Association	A			No comments added.	

Rule 3.7: Lawyer as Witness

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2008 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. Rule 5-210 provides as follows:

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

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

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

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

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

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

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

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

New York: DR 5-102 provides as follows.

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

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

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

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

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

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

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

(D) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

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

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

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

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

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

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

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Proposed Rule 6.3 [N/A]
"Membership in Legal Services Organization"

(Draft #3, 6/8/09)

Summary: Proposed Rule 6.3 is essentially unchanged from Model Rule 6.3. The Commission has added a reference to a lawyer's duty of confidentiality in order to emphasize that a lawyer's membership in a legal services organization is subject to both the lawyer's duty to avoid conflicts of interest and the duty to protect confidential client information.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☐ Existing California Law

Rules

Statute

Case law

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption _6_
Opposed Rule as Recommended for Adoption _5_
Abstain __0__

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders
☑ The Following Stakeholders Are Known:

Commission on Access to Justice

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.3* Membership in Legal Services Organization

November 2009
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.3 is essentially unchanged from Model Rule 6.3. However, the Commission recommends adding to the Rule a reference to California's statutory duty of confidentiality in order to emphasize that a lawyer's membership in a legal services organization is subject both to the lawyer's duty to avoid conflicts of interest and the duty to protect confidential client information. The Commission does not recommend any further changes following public comment. See Public Comment Chart, below.

MINORITY. A minority of the Commission believes subparagraphs (a) and (b) of this Rule will create disciplinary risks for lawyers and thereby discourage them from participating in legal services organizations. Virtually every aspect of the normal duties of a director or officer of the organization may violate both subparagraphs. This Rule does not give guidance about what will or will not lead to discipline. See the minority statement, which is provided in these materials after the Comment Comparison Chart. A second minority believes that the subject of this Rule is not an appropriate topic for Rules of Professional Conduct. This minority notes that the main purpose of the Rule is motivational and, although the minority concurs in the noble motive which the Rule expresses, the minority believes that the Rule, like all aspirational principles, has no place in a disciplinary rule. Moreover, the minority considers the limitations on lawyers' social action expressed in proposed paragraphs (a) and (b) to be mistaken, and probably unconstitutional limitations on a lawyer's freedom of speech and political action. The minority takes the position that lawyers' duties to clients are comprehensive; but they should not and cannot limit the lawyer's freedom to advocate and support social actions and objectives that the lawyer wishes to support outside the scope of the engagement and on the lawyer's own time.

* Proposed Rule 6.3, Draft 3 (6/8/09, MTY edit).

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

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

Rule 6.3: Membership in Legal Services Organization
Rules Revision Commission – Minority Dissent

The beginning of this rule is laudable. Lawyers should be encouraged to participate in legal services organizations. But subparagraphs (a) and (b) will create disciplinary risks for lawyers and thereby discourage them from doing so. Rule 6.3 will be a disciplinary rule, binding on all members of the State Bar. A breach may expose a lawyer to discipline. Bus. & Prof. Code § 6077. However, this rule does not tell lawyers what will be permitted or prohibited. For example, if the lawyer has a client whose interests are adverse to the interests of a client of the legal services organization, will the lawyer voting on the budget of the legal services organization violate paragraph (a) or not? If the lawyer participates in a decision whether to hire or fire an employee of the organization, will that violate paragraph (a) or not? Conversely, paragraph Rule 6.3 (b) will also expose lawyers to discipline for good faith participation in decisions of the legal services organization. Participating in discussions about or votes on a budget for, or to hire or fire an employee, "could have a material adverse effect on the representation of a client of the organization." Virtually every aspect of the normal duties of a director or officer of the organization may violate both paragraphs (a) and (b). Under what circumstances will the lawyer have to obtain the informed written consent of the lawyer's clients before participating in a decision affecting a legal services organization? Neither Rule 6.3 nor Rule 1.7 gives any guidance about what will or will not lead to discipline. A Rule of Professional Conduct ought to give clear indication of what conduct is or is not permissible under it. Rule 6.3 does not. If it is adopted, a lawyer who participates in a legal services organization that has a client adverse to the lawyer's firm's own client will do so at considerable risk. This will have a chilling effect on lawyers' decisions whether to participate in a legal services organization. Neither the State Bar nor a Rule of Professional discipline should discourage lawyers from doing so. Therefore, this rule should not be adopted as proposed.

Rule 6.3: Membership in Legal Services Organization

(Commission's Proposed Rule – Clean Version)

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

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 or Business and Professions Code section 6068(e)(1); or

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

COMMENT

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

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

Rule 6.3 Membership in Legal Services Organization.
[Sorted by Commenter]

TOTAL =__ **Agree = 3**
Disagree = 1
Modify = 1
NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Commission on Access to Justice	A			We wholeheartedly support the adoption of this Rule.	No response necessary.
2	COPRAC	A			COPRAC supports the adoption of proposed Rule 6.3 and the Comments to the Rule.	No response necessary.
3	Orange County Bar Association	D			The OCBA does not believe it is necessary to adopt Rule 6.3. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for certain legal services organizations. The OCBA suggests the proposed Rule be amended to include, at the end, the language that has been adopted in Georgia: "There is no disciplinary penalty for a violation of this Rule." This would act to offset any disincentive for attorneys to participate in legal services organizations if the proposed rule is adopted, but still provide helpful guidance to volunteering attorneys.	The Commission disagrees. The policy of encouraging lawyers to devote their time to legal services organizations outweighs the purported burdens the Commenter speculates the Rule will create.
4	San Diego County Bar Association Legal Ethics Committee	M			The proposed rule does not define "legal service organization(s)". Could not find a definition of that exact term anywhere in the proposed rules, the State Bar rules, the California Codes, the Federal Statutes, the Code of Federal Regulations, the ABA Rules,	The Commission disagrees. As the commenter noted, there is no readily available definition of "legal services organization." No other jurisdiction has seen the need to create such a definition. An attempt to define the term would run the risk of excluding from the Rule's *permissive* coverage

