

ATTACHMENT 2

Dashboard Cover Sheet, Introduction, Model
Rule Comparison Table, Clean Rule Draft, and
State Variation Excerpts for Rules In Batches 1 - 4^{*}

^{*} NOTE: The Commission recently determined to re-number Rule 1.8.12 as Rule 1.8.9 and some of the documents in this attachment may contain references to Rule 1.8.12. These references will be updated before the rules are posted for public comment.

Proposed Rule 1.0 [RPC 1-100]

“Purpose and Scope of the Rules”

(Draft #8.1, 10/18/09)

Summary: Proposed Rule 1.0 provides a description of the purposes and scope of the Rules of Professional Conduct in place of the Preamble and Scope to the ABA Model Rules. The purposes of the Rules are to protect the public and the interests of the client, to protect and promote the legal system and the administration of justice and to promote respect for and confidence in the legal profession. The Rules apply to members of the State Bar practicing in and outside of California and to other lawyers practicing law in this state. A willful violation of the Rules is a basis for discipline. The Rules are not intended to enlarge or restrict the law regarding the liability of lawyers to others.

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 1-100

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 12

Opposed Rule as Recommended for Adoption 0

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 of California Committee on Professional Liability Insurance

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The Commission recommends that the Model Rule Preamble and Scope not be adopted and that the purpose and scope of the Rules be included in a separate rule of professional conduct. In addition, the Commission recommends including the concept in the Model Rule Scope, paragraph 20, that a violation of a rule will not itself give rise to a civil cause of action; however, a violation of a rule may be evidence of breach of a fiduciary or other substantive duty in a non-disciplinary context.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.0* Purpose and Scope of the Rules of Professional Conduct

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.0 provides a description of the intended purpose and scope of the Rules of Professional Conduct. The Rule does not have a counterpart in the ABA Model Rules. The Model Rules, instead, are preceded by a Preamble describing a lawyer's responsibilities in 13 comments and a Scope that describes how the Rules are to be applied in 8 additional comments. The Preamble and Scope to the Model Rules follows a tradition that began with the preamble to the original ABA Canons of Professional Conduct and continued with the ABA Model Code of Professional Responsibility. California has traditionally described the purpose and scope of its Rules in a separate rule, and the Commission recommends that this tradition be continued in proposed Rule 1.0.

Rule 1.0(a) enumerates four purposes of the Rules: (1) to protect the public; (2) to protect the interests of clients; (3) to protect the integrity of the legal system and promote the administration of justice and (4) to promote respect for, and confidence in, the legal professional. These four purposes are derived from the Rules themselves and from court decisions and ethics opinions that have discussed and applied the Rules. Paragraph (a) is consistent with the Model Rules and provides a more concise statement of the purpose of the Rules than the general orientation contained in the Preamble and Scope to the Model Rules.

Rule 1.0(b) describes the scope of the Rules and is derived in part from current California Rule 1-100 and provisions of the State Bar Act and from comments under the Scope section to the Model Rules. Paragraph (c) tracks Scope paragraph 21 in explaining the purpose of the comments accompanying the Rules. Paragraph (d) explains how the Rules should be cited.

Variation in other jurisdictions. Although most states include a preamble and scope section similar to the Model Rules, several states, including Michigan and Nevada, replace the preamble and scope with a rule which incorporates some of the paragraphs of the preface to the Model Rule.

* Proposed Rule 1.0, Draft 8.1 (10/18/09).

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General	<u>Commission's Proposed Rule</u>[*] Rule 1.0 <u>Purpose and Scope of the Rules of Professional Conduct</u>, ~~in General~~	<u>Explanation of Changes to the ABA Model Rule</u>
(A) Purpose and Function. The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.	(Aa) ~~Purpose and Function. The purposes of the following Rules are:~~ ~~The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.~~	Paragraph (a) provides a succinct statement of the purposes of the Rules in place of the more general orientation contained in the Preamble and Scope to the Model Rules. Paragraph (a) continues the approach in current California Rule 1-100(A) of describing the policies underlying the Rules. The paragraph expands on the purposes stated in current Rule 1-100 and is intended to provide greater guidance to lawyers in applying the Rules. The four purposes are derived from the Rules themselves and from relevant case law and ethics opinions on the purposes of the Rules. Each of the four stated purposes in paragraph (a) is consistent with the ABA Preamble on A Lawyer's Responsibilities and the Scope section to the Model Rules. See Model Rule, Preamble and Scope, below, particularly paragraphs 1 through 9, 11, 12, and 17.
	<u>(1) To protect the public;</u>	
	<u>(2) To protect the interests of clients;</u>	
	<u>(3) To protect the integrity of the legal system and to promote the administration of justice; and</u>	

^{*} Proposed Rule 1.0, Draft 8.1 (10/18/09). Redline/strikeout showing changes to the ABA Model Rule