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 6.3 Membership in Legal Services Organization.
[Sorted by Commenter]

TOTAL =__ Agree = 3, Disagree = 1, Modify = 1, NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					or the Model Rules. Also, the term is confusingly similar to other terms of art such as "legal service corporations" governed by federal law to provide legal services to the poor, qualified employer sponsored tax-exempt prepaid group legal plans under Internal Revenue Code sections 120 and 501(c) 20, and lawyer referral services, which are not intended to be included in the proposed rule. The proposed rule should be modified to include the intended definition of "legal service organization" by citing to the intended definition if one exists or defining the term in a new subsection (c) as follows: "(c) The term "legal service organization" means those defined in section(s) _____ of _____ [and/or the case of _____]." OR "(c) The term "legal service organization" means . . . "	activities that should be encouraged.
5	Santa Clara County Bar Association	A			No comments added.	No response necessary.

Rule 6.3: Membership in Legal Services Organizations

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2008 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

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

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

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

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

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

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

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

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

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Proposed Rule 6.4 [N/A]
"Law Reform Activities Affecting Client Interests"

(Draft #4, 12/13/09)

Summary: Proposed Rule 6.4, which concerns lawyers' participation in law reform activities, is based on Model Rule 6.4. However, that part of the Rule that requires disclosures by lawyers participating in law reform activities has been deleted in response to public comment. See Introduction.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☑ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☐ Existing California Law

Rules

Statute

Case law

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption ___7__
Opposed Rule as Recommended for Adoption __4___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

Commission on Access to Justice. See also Public Comment Chart.

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

There were several negative comments urging that this Rule not be adopted, or if it were adopted, that it be amended by deleting the second sentence that imposes disclosure requirements. See Public Comment Chart for details. The Commission rejected the suggestions that the Rule not be adopted in the belief that its rejection would send a negative message relating to the encouragement of lawyers to participate in law reform activities. It should be noted, however, that the California Access to Justice Commission strongly supported the public comment version of the Rule.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.4* Law Reform Activities Affecting Client Interests

December 2009
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.4 is based on Model Rule 6.4. The Commission recommends the adoption of the first sentence of the Model Rule but not the second sentence. After consideration of several comments received during the public comment period, the Commission determined that including the second sentence would impose on lawyers who participate in law reform activities burdensome disclosure requirements to non-clients, thereby countering the positive effect of the first sentence, which is intended to encourage participation in such activities. See Public Comment Chart, below. In addition, the Commission also concluded that the requirements of disclosure are better left to internal disclosure rules and procedures of the organization that the lawyer serves as a director, officer or member. See Explanation of Changes to the Rule.

Minority. A minority of the Commission agrees with the California Commission on Access to Justice and the Legal Aid Association of California that Model Rule 6.4 is as an important addition to the California Rules as is Model Rule 6.3, which the majority has recommended be adopted without material modification. Deleting the requirement to disclose the fact that the lawyer knows that the interests of the lawyer's client may be materially affected by a decision in which the lawyer participates sends the wrong message to the public and to the profession. As Model Rule 6.4, Comment [1] correctly states, a lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure. The minority also notes that there are no reported decisions of a lawyer being disciplined under the second sentence of Rule 6.4. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, RULE 6.4, at page 508 (6th Ed. 2008).

* Proposed Rule 6.4, Draft 4 (12/13/09).

A separate minority takes the position that, while the proposed Rule has laudable, aspirational goals, it has no place in a set of disciplinary rules. See full Dissent, below.

Variations in Other Jurisdictions. Nearly every state, including New York (effective 4/1/2009), has adopted Model Rule 6.4 verbatim or nearly verbatim. See Selected State Variations, below.

ABA Model Rule **Rule 6.4 Law Reform Activities Affecting Client Interests**	Commission's Proposed Rule* **Rule 6.4 Law Reform Activities Affecting Client Interests**	Explanation of Changes to the ABA Model Rule
A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.	A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. ~~When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.~~	The Commission recommends the adoption of the first sentence of Model Rule 6.4. The Commission recommends that the second sentence of Model Rule 6.4 not be adopted. The Commission concluded that the requirements of disclosure are better left to internal disclosure rules and procedures of the organization that the lawyer serves as a director, officer or member. A minority of the Commission disagrees with this position. See Introduction.

* Proposed Rule 6.4, Draft 4 (12/13/09). Strikeouts and underlines reflect changes to the Model Rule.

ABA Model Rule **Rule 6.4 Law Reform Activities Affecting Client Interests** **Comment**	**Commission's Proposed Rule** **Rule 6.4 Law Reform Activities Affecting Client Interests** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.	[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). ~~For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.~~	The Commission recommends adoption of only the first two sentences of the Model Rule comment. The Commission determined that the third and fourth sentences are unnecessary exposition. The Commission also recommends that the last sentence not be adopted in light of its recommendation that the second sentence of the black letter not be adopted. See Explanation of Changes for Rule.

Proposed Rule 6.4 Law Reform Activities Affecting Client Interests

Minority Dissent

Proposed Rule 6.4 has lofty aspirational goals. All lawyers should be encouraged to serve their communities by serving on boards and commissions. Their legal education and training could be helpful in the deliberations of boards and commissions. They should, in all candor, disclose to such boards and commissions whenever they have a conflict, i.e., having a client who may be affected by any decision they make on such boards and commissions. However, the requirements should be part of law school education where students should learn what it means to be a lawyer and how lawyers should conduct themselves so as to promote the integrity of the profession. In no way should such service be the subject of discipline.

The Commission was not asked by the State Bar to write a practice guide, but to review and rewrite rules of discipline and conform, wherever possible, the California rules to the ABA rules. In these situations where the lawyer is not in a lawyer-client relationship and, therefore, owes no particular duty to a board or commission except ones created by, and agreed to by the board or commission.

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

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b).

Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]

TOTAL =__ **Agree = _1_**
Disagree = _4_
Modify = _2_
NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice	D			CACJ objects to this proposal as unnecessary and unworkable. For example, the proposed rule would require that every officer of CACJ disclose to CACJ every time a decision in which he or she participates might benefit (or, less likely, adversely affect) one of his or her clients. Under the proposed rule, every other officer of CACJ would have to make such disclosures to CACJ every time he or she participates in a discussion concerning the position that CACJ should take on proposed legislation for a new penal statute or amendment to a penal statute. We think that is unduly burdensome and unreasonable. Currently in California there is no provision addressing this issue. That is the way it should remain.	The Commission has deleted the second sentence of the proposed Rule, which imposed the disclosure obligations.
2	California Commission on Access to Justice	A			We strongly support the addition of proposed Rule 6.4.	No response necessary.
3	Executive Committee of the State Bar of California Business Law Center	D			The Executive Committee recommends that, like New York State, California not adopt proposed Rule 6.4. Proposed rule 6.4 is unclear in its scope and implementation, while subjecting a lawyer engaged in the worthwhile activity of law	New York has adopted Model Rule 6.4. The Commission disagrees. The policy of encouraging lawyers to participate in law reform activities outweighs the purported burdens the Commenter speculates the Rule will create; The

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]

TOTAL =__ Agree = _1_ Disagree = _4_ Modify = _2_ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					reform, for which a lawyer has particular training, to the risk of disciplinary action if proper disclosure is not made. Alternatively, the disclosure will become so common as to render it rote and meaningless. In the alternative, the Executive Committee recommends the following amendments if the Commission chooses to adopt proposed Rule 6.4. 1. Amend the rule, as the State of Georgia has done, to provide that a lawyer is not subject to discipline for violation of the rule. 2. To permit a lawyer to participate in organizations, in addition to law reform and administration organizations, the first sentence of the proposed rule should read as follows: "A lawyer may serve as a director, officer or member of any organization, including any organization that may be involved in reform of the law or its administration, notwithstanding that the involvement may affect the interests of a client of the lawyer." 3. Amend the Comment so it reads as follows: "[1] Lawyers involved in organizations	"material" limitation on the benefit or adverse effect that might result should avoid that result. In light of the concerns raised concerning the disclosures required by the second sentence of Model Rule 6.4, that sentence has been deleted. 1. In light of the deletion of the second sentence to the Model Rule, no such legend is required. 2. The Commission disagrees. The proposed draft and the Model Rule are limited to law reform activities, which is consistent with the title to the Rule. The proposed revision would cause the rule to apply to all organizations of any kind, of which law reform organizations are only one example. 3. No change required. The first two sentences of the Commenter's proposal are identical to the Model Rule. Those are the only two sentences the

Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]

TOTAL =__ Agree = _1_ Disagree = _4_ Modify = _2_ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program or other organization that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rules 1.7, 1.8, 1.9, 1.11 and 1.18. When a lawyer participates in a decision that materially benefits or adversely affects a client, the lawyer should protect the integrity of the organization by making an appropriate disclosure within the organization. "	Commission has recommended be adopted given its recommendation that the second sentence of the Rule be deleted.
4	Orange County Bar Association	D			The OCBA does not believe it is necessary to adopt Rule 6.4. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for organizations addressing law reform. If the Bar decides to adopt proposed Rule 6.4, the OCBA respectfully suggests adopting	The Commission disagrees. The policy of encouraging lawyers to participate in law reform activities militates in favor of the Rule. The concern that the rule might chill lawyer's participation has been obviated by deletion of the second sentence of the Model Rule. The proposed revision is unnecessary in light of the

Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]

TOTAL =__ Agree = _1_ Disagree = _4_ Modify = _2_ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					language like that used by Florida, namely – "materially affected" instead of "materially benefitted or adversely affected." The OCBA also suggests amending the proposed Rule to include, at the end, the language that has been adopted in Georgia: "There is no disciplinary penalty for a violation of this Rule." This language would act to offset any disincentive for attorneys to participate in organizations addressing law reform while still providing helpful guidance to participating attorneys.	second sentence's deletion. In light of the deletion of the second sentence to the Model Rule, no such legend is required.
5	San Diego County Bar Association Legal Ethics Committee	M			It is foreseeable that a lawyer involved in law reform will not always be able to disclose that a client's interests may be materially benefitted or adversely affected without disclosing client confidences. The fact that a client need not be identified does not solve the problem. Hiding the client's identity does not permit the lawyer to reveal the client's confidences. For instance, a lawyer's record of representing certain clients may be enough in some instances for others to correctly infer the client whose interests would be materially benefitted or adversely affected. In such instances when the lawyer could not make the disclosure required by Proposed Rule 6.4 without disclosing client confidences, an option must be permitted. Proposed Rule	The Commenter's concerns are all addressed by the deletion of the second sentence to the Rule the deletion of most of the Comment.

Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]

TOTAL =__ Agree = _1_ Disagree = _4_ Modify = _2_ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					6.4 should explicitly provide that option, either in the text of the rule or in a comment, by stating that, if disclosure is not permitted by the lawyer's obligations to clients under other Rules and statutes, the lawyer should instead recuse himself or herself from participating in the decision that may materially benefit or adversely affect the client. Have the last two sentences of Rule 6.4 read: "When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, the lawyer shall disclose that fact, <u>if not prohibited by the lawyer's obligations to clients under other Rules and statutes,</u> but need not identify the client. <u>If disclosure is prohibited, the lawyer shall not participate in any decision that may materially benefit or adversely affect the interests of his or her client</u>." In the alternative, Proposed Rule 6.4 could remain worded as currently proposed but be accompanied by a second Comment worded as follows: "If disclosure is prohibited by the lawyer's obligations to any client under other Rules or statutes, then a lawyer cannot provide the disclosure the disclosure required. If disclosure is prohibited, or if the lawyer	

Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]

TOTAL =__ Agree = _1_ Disagree = _4_ Modify = _2_ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					chooses not to disclose in accordance with Rule 6.4 for any other reason, the lawyer shall not participate in any decision that the lawyer knows may materially benefit or adversely affect the interests of a client." Concerned about the impact the rule will have on members who participate in organizations such as the California Conference of delegates. The addition of another Comment to address this issue is encouraged. It is hard to imagine that the drafters intended all the delegates to make such disclosures to the Conference but including "members" within the ambit or the proposed, rather than limiting it to officers and directors of the Conference leads to a questionable outcome.	
6	Santa Clara County Bar Association	D			This rule as proposed should not be adopted. The SCCBA supports the rationale for having this rule: to encourage attorneys to participate in law reform organizations. However, the rule elevates fiduciary duties that the attorney owes the organization as a Board member to an attorney rule of conduct subjecting the attorney to discipline. The attorney's duty as an attorney runs to the client; the attorney's duty as a member of the Board or a committee runs to the organization and is governed by the conflict of interest rules that govern that organization. As such,	The Commission disagrees. The policy of encouraging lawyers to participate in law reform activities militates in favor of the Rule. The concerns the Commenter has expressed have been obviated by deletion of the second sentence of the Model Rule.

Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]

TOTAL =__ Agree = _1_ Disagree = _4_ Modify = _2_ NI = __

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the last sentence should be deleted or be modified to read: "While a lawyer may be required to disclose a conflict of interest related to a client pursuant to fiduciary duties as an officer or member of such an organization, the lawyer shall protect the confidentiality of the client as required by Business & Professions Code Sec. 6068(e)(1)." The Comment to this rule should be revised accordingly.	
7	State Bar Trusts & Estates Section Executive Committee	M			The Executive Committee of the Trusts and Estates Section of the State Bar urges that the last sentence of proposed Rule 6.4 be deleted as unnecessary and impractical, or at least clarified such that it does not apply to organizations that are merely advisory.	The second sentence of the proposed Rule has been deleted.

Rule 6.4: Law Reform Activities Affecting Client Interests

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2008 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. has no comparable provision.

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

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

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

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

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

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

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

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Proposed Rule 8.3 [1-120 & 1-500(B)]
"Reporting Professional Misconduct"

(Draft #6, 12/14/09)

Summary: Proposed rule 8.3 adds new permissive and mandatory reporting standards, including a requirement that a lawyer report to the State Bar when another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. Permissive reporting standards are imposed for general lawyer misconduct and for judicial misconduct by judges and other adjudicative officers. In the place of current California Rule 1-500(B), a proposed rule comment provides a cross reference to the broader prohibition in existing Business and Professions Code §6090.5.

Comparison with ABA Counterpart

Rule	Comment
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☑ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 1-120, 1-500(B)
Statute	Bus. & Prof. Code 6090.5.
Case law	

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption of the Rule ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __7__
Opposed Rule as Recommended for Adoption __2__
Abstain __0__

Approved on Consent Calendar ☐

Approved by consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☑Yes ☐ No

(See Introduction.)

Stakeholders and Level of Controversy

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☑ Very Controversial – Explanation:

See Introduction. The proposed rule includes limited mandatory reporting of certain lawyer misconduct.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.3* Reporting Professional Misconduct

December 2009
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 8.3 adds new disciplinary standards concerning a lawyer reporting the misconduct of another member of the legal profession that are not currently found in the California rules or the State Bar Act. The new disciplinary standards include one limited mandatory reporting standard and two permissive reporting standards. (i) Paragraph (a) of proposed Rule 8.3 states that a lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer *must* inform the appropriate disciplinary authority. (ii) Paragraph (b) states that, except *as required by paragraph (a)*, a lawyer *may, but is not required to*, report misconduct of another lawyer. Paragraph (c) states that a lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office *may, but is not required to*, report the violation to the appropriate authority. The proposed Rule thus differs from the broad mandatory reporting requirements as to both lawyer and judicial misconduct that are found in ABA Model Rule 8.3 and most states. The Commission believes that a balancing of the policies involved favors permissive reporting for most misconduct, but a limited mandatory reporting standard for certain egregious criminal acts that, if not remedied, are most likely to cause substantial harm to the public and might remain under the radar for a significant period of time or perhaps forever, during which time additional substantial public injury may occur.