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General	<u>Commission's Proposed Rule*</u> Rule 1.0 <u>Purpose and Scope of the Rules of Professional Conduct</u>, ~~in General~~	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(4) To promote respect for, and confidence in, the legal profession.</u>	
For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.	~~For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.~~	See Explanation of Changes for paragraph (b) and Comments [1], [2] and [4].
The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof.Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.	~~The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof.Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~	See Explanation of Changes for Comment [3].
	<u>(b) Scope of the Rules:</u> <u>(1) These Rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these Rules, regulate the conduct of lawyers and are binding upon all members of the State Bar and all other lawyers practicing law in this state.</u>	Paragraph (b) provides a separate statement of the intended scope of the Rules. Paragraph (b)(1) is derived from the last sentence in current California Rule 1-100(A). The sentence has been modified to clarify that the Rules also apply to lawyers who are not members of the State Bar and who practice law in this state pursuant to California Rules of Court and other law. See Comment [5] and proposed Rules 5.5 and 8.5. A separate statement on the scope of the Rules is consistent with the Model Rules, which have a separate Scope section as an introduction to the Model Rules. See Model Rule, Scope, below.

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General	<u>Commission's Proposed Rule</u>* Rule 1.0 <u>Purpose and Scope of the Rules of Professional Conduct</u>, ~~in General~~	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(2) A willful violation of these Rules is a basis for discipline.</u>	Paragraph (b)(2) is based on Model Rule Scope, paragraph 19, and conforms to the second paragraph in current California Rule 1-100(A).
These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.	~~These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.~~	See Explanation of Changes for paragraph (b)(3) and Comment [2].
	<u>(3) Nothing in these Rules or the comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.</u>	Paragraph (b)(3) is based on Model Rule Scope, paragraph 20, and replaces the fourth paragraph in current California Rule 1-100(A). Paragraph (b)(3), as amplified by Comment [2] below, embodies the concept stated in Model Rule Scope, paragraph 20, and existing case law, that a violation of a rule does not itself give rise to a civil cause of action; however, a violation of a rule may be evidence of breach of a lawyer's fiduciary or other legal duty in a non-disciplinary context.
(B) Definitions. (1) "Law Firm" means: (a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or	~~(B) Definitions.~~ ~~(1) "Law Firm" means:~~ ~~(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~	The definitions in current California Rule 1-100(B) have been moved to a separate terminology rule (proposed Rule 1.0.1) to conform to Model Rule 1.0 on "Terminology."

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General	<u>Commission's Proposed Rule*</u> Rule 1.0 <u>Purpose and Scope of the Rules of Professional Conduct</u>, ~~in General~~	<u>Explanation of Changes to the ABA Model Rule</u>
(b) a law corporation which employs more than one lawyer; or (c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or (d) a publicly funded entity which employs more than one lawyer to perform legal services.	~~(b) a law corporation which employs more than one lawyer; or~~ ~~(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~ ~~(d) a publicly funded entity which employs more than one lawyer to perform legal services.~~	
(2) "Member" means a member of the State Bar of California.	~~(2) "Member" means a member of the State Bar of California.~~	
(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.	~~(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~	

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General	<u>Commission's Proposed Rule*</u> Rule 1.0 <u>Purpose and Scope of the Rules of Professional Conduct</u>, ~~in General~~	<u>Explanation of Changes to the ABA Model Rule</u>
(4) "Associate" means an employee or fellow employee who is employed as a lawyer.	~~(4) "Associate" means an employee or fellow employee who is employed as a lawyer.~~	
(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.	~~(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~	
(C) Purpose of Discussions. Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.	~~(C) Purpose of Discussions.~~ ~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.~~	See Explanation of Changes for paragraph (c).
	<u>(c) Comments: The comments following the Rules do not add obligations to the Rules but provide guidance for their interpretation and for acting in compliance with the Rules.</u>	Paragraph (c) is derived from the last sentence in Model Rule, Scope, paragraph 14, and the first sentence in ¶ 21. See Model Rule, Preamble and Scope, below. The paragraph is intended to replace current California Rule 1-100(C).

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General	<u>Commission's Proposed Rule*</u> Rule 1.0 <u>Purpose and Scope of the</u> Rules of Professional Conduct, ~~in General~~	<u>Explanation of Changes to the ABA Model Rule</u>
(D) Geographic Scope of Rules. (1) As to members: These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules. (2) As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.	~~(D) Geographic Scope of Rules.~~ ~~(1) As to members:~~ ~~These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.~~ ~~(2) As to lawyers from other jurisdictions who are not members:~~ ~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~	The provision on the disciplinary authority over lawyers who are members of the State Bar practicing in and outside of this state and other lawyers practicing in this state has been moved to proposed Rule 8.5 to be consistent with the Model Rules. As a result, a statement regarding the geographic scope of the Rules is provided in Comment [5] with a cross reference to proposed Rule 8.5.
(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California."	~~(E)~~ <u>Title:</u> These ~~rules may be cited and referred to as~~ Rules are the "California Rules of Professional Conduct ~~of the State Bar of California.~~"	Paragraph (d) is based on current California Rule 1-100(E) and identifies how the Rules should be referred to and cited.