The Commission agrees with the concepts that the self-regulation of the legal profession requires each lawyer to be vigilant for ethical violations, and that lawyers should be encouraged to report the misconduct of other lawyers, but it has concluded that a balanced approach to reporting misconduct is more appropriate than establishing a single standard that subjects all misconduct to possible mandatory reporting. There are several reasons for this approach. These include the following:

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* Proposed Rule 8.3, Draft 6 (12/14/09).

a. First, a limited mandatory reporting standard for certain, egregious criminal acts is consistent with the concept of self-regulation. Such acts are more likely to result in substantial harm to the public and mandating their reporting will offer additional public protection not present in the existing California rules. A broad mandatory reporting rule, however, would be inconsistent with the lawyer's duty of undivided loyalty to his or her client. This important client-protection principle is enforced more robustly in California than under the Model Rules, and the Commission supports maintaining the obligation of lawyers to focus their professional efforts primarily on client welfare and interests. See *Flatt v. Superior Court* (1994) 9 Cal.4th 281, 289 ["A lawyer's fiduciary duty of loyalty is to protect the client in every possible way and not to assume a position adverse or antagonistic to his or her client without the client's free and intelligent consent given after full knowledge of all the facts and circumstances. Absent such informed consent, a lawyer is precluded from assuming any relation which would prevent him from devoting the lawyer's entire energies to the client's interests."] Cf. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) [lawyer suspended who abided by client's directive not to report her former counsel's misconduct]. As exemplified by *Himmel*, mandatory lawyer reporting compels the client to be a participant in the disciplinary process without the client's consent and even over the client's objections. The Commission considers the client loyalty issue paramount. Broadly mandating reporting of another lawyer's misconduct could prejudice the reporting lawyer's client, e.g., by: (i) disclosing the client's confidential information; (ii) interfering with the pursuit of the client's legitimate objectives; (iii) implicating the client in wrongdoing; and (iv) as mentioned below (see ¶. 9 of this Introduction), embroiling the client as a witness in the disciplinary proceedings.

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

c. Third, a rule that broadly mandates reporting, similar to the Model Rule, would create a potential conflict with statutory duties of confidentiality a lawyer might have in another role, such as might happen with information a lawyer were to learn while serving as a mediator. For all of these reasons, the Commission believes that any broad reporting obligation should be permissive and left to the exercise of a lawyer's professional judgment; a lawyer's fitness to practice law is not called into question by a decision not to report another person's ethical violation. This view is implemented in the proposed rule that includes permissive reporting for most misconduct and a limited mandatory reporting standard for certain egregious criminal acts.

Georgia has adopted a version of the reporting rule which expressly states that a lawyer cannot be disciplined under it. Kentucky has addressed some of the weaknesses in Model Rule 8.3 in its new Rule (effective 7/15/09) that: (i) adds an immunity provision for the lawyer who makes the Rule 8.3 report [but overlooks the civil risk to a lawyer who exercises judgment to not report]; and (ii) adds an extremely limited self-reporting obligation [limited to a lawyer who is disciplined in another jurisdiction. Cf. Comment [3], below]. A number of jurisdictions have reacted to the mandatory nature of the Model Rule by excepting information learned in certain circumstances, such as by participating in a lawyer assistance

program. Ohio's rule limits the duty to providing only unprivileged information. New York's Rule 8.3 (effective 4/1/09) eliminates the duty to report on judicial misconduct. For reasons explained in the comparison chart, the Commission's proposed rule permits but does not require the reporting of judicial misconduct.

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

The prohibition found in current California Rule 1-500(B) against agreements not to report violations has been incorporated into this Rule by clarifying in Comment [5] that lawyers may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5, which provides broader prohibitions on such agreements. Following public comment, some revisions were made for clarity and a comment added to emphasize that this new Rule is not intended to abrogate a lawyer's obligations under California Rule 5-100 ("Threatening Criminal, Administrative, or Disciplinary Charges").

Minority. A minority of the Commission dissents from the mandatory reporting requirement in the proposed Rule. The minority contends that mandatory reporting issues often arise in the midst of representing a client. The experience in jurisdictions with mandatory reporting is that when reporting occurs in this context, the innocent client often suffers. Reporting can lead to disputes among the lawyers representing clients in a matter. It can lead to a change in counsel and corresponding continuances or inability to complete a pending settlement as well as other situations in which the innocent client bears the cost. Mandatory reporting does not protect clients in these situations and elevates the protection of non-clients over the legitimate interests of clients.

ABA Model Rule Rule 8.3 Reporting Professional Misconduct	Commission's Proposed Rule* Rule 8.3 Reporting Professional Misconduct	Explanation of Changes to the ABA Model Rule
(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.	(a) A lawyer who knows that another lawyer has committed a ~~violation of the Rules of Professional Conduct~~felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer ~~in other respects,~~ shall inform the appropriate ~~professional~~disciplinary authority.	As discussed in detail in the Introduction, the Commission is recommending a balanced approached of both permissive and limited mandatory reporting, rather than setting a single standard that subjects all misconduct to possible mandatory reporting. Proposed paragraph (a) states the limited mandatory reporting obligation imposed for egregious criminal acts. This mandatory standard requires that a report be made to a disciplinary authority that would have jurisdiction to take action on the reported misconduct. The Introduction notes the minority view that opposes the mandatory reporting obligation.
	(b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.	See above Explanation of Changes for paragraph (a). Proposed paragraph (b) states the general permissive reporting standard for violations of the Rules or the State Bar Act that are not felonious criminal acts subject to mandatory reporting under paragraph (a).
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.	(~~b~~c) A lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to ~~the judge's~~that person's fitness for office ~~shall inform~~may, but is not required to, report the violation to the appropriate authority.	The Model Rule expands the scope of the concept of lawyer self-regulation to include a duty to report judicial misconduct. The Commission agrees that there may be situations where a lawyer's report of judicial misconduct would be beneficial for the client and provide public protection; however, the Commission also believes it would be unduly harsh to subject a lawyer to the threat of discipline for deciding not to report judicial misconduct because of concerns about how doing so might affect the lawyer's other current clients or the lawyer's self interest. Accordingly, proposed paragraph (c) states a permissive standard for reporting judicial misconduct.