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General Discussion	<u>Commission's Proposed Rule</u> Rule 1.0 <u>Purpose and Scope of the</u> Rules of Professional Conduct, ~~in General~~ Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Discussion	~~Discussion~~Comment [1] The Rules of Professional Conduct are Rules of the Supreme Court of California regulating lawyer conduct in this state. (See <i>In re Attorney Discipline System</i> (1998) 19 Cal. 4th 582, 593-597 [79 Cal Rptr.2d 836]; <i>Howard v. Babcock</i> (1993) 6 Cal. 4th 409, 418 [25 Cal Rptr.2d 80]. The Rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to Business and Professions Code sections 6076 and 6077. The Supreme Court of California has inherent power to regulate the practice of law in California, including the power to admit and discipline lawyers practicing in this jurisdiction. (<i>Hustedt v. Workers' Comp. Appeals Bd.</i> (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801]; <i>Santa Clara County Counsel Attorneys Association v. Woodside</i> (1994) 7 Cal.4th 525, 542-543 [28 Cal.Rptr.2d 617] and see Business and Professions Code section 6100.)	Comment [1] confirms that the Rules, when approved, are the Rules of the Supreme Court and that the Supreme Court has inherent power to regulate the practice of law in California and ultimate authority over lawyer conduct in this state. The comment is based on case decisions and provisions of the State Bar Act and is derived in part from current California Rule 1-100(A). The comment does not have a direct counterpart in the Model Rules, although it is consistent with provisions in the Preamble to the Model Rules, particularly paragraphs 10–11. See Model Rules, Preamble and Scope, below.
The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline (See <i>Ames v. State Bar</i> (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See <i>Noble v. Sears Roebuck &</i>	[2] The Rules ~~of Professional Conduct~~ are ~~intended~~designed to ~~establish the standards~~provide guidance to lawyers and to provide a structure for members for purposes of regulating conduct through discipline. (See <i>Ames v. State Bar</i> (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) ~~The fact that a member has engaged in conduct that may be~~	Comment [2] is based on provisions in the Preamble and Scope to the Model Rules, particularly paragraphs 16, 19 and 20, and also on case law in California. The comment reinforces the principle in paragraph (b)(2) that the Rules are not intended to expand civil liability for lawyers. At the same time, the comment recognizes, as does Scope, paragraph 20 of the Model Rules and California case law, that a violation of a rule may be evidence of

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General Discussion	<u>Commission's Proposed Rule</u> Rule 1.0 <u>Purpose and Scope of the Rules of Professional Conduct</u>, ~~in General~~ Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Co. (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., Klemm v. Superior Court (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).	~~contrary~~Therefore, failure to ~~these rules~~comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not automatically itself give rise to a ~~civil~~ cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (See <u>Stanley v. Richmond</u> (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]; <u>Noble v. Sears Roebuck & Co.</u> (1973) 33 Cal.App.3d 654, 658 [109 Cal.Rptr. 269]; <u>Wilhelm v. Pray, Price, Williams & Russell</u> (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355].) ~~These rules are not intended to supercede existing law relating to members~~Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary ~~contexts~~context. (See, <u>Stanley v. Richmond, supra</u>, 35 Cal.App.4th at p. 1086; <u>Mirabito v. Liccardo</u> (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of the rule may have other non-disciplinary consequences. (See e.g., <u>Klemm v. Superior Court</u> (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (~~motion for disqualification of counsel due to a conflict of interest~~); <u>Academy of California Optometrists, Inc. v. Superior Court</u> (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); <u>Fletcher v. Davis</u> (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); <u>Chambers v. Kay</u> (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); <u>Chronometrics, Inc. v. Sysgen, Inc.</u>	breach of a lawyer's fiduciary or other substantive duty in a non-disciplinary context. Relevant cases are included to provide guidance for lawyers in understanding the scope of the Rules. Comment [2] is intended to replace the first paragraph of the Discussion to current California rule 1-100, which is believed to be outdated and would mislead lawyers if retained in the Rules.