* Proposed Rule 8.3, Draft 6 (12/14/09). Redline/strikeout showing changes to the ABA Model Rule,

ABA Model Rule Rule 8.3 Reporting Professional Misconduct	Commission's Proposed Rule* Rule 8.3 Reporting Professional Misconduct	Explanation of Changes to the ABA Model Rule
(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.	(~~c~~d) This Rule does not ~~require disclosure of~~authorize a lawyer to report misconduct if the lawyer is prohibited from doing so by the lawyer's duties to a client a former client or by law. Such prohibitions include, but are not limited to, the lawyer's duty not to disclose (i) information otherwise protected by Business and Professions Code section 6068(e)(1), Rule 1.6, or Rule 1.9; (ii) information gained by a lawyer or judge while participating in an approved lawyers assistance program; (iii) information gained during a mediation; (iv) information subject to a confidential protective order; or (v) information otherwise protected under laws governing fiduciaries.	Similar to Model Rule 8.3(c), the Commission agrees that a lawyer should not make a permissive report under paragraphs (b) and (c) of the proposed Rule if doing so would compromise client information, but it disagrees with the Model Rule because it is too narrow in referring only to confidentiality as there are other client interests that a lawyer should consider before deciding whether to make a permissive report.

ABA Model Rule Rule 8.3 Reporting Professional Misconduct Comment	Commission's Proposed Rule* Rule 8.3 Reporting Professional Misconduct Comment	Explanation of Changes to the ABA Model Rule
[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.	~~[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.~~	The Commission recommends the rejection of Model Rule 8.3, Comment [1], because it is inconsistent with its recommended balanced approach of including a limited mandatory reporting standard egregious criminal acts and a general permissive reporting standard for other misconduct.
	[1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act that is not required by paragraph (a), a lawyer should consider among other things whether the violation raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.	The Commission agrees with the premise of MR 8.3 that the seriousness of the other lawyer's misconduct is a proper concern in deciding whether to report that misconduct. The Commission therefore recommends the adoption of this Comment [1], which borrows that concept from MR 8.3(a).
[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.	~~[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.~~	As explained above with respect to paragraph (d), the Commission recommends replacing the reference to confidentiality with a broader discussion of pertinent concerns. Given the importance of these concerns, they are addressed in the rule rather than in a comment to the rule.

* Proposed Rule 8.3, Draft 6 (12/14/09).

ABA Model Rule Rule 8.3 Reporting Professional Misconduct Comment	Commission's Proposed Rule* Rule 8.3 Reporting Professional Misconduct Comment	Explanation of Changes to the ABA Model Rule
	[2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, section 6068(o).) In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.	California is unique in the self-reporting requirement cited in this proposed Comment. Because of the relationship between proposed Rule 8.3 and the separate issue of self-reporting, the Commission believes it would be helpful to include this cross-reference. Also included in this Comment is an express statement that a lawyer is not required to report another lawyer's misconduct under paragraph (a) if that report would constitute a relinquishment of the reporting lawyer's privilege against self-incrimination.
[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.	~~[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.~~	For the most part, Model Rule 8.3, Comment [3], is unrelated to the Rule that the Commission recommends, and it therefore recommends the comment's removal. The limited mandatory reporting standard relates to felonious criminal acts not mere rule violations. The Commission's proposed Comment [3] is on a different topic and is given and explained immediately below.

ABA Model Rule Rule 8.3 Reporting Professional Misconduct Comment	Commission's Proposed Rule* Rule 8.3 Reporting Professional Misconduct Comment	Explanation of Changes to the ABA Model Rule
	[3] Even if a lawyer is permitted or required to report under this Rule, the lawyer must not threaten to file criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.	As with proposed Comment [2], the Commission believes it could be helpful to lawyers to provide this cross-reference to the Rule that prohibits lawyers from threatening criminal, administrative or disciplinary charges.
[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.	[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.	Proposed Comment [4] adopts language of the Model Rule counterpart.
	[5] A lawyer may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5.	Current California Rule 1-500(B) provides that a member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules. The Commission recommends replacing the substance of this current rule with the cross reference in proposed Comment [5] to California's statutory prohibition located at Business and Professions Code section 6090.5. The statutory prohibition subsumes the prohibition in current California Rule 1-500(B) and also prohibits related misconduct not found in the current rule (e.g., a prohibition against improperly agreeing to withdraw a State Bar complaint). Rather than perpetuating the overlap of topics, the Commission is recommending a cross reference to the broader statutory prohibition.

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

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

(a) A lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate disciplinary authority.

(b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.

(c) A lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office may, but is not required to, report the violation to the appropriate authority.

(d) This Rule does not authorize a lawyer to report misconduct if the lawyer is prohibited from doing so by the lawyer's duties to a client a former client or by law. Such prohibitions include, but are not limited to, the lawyer's duty not to disclose (i) information otherwise protected by Business and Professions Code section 6068(e)(1), Rule 1.6, or Rule 1.9; (ii) information gained by a lawyer or judge while participating in an approved lawyers assistance program; (iii) information gained during a mediation; (iv) information subject to a confidential protective order; or (v) information otherwise protected under laws governing fiduciaries.

COMMENT

[1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act that is not required by paragraph (a), a lawyer should consider among other things whether the violation raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.

[2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. (See, e.g., Business & Professions Code, section 6068(o).) In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.

[3] Even if a lawyer is permitted or required to report under this Rule, the lawyer must not threaten to file criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] A lawyer may not be a party to or participate in offering or making an agreement that would violate Business and Professions Code section 6090.5.

Rule 8.3 Reporting Professional Misconduct.
[Sorted by Commenter]

TOTAL = 4 **Agree = 1**
Disagree = 2
Modify = 1
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Konig, Alan	D			Only a mandatory reporting rule should be adopted, as that is the standard in a majority of jurisdictions.	Commission made the suggested revision as to the reporting of certain criminal acts, as explained in the Introduction.
2	Poll, Edward	D			Reporting rules have anomalous consequences that are contrary to the interests of clients, such as the situation in *In re Himmel* (Ill. 1988) 533 N.E.2d 790	Commission agrees in part with the criticism of the *Himmel* case but believes that it remains proper to encourage lawyers to report the misconduct of other lawyers so long as client interests are not prejudiced and that mandatory reporting of felonious criminal acts that raise a substantial question about a lawyer's honesty and fitness to practice is appropriate. The Rule expressly states, however, that reporting is not allowed if it would violate client confidentiality or otherwise prejudice the interests of a client.
3	San Diego County Bar Association	M			Comment [2] would be clearer if the was changed to use a list format. The rule also should address the reporting of judicial misconduct. Comment [2] should be revised to more clearly enumerate the circumstances where the rule does not allow the reporting of misconduct.	Commission agreed and revised Comment [2], but moved the subject of the Comment into the Rule itself. See paragraph (d) of the Rule. Commission included a provision for discretionary reporting of judicial misconduct. See paragraph (c) of the Rule. Commission agreed and revised Comment [2] and placed it in the Rule itself.
4	San Francisco, Bar Association of	A			Supports as drafted but suggests a new comment clarifying that Rule 5-100 is not abrogated.	Commission agreed and added a new Comment [3], which refers to Rule 3.10, the number assigned current rule 5-100 in the proposed Rules.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 8.3: Reporting Professional Misconduct

STATE VARIATIONS

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

Arizona: Rule 8.3(c) retains language similar to the pre-2002 version of the ABA Model Rule, protecting information gained while serving in a lawyer assistance program that "would be confidential if it related to the representation of a client" and if confidentiality has not otherwise been waived.

Arkansas: Rule 8.3(d) generally exempts lawyers working with the Arkansas Lawyer Assistance Program from mandatory reporting obligations "unless it appears… that the attorney in question, after entry into the ALAP, is failing to desist from said violation, or is failing to cooperate with a program of assistance to which said attorney has agreed, or is engaged in the sale of a controlled substance or theft of property constituting a felony under Arkansas law, or the equivalent thereof if the offense is not within the State's jurisdiction."

California: The California Rules of Professional Conduct have no comparable provision.

Connecticut adds the following sentence to Rule 8.3(a): "A lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority." Rule 8.3(c) tracks the pre-2002 version of ABA Model Rule 8.3(c), but Connecticut's version also refers to Connecticut General Statutes §51-81d(f), which governs crisis intervention assistance to attorneys.

District of Columbia: Rule 8.3(c) omits the phrase "or information gained by a lawyer or judge while participating in an approved lawyers assistance program." The phrase is unnecessary because D.C. Rule 1.6(i) provides as follows:

> [A] lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee... shall be treated as a confidence or secret within the terms of paragraph (b) [of Rule 1.6]. Such information may be disclosed only to the extent permitted by this rule.

D.C. Rule 1.6(j) contains parallel language regarding information that a lawyer receives in connection with service on the D.C. Bar Practice Management Service Committee (formerly known as the Lawyer Practice Assistance Committee).

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Florida: Rule 8.3 ends by providing that "if a lawyer's participation in an approved lawyers assistance program is part of a disciplinary sanction this limitation shall not be applicable and a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency." Florida also adds Rule 8.3(d), which provides as follows:

> *Limited Exception for LOMAS Counsel*. A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member... if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer's practice. *Provided further*, however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.

Georgia changes "shall" to "should" in Rule 8.3(a) and (b), and replaces ABA Model Rule 8.3(c) by stating: "There is no disciplinary penalty for a violation of this Rule." Georgia also adds a special self-reporting provision, Rule 9.1, which requires members of the Georgia Bar to notify the State Bar of Georgia of (a) all other jurisdictions in which they are admitted to practice law and the dates of admission; and (b) "the conviction of any felony or of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyers fitness to practice law, within sixty days of conviction." Finally, Georgia adds a special Rule 9.2, regarding agreements not to report, which provides as follows:

> In connection with the settlement of a controversy or suit involving misuse of funds held in a fiduciary capacity, a lawyer shall not enter into an agreement that the person bringing the claim will be prohibited or restricted from filing a disciplinary complaint, or will be required to request the dismissal of a pending disciplinary complaint concerning that conduct.