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General Discussion	<u>Commission's Proposed Rule</u> Rule 1.0 <u>Purpose and Scope of the Rules of Professional Conduct</u>, ~~in General~~ Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	(1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (~~disqualification of member appropriate remedy for improper~~ communication with ~~adverse~~<u>represented</u> party).)	
	[3] <u>These Rules are not the sole basis of lawyer regulation. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other statutes, rules of court, and the opinions of California courts. Although not binding, issued opinions of ethics committees in California should be consulted for guidance on proper professional conduct. Ethics opinions of other bar associations may also be considered to the extent they relate to rules and laws that are consistent with the rules and laws of this state.</u>	Comment [3] is based on the third paragraph in current California Rule 1-100(A). It is intended to remind lawyers that the Rules are not the exclusive source of lawyer regulation in California and that lawyers are also bound by the State Bar Act and other law. The comment is consistent with provisions in the Preamble and Scope to the Model Rules, particularly the first sentence in paragraph 7, and paragraphs 15 and 17. See Model Rules, Preamble and Scope, below.
	[4] <u>Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. (<i>Phillips v. State Bar</i> (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code section 6077.)</u>	Comment [4] is intended to amplify paragraph (b)(2) by providing guidance on what constitutes a willful violation of the Rules.
	[5] <u>For the disciplinary authority of this state and choice of law, see Rule 8.5.</u>	Comment [5] cross-references proposed Rule 8.5, which addresses the disciplinary authority and choice of law in applying these Rules. The cross-reference is intended to direct lawyers to Rule 8.5 on these issues, which currently are addressed in part by California Rule 1-100(D).

<u>Current California Rule</u> Rule 1-100 Rules of Professional Conduct, in General Discussion	<u>Commission's Proposed Rule</u> Rule 1.0 <u>Purpose and Scope of the</u> Rules of Professional Conduct, ~~in General~~ Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.	~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law.~~	See Explanation of Changes for current California rule 1-100(B) (Definitions).

Rule 1.0 Purpose and Scope of the Rules of Professional Conduct

(Commission's Proposed Rule – Clean Version)

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

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

(b) Scope of the Rules:

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

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

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

COMMENT

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

[2] The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]; *Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355].) Nevertheless, a lawyer's

violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. (See, *Stanley v. Richmond*, *supra*, 35 Cal.App.4th at p. 1086; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of the rule may have other non-disciplinary consequences. (See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party).)

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

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

- [5] For the disciplinary authority of this state and choice of law, see Rule 8.5.

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

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.)

Connecticut adds: “‘Client’ or ‘person’ as used in these Rules includes an authorized representative unless otherwise stated.”

District of Columbia defines “matter” as “any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relationship practice issue, or any other representation, except as expressly limited in a particular rule.”

Illinois retains the 1983 version of the ABA Terminology, retains the definitions of “confidence” and “secret” derived from DR 4-101(A) of the ABA Model Code of Professional Responsibility, and adds the following terminology:

“Contingent fee agreement” denotes an agreement for the provision of legal services by a lawyer under which the amount of the lawyer’s compensation is contingent in whole or in part upon the successful completion of the subject matter of the agreement, regardless of whether the fee is established by formula or is a fixed amount.

“Disclose” or “disclosure” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Person” denotes natural persons, partnerships, business corporations, not-for-profit corporations, public and quasi-public corporations, municipal corporations, State and Federal governmental bodies and agencies, or any other type of lawfully existing entity.

Massachusetts: Rule 9.1 retains the 1983 version of the ABA Terminology and adds a definition of a “qualified legal assistance organization.” Amended Comment 3 to Rule 9.1 provides as follows: “The final category of qualified legal assistance organization requires that the organization ‘receives no profit from the rendition of legal services.’ That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a ‘profit’ from that particular lawsuit.”

New York defines “fraud” as follows:

“Fraud” does not include conduct, although characterized as fraudulent by statute or administrative rule which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

New York also defines “domestic relations matters,” and defines “tribunal” to include “all courts, arbitrators and other adjudicatory bodies.”

Ohio: Rule 1.0 defines “fraud” and “fraudulent” as denoting “conduct that has an intent to deceive and is either of the following:”

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred; (2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

Oregon adds or alters the meaning of a number of phrases, including “electronic communication,” “informed consent,” “law firm,” “knowingly,” and “matter.”

Texas generally retains the 1983 version of the ABA Terminology, but modifies some of the 1983 definitions and adds others that are neither in the 1983 nor current versions of the ABA Terminology. Specifically, Texas includes the following definitions:

“Adjudicatory Official” denotes a person who serves on a Tribunal.

“Adjudicatory Proceeding” denotes the consideration of a matter by a Tribunal.

“Competent” or “Competence” denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

“Firm” or “Law firm” denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal

department of a corporation, legal services organization, or other organization, or in a unit of government.

“Fitness” denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer’s responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

“Should know” when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

“Substantial” when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

“Tribunal” denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. “Tribunal” includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

Virginia retains the 1983 version of the Terminology section and adds:

“Should’ when used in reference to a lawyer’s action denotes an aspirational rather than a mandatory standard.”

Wisconsin: Wisconsin adds or alters the meaning of a number of phrases, including “consultation,” “firm,” “misrepresentation,” and “prosecutor.”

Proposed Rule 1.1 [RPC 3-110]

Competence

(Draft #7, 6/18/07)

Summary: Proposed Rule 1.1 is a departure from the ABA Model Rule's approach to regulating competence. The Commission decided to retain California's disciplinary standard from current Rule 3-110. The current rule offers more public protection because the focus is on applying a lawyer's legal knowledge, skill, and thoroughness as opposed to merely possessing those components. Also, the Model Rule could be interpreted to impose discipline for a single negligent act, contrary to existing California law.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
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- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-110

Statute

Case law

Lewis v. State Bar (1981) 23 Cal.3d 683

- ☐ 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 9
Opposed Rule as Recommended for Adoption 3
Abstain 1

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:

☒ Moderately Controversial – Explanation:

See Introduction and Public Comment Chart for the statement of the minority position and members of the public.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.1* Competence

October 2009

(Draft rule revised following consideration of public comment.)

INTRODUCTION:

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

The Model Rule by its terms permits the professional discipline of a lawyer for an isolated act of simple negligence. The Commission believes the correct policy is as stated the Supreme Court in *Lewis v. State Bar* (1981) 23 Cal.3d 683, where the Court reaffirmed that a lawyer's single act of ordinary negligence does not suggest that the lawyer is unfit to practice law, and that the discipline system should not be burdened with conduct that is best addressed as a civil issue: "This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence."

In addition, states that have adopted the substance of Model Rule 1.1 ordinarily do not impose discipline for a single act of negligence. Instead, the practice in most jurisdictions is closer to California's, resulting in an application of the rule to acts of gross or repeated negligence but not individual acts of simple negligence. That fact is hidden in Model Rule 1.1 and makes the rule misleading to lawyers and the public. Accordingly, the Commission determined that rather than hide that fact in a Comment or in disciplinary rulings that often remain confidential, the standard of the existing California rule should be retained.

* Proposed Rule 1.1, Draft 7 (6/18/07).

INTRODUCTION (Continued):

Minority. A minority of the Commission disagrees with the Commission's decision to continue the current California approach to competence. The minority points out that the core provision of Model Rule 1.1 requiring a lawyer to provide competent legal services is the rule in 47 states and sets an appropriate public protection standard in providing for an unqualified duty of lawyer competence. Only California tolerates lawyer incompetence if it is not intentional, repeated, or reckless. The minority also notes that some jurisdictions include a comment that discipline cannot be imposed for single act of negligence and that the Commission's proposed comment [6] makes this point by stating that the rule is not intended to apply to "a single act of negligent conduct or a single mistake in a particular matter." The minority argues that by including proposed comment [6], the Commission majority should not be hesitant to adopt the language of Model Rule 1.1. The minority also argues that the current rule suggests to the California public that the legal profession in California tolerates incompetent legal services that do not involve intentional, reckless, or repeated acts. The minority also does not believe resort to a legal malpractice lawsuit is the appropriate default for what should be disciplinable incompetence. Lastly, the minority emphasizes the Commission's charge to foster a national standard and observes that lawyer competence is a foundational standard of professional responsibility that should not change when a lawyer crosses the California border.

<u>ABA Model Rule</u> Rule 1.1 Competence	<u>Commission's Proposed Rule*</u> Rule 1.1 Competence	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation	~~A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation~~ (a) <u>A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.</u>	The proposed language of paragraph (a) is taken directly from current rule 3-110. Please see the Introduction for a discussion of the Commission's recommendation to retain current rule 3-110's approach and the position of a minority of the Commission to adopt the Model Rule.
	(b) <u>For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.</u>	This language is taken verbatim from current rule 3-110(B) and is similar to the language of Model Rule 1.1, but adds the further public protections of requiring mental, emotional, and physical ability reasonably necessary for the performance of such service. The experience of members of the Commission, many of whom have represented other lawyers in legal malpractice and disciplinary actions in California, demonstrates that such further components are necessary to protect the public from incompetence resulting from alcohol and substance abuse, mental illness and physical infirmities. The language is also similar to the explanation of competence in Comment [1] of the proposed Rule.

* Proposed Rule 1.1, Draft 7 (6/18/07). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.1 Competence	<u>Commission's Proposed Rule*</u> Rule 1.1 Competence	<u>Explanation of Changes to the ABA Model Rule</u>
	(c) <u>If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.</u>	Most of the language in paragraph (c) is taken directly from current rule 3-110(C), with some minor changes. As further client protection, the Commission has added the third alternative of referral to a competent lawyer. This language is similar to language in Comment [2] of Model Rule 1.1.

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

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.1 Competence Comment	<u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.	~~[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.~~	The substance of Model Rule 1.1, cmt. [2], is already contained in current rule 3-311(C) and the Commission recommends retaining the concept in the black letter of the proposed Rule. Paragraph (c) of proposed Rule 1.1 is a slightly revised version of current rule 3-110(C) and provides: (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent. The Commission believes the above language effectively conveys the relevant guidance and that the inclusion of Model Rule 1.1, cmt. [2] would unnecessarily lengthen the proposed Rule without any significant additional benefit.