Georgia's Comment to Rule 9.2 provides as follows:

> [1] The disciplinary system provides protection to the general public from those lawyers who are not morally fit to practice law. One problem in the past has been the lawyer who settles the civil claim/disciplinary complaint with the injured party on the basis that the injured party not bring a disciplinary complaint or request the dismissal of a pending disciplinary complaint. The lawyer is then free to injure other members of the general public.
>
> [2] To prevent such abuses in settlements, this rule prohibits a lawyer from settling any controversy or suit involving misuse of funds on any basis which prevents the person bringing the claim from pursuing a disciplinary complaint.

Illinois: Rule 8.3(a) requires a lawyer to report knowledge "not otherwise protected as a confidence by these Rules or by law" that another lawyer has committed specified violations. Rule 8.3(c) provides that upon proper request of a tribunal or disciplinary authority, "a lawyer possessing information not otherwise protected as a confidence by these Rules or by law concerning another lawyer or a judge shall fully reveal such information." Rule 8.3(d) provides the following: "A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before anybody other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission."

Kansas: Rule 8.3(c) adds that lawyers are "not required to disclose information" learned through participation in a

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variety of self-help organizations, such as Alcoholics Anonymous.

Also, Rule 223 of the Kansas Rules Relating to Discipline of Attorneys, entitled "Immunity," provides as follows: "Complaints, reports, or testimony in the course of disciplinary proceedings under these Rules shall be deemed to be made in the course of judicial proceedings. All participants shall be entitled to judicial immunity and all rights, privileges and immunities afforded public officials and other participants in actions filed in the courts of this state."

Massachusetts: The Comment to Rule 8.3 provides as follows:

> [3] While a measure of judgment is required in complying with the provisions of the Rule, a lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a "serious crime."… Section 12(3) of Rule 4:01 provides that a serious crime is "any felony, and... any lesser crime a necessary element of which... includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy. or solicitation of another, to commit [such a crime]." In addition to conviction of a felony, misappropriation of client funds or perjury before a tribunal are common examples of reportable conduct….
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> [3A] In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

Michigan adds the word "significant" before "violation" in Rules 8.3(a) and (b). The duty to report is suspended if the lawyer gained the information "while serving as an employee or volunteer of the substance abuse counseling program of the State Bar of Michigan, to the extent that the information would be protected under Rule 1.6 from disclosure if it were a communication between lawyer and client." Rule 8.3(c)(2).

New Jersey cuts off Rule 8.3(c) after "Rule 1.6" and adds Rule 8.3(d), which provides as follows:

> Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:
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> (i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and
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> (ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or

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present violations that did not or do not pose a serious danger to clients.

New York: DR 1-103 provides the following:

> A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
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> B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

A related statute, §499 of the New York Judiciary Law (reprinted below in our Selected New York Statutes) protects communications between a lawyer and a lawyer assistance program to the same extent as communications between attorneys and their clients.

North Carolina: Rule 8.3(c) provides only that Rule 8.3 "does not require disclosure of information otherwise protected by Rule 1.6," omitting the ABA reference to a lawyers' assistance program, but North Carolina accomplishes the same result by providing in Rule 1.6(c) that the duty of confidentiality under Rule 1.6 "encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program... regarding another lawyer or judge seeking assistance or to whom assistance is being offered." (Rule 1.6 also defines the term "client" to include lawyers seeking assistance from approved lawyers' or judges' assistance programs.)

North Carolina also adds a Rule 8.3(d), which provides that a lawyer who has been disciplined in any state or federal court for violating that court's Rules of Professional Conduct must "inform the... State Bar of such action in writing no later than 30 days after entry of the order of discipline." Finally, North Carolina Rule 1.15-2(o), entitled "Duty to Report Misappropriation," provides that a lawyer who "discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar."

Ohio: Rule 8.3 provides as follows:

> (a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trust, worthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.
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> (b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.
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> (c) Any information obtained by a member of a committee... of a bar association... designed to assist lawyers with substance abuse or mental health problems ... shall be privileged for all purposes under this rule.

Texas alters Rule 8.3(c) as follows:

> (c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of

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this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

Texas also adds a Rule 8.3(d), which makes clear that Rule 8.3 does not require disclosure of knowledge or information otherwise protected as confidential information by Texas Rule 1.05 (the Texas equivalent to ABA Model Rule 1.6) or by "any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program."

Virginia: Rule 8.3(b) replaces the phrase "who knows" with the phrase "having reliable information." Virginia Rule 8.3(c) provides that if a lawyer serving as a third-party neutral receives "reliable information" in that capacity about another lawyer's misconduct that would otherwise have to be reported, the lawyer/neutral "shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority." Rule 8.3(d)--equivalent to ABA Model Rule 8.3(c)--also exempts disclosure by a lawyer who is a "trained intervenor or volunteer" for an approved lawyers' assistance committee, or who is "cooperating in a particular assistance effort," when the information is obtained "for the purposes of fulfilling the recognized objectives of the program."

Virginia also adds Rule 8.3(e), which requires a lawyer to inform the Virginia State Bar if (1) the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any jurisdiction for violating that jurisdiction's rules of professional conduct, or (2) the lawyer has been convicted of a felony in any United States jurisdiction, or (3) the lawyer has been convicted of either "a crime involving theft, fraud, extortion, bribery or perjury," or "an attempt, solicitation or conspiracy to commit any of the foregoing offenses" in any United States jurisdiction.

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