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

<u>ABA Model Rule</u> Rule 1.1 Competence Comment	<u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.	This Comment makes it clear that a lawyer who accepts employment knowing he or she is not competent for the matter, and who does not expect to become competent is subject to discipline. The substance of this comment is not found in the comments to Model Rule 1.1. It adds further public protection by putting the lawyer on notice of the standard for accepting or continuing a matter regarding competence.
[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.	~~[354]~~ In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, ~~for ill-considered action under emergency conditions can jeopardize the client's interest.~~	This Comment is substantially similar to Comment [3] of the ABA rule. The last clause was deleted as surplusage.

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

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

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

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

COMMENT

- [1] It is the duty of every lawyer to provide competent legal services to the client.
- [2] Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may exercise professional discretion in

determining the means by which a matter should be pursued. See Rules [1.2] and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

- [3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.
- [4] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.
- [5] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person. [See also Rule 6.2]
- [6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.

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

Rule 1.1: Competence

STATE VARIATIONS

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

California: Rule 3-110 (Failing to Act Competently) provides as follows:

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

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

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

District of Columbia: Rule 1.1(a) is identical to ABA Model Rule 1.1(b), but D.C. adds Rule 1.1(b), which states: "A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."

Illinois adds the following subparagraphs to Rule 1.1:

(b) A lawyer shall not represent a client in a legal matter in which the lawyer knows or reasonably should know that the lawyer is not competent to provide representation, without the association of another lawyer who is competent to provide such representation.

(c) After accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the lawyer's firm the responsibility for performing or completing that employment, without the client's consent.

Michigan: Rule 1.1 retains some language from DR 6-101 of the ABA Model Code of Professional Responsibility.

New Hampshire: New Hampshire defines competence in detail, providing a long list of requirements that a lawyer must satisfy in order to achieve "legal competence."

New Jersey: Rule 1.1 provides that a lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

New York: DR 6-101 provides that a lawyer shall not:

(A) Handle a legal matter which the lawyer knows or should know that he is not competent to handle, without associating with a lawyer who is competent to handle it.

(B) Handle a legal matter without preparation adequate in the circumstances.

(C) Neglect a legal matter entrusted to the lawyer.

Texas: Rule 1.01 provides as follows:

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer;
or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Proposed Rule 1.13 [RPC 3-600]

“Organization as Client”

(Draft # 11, 10/20/09)

Summary: Proposed Rule 1.13 is based on Model Rule 1.13 but, because of California's strong policy on client confidentiality, diverges from the Model Rule in one significant respect. Unlike the Model Rule, the proposed Rule does not permit a lawyer for an organization to report suspected wrongdoing of the organization's constituents outside the organization's chain of command. 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

Rule

RPC 3-600

Statute

Business & Professions Code § 6068(e)(1).

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 9

Opposed Rule as Recommended for Adoption 0

Abstain 1

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:

☒ Moderately Controversial – Explanation:

In rejecting the Model Rule's provisions that permit a lawyer to report misconduct outside the organization, the proposed Rule creates a potential conflict for California lawyers with the SEC Standards of Professional Conduct, which were promulgated pursuant to the Sarbanes-Oxley Act and which also permit reporting outside the organization. See Introduction.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.13* Organization as Client

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.13 is based on Model Rule 1.13. However, the proposed rule diverges significantly from the Model Rule in not permitting a lawyer for an organization to report suspected wrongdoing of the organization's constituents outside the organization's chain of command. The Commission makes this recommendation because the Model Rule provision is based on policy decisions that are inimical to California's traditional emphasis on protection of client confidentiality.

The American Bar Association revised Model Rule 1.13 in August 2003, following the financial debacles involving companies such as Enron, Global Crossing and WorldCom. The revisions of Model Rule 1.13, which permit whistle blowing by lawyers outside the corporate structure, were intended as a companion piece to the ABA's concurrent revisions to Model Rule 1.6, which created exceptions to confidentiality that permit a lawyer to reveal a client's confidential information to prevent or rectify a criminal act reasonably certain to result in financial injury or property loss to a third party. The Commission has recommended rejection of those exceptions for the same reason it recommends rejection of the whistle blowing provision in Model Rule 1.13(c): First, Model Rules 1.6 and 1.13 are inconsistent with the all but absolute duty of confidentiality under § 6068(e). Second, these provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law. Proposed Rule 1.13 provides that assurance by mandating that a lawyer who knows of wrongdoing by a constituent in the organization attempt to dissuade the constituent from his or her action and, failing that, to go up the organizational ladder – if necessary to highest authority in the organization authorized to act on its behalf, in an attempt to change the course of conduct. If the lawyer's

* Proposed Rule 1.13, Draft 11.1 (10/20/08).

INTRODUCTION (Continued):

attempts fail, then the lawyer must abide by the lawyer's duty of confidentiality under Business & Professions Code § 6068(e)(1) and not reveal the information outside the corporate chain of command. See Explanation of Changes for Comments [2] and [9].

The Commission believes that this approach will better promote the organizational client's compliance with the law by encouraging the client's constituents to be candid with the lawyer, a candor that would be lost if the constituents know the lawyer is authorized to report misconduct outside the organization. In conformance with this approach, both the black letter and comment to the Model Rule have been revised to alert lawyers that ignoring violations of duty or law that will likely injure the organization is not an option. For example, the black letter of Model Rule 1.13(b) has been revised to impose on an organization's lawyer an objective standard ("knows or reasonably should know") to determine when the lawyer must report up the organization's ladder. In addition, the comment to the Rule has been revised to emphasize that a lawyer may no longer hide his or her head in the sand. See, e.g., Explanation of Changes for Comments [4], [5] and [6].

Variation in Other Jurisdictions. Most jurisdictions have adopted to some extent the 2003 revisions to Model Rule 1.13, i.e., they have added revised paragraph (c) and new paragraphs (d) and (e), and accompanying comments, which together address a lawyer's authority to report misconduct outside the organization. Jurisdictions that have not adopted those paragraphs include the District of Columbia, Georgia, Missouri, New York, Ohio, Pennsylvania and Texas.

Potential Conflict with SEC Standards of Professional Conduct. The Commission's proposed Rule arguably creates a potential conflict for California lawyers with the SEC Standards of Professional Conduct, which were promulgated pursuant to the Sarbanes-Oxley Act, 15 U.S.C. § 7245 and which also permit reporting outside an organization. See 17 C.F.R. 205.3(d)(i)-(iii). However, because the SEC rules are permissive and not mandatory, California lawyers should be able to fulfill their duties under proposed Rule 1.13 (as they have been able to do under current rule 3-600), without violating duties imposed under the SEC Rules. See also *The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality* (Spring 2004), available at <http://www.calbar.ca.gov/calbar/pdfs/SEC-ethics-alert.pdf>.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client	<u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.	(a) A lawyer employed or retained by an organization ~~represents~~ <u>shall conform his or her representation to the concept that the client is the organization itself</u>, acting through its duly authorized constituents <u>overseeing the particular engagement</u>.	Paragraph (a) is based on Model Rule 1.13(a), but two clarifying changes have been made: first, emphasis is placed on the fact that the lawyer is <i>obligated</i> to treat the organization as the client; and second, emphasis is placed on the fact that the organization acts through those duly authorized constituents who <i>oversee the particular engagement</i> for which the lawyer has been retained.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.	(b) If a lawyer ~~for representing~~ an organization knows that an officer, employee or other person associated with the organization is ~~engaged in action~~ <u>acting</u>, intends to act or refuses to act in a matter related to the representation <u>in a manner that the lawyer knows or reasonably should know</u> is (i) a violation of a legal obligation to the organization, or a violation of law ~~that~~ reasonably ~~might be imputed~~ <u>imputable</u> to the organization, and ~~that is~~ <u>(ii)</u> likely to result in substantial injury to the organization, ~~then~~ the lawyer shall proceed as is reasonably necessary in the best <u>lawful</u> interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best <u>lawful</u> interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that	Paragraph (b) closely follows Model Rule 1.13(b), but with several changes. First, the word “representing” is substituted for the word “for” as a clarification. Second, the word “acting” is substituted for “engaged in action” for economy of language. Third, the phrase “in a manner” has been added to make the sentence grammatically correct. Fourth, and most important, using “knows or reasonably should know” imposes an objective standard on a lawyer’s determination of whether the constituent’s action is (i) a violation of a legal obligation or a violation of law, and (ii) likely to result in substantial injury to the organization. Although the lawyer must have actual knowledge of the constituent’s action, the lawyer’s analysis of the action’s consequences must be objective. Further, romanettes are used to clarify that both a (i) “violation” (of duty or law) <u>and</u> (ii) likely injury to the organization must be present before the lawyer’s duty to act is triggered. By using the “knows or reasonably should know” standard, the lawyer’s obligations under paragraph (b) are expanded beyond the Model Rule and the rules adopted in most jurisdictions, thereby increasing the likelihood that

* Proposed Rule 1.13, Draft 11.1 (10/20/09). Redline/strikeout showing changes to the ABA Model Rule

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	can act on behalf of the organization as determined by applicable law.	a lawyer will go up the corporate ladder to report malfeasance or misfeasance. Finally, "lawful" has been added as a modifier of "interest" to emphasize that the lawyer's duty only to pursue the best "lawful" interests of the client organization.
(c) Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.	~~(c) Except as provided in paragraph (d), if~~ ~~(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and~~ ~~(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,~~ ~~then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.~~	The Commission recommends the deletion of Model Rule 1.13(c) because it is inimical to California's strong policy of protecting the confidentiality and maintaining the trust of the client. See Business & Professions Code § 6068(e)(1) and Explanation of Changes for paragraph (c), below. See also Introduction, ¶¶. 2,3. In recommending that Model Rule 1.13(c) not be adopted, the Commission urges the continuation of the longstanding approach reflected in current California Rule 3-600 of requiring the lawyer to work within the organization in situations defined in paragraph (b) and not to have unilateral discretion to report outside the organizational, conduct that would be contrary to the lawyer's duties under section 6068(e).

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	<u>(c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068(e)(1).</u>	Paragraph (c) has no counterpart in the Model Rule. The Commission recommends the adoption of paragraph (c), which correctly states California policy on protecting a client's confidential information. See Introduction, ¶¶. 2,3. See also Explanation of Changes for deleted Model Rule 1.13(c).
(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.	~~(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.~~	Because the Commission has recommended deleting Model Rule 1.13(c), see Explanation of Changes, above, it also recommends deletion of Model Rule 1.13(d), which limits the application of deleted paragraph (c).
	<u>(d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.</u>	Paragraph (d) has no counterpart in the Model Rule. The Commission recommends adoption of paragraph (d) because it states, in accordance with California's strong policy of confidentiality, the appropriate course of action a lawyer should take if the lawyer is unsuccessful in persuading the organization's constituents not to pursue action that is a violation of duty or law, and likely to substantially injure the organization. In effect, it rejects the permissive disclosure procedure sanctioned by Model Rule 1.13(c). See Introduction, ¶¶. 2,3.

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(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.	(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) ~~or (c)~~, or who <u>resigns or</u> withdraws under circumstances ~~that require or permit the lawyer to take action under either of those paragraphs,~~<u>described in paragraph (d).</u> shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.	Paragraph (e) is based on Model Rule 1.13(e), but has been modified to conform to the differences between proposed paragraphs (b), (c) and (d), and Model Rule 1.13(b), (c) and (d).
(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.	(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer <u>representing the organization</u> shall explain the identity of the <u>lawyer's</u> client ~~when~~<u>whenever</u> the lawyer knows or reasonably should know that the organization's interests are adverse to those of the ~~constituents~~<u>constituent(s)</u> with whom the lawyer is dealing.	Paragraph (f) is based on Model Rule 1.13(f). The phrase "representing the organization" and the word "lawyer" have been added to clarify when the lawyer's duty under the paragraph is triggered. The second romanette clause, concerning the constituent's mistaken belief, has been added to emphasize the lawyer's duty to avoid misapprehension by an unrepresented person that the lawyer represents that person. See also proposed Rule 4.3. The second sentence of paragraph (f) is carried forward from current California rule 3-600(D). This sentence adds an affirmative duty not to mislead to the duty in the first sentence to correct the constituent's misapprehension.

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(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.	(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules <u>1.7, 1.8.2, 1.8.6, and 1.8.7</u>. If the organization's consent to the dual representation is required by <u>Rule 1.7</u> <u>any of these Rules</u>, the consent shall be given by an appropriate official <u>or body</u> of the organization other than the individual who is to be represented, or by the shareholders.	Paragraph (g) closely follows Model Rule 1.13(g). References to several other rules that might create a dual representation conflict have been added, as well as an appropriate grammatical change ("any of these Rules"). The phrase, "or body" has been added in recognition that an organization often authorizes a group of constituents to consider and approve conflict waivers. This might be, for example, the Board of Directors or a litigation committee of the Board.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
The Entity as the Client [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.	The Entity as the Client [1] ~~An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to~~<u>This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to</u><u>This Rule also applies to governmental organizations. See Comment [13]. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders held by persons acting for. In the case of other organizational clients that are not corporations, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.</u>	Although the substance of Model Rule 1.13, cmt. [1] and that of proposed Comment [1] are generally the same, the Commission recommends adoption of proposed Comment [1] because it provides better guidance than the Model Rule comment concerning the nuances of who is the client when a lawyer represents an organization. In particular, the proposed comment gives examples of the kinds of organizations within the rule, (see first sentence) and explains that an agent or fiduciary who acts on behalf of the organization is a constituent within the scope of the Rule for purposes of the matter (last sentence).

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	<u>[2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.</u>	Comment [2] has no counterpart in the Model Rule. It has been added to improve guidance to a lawyer on the constituents within the organization with whom the lawyer should communicate with or from the lawyer should take direction.
[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.	~~[2]~~<u>[3] When one of the constituents</u> <u>When a constituent</u> of an organizational client communicates with the organization's lawyer in that ~~person's~~<u>constituent's</u> organizational capacity, the communication is protected <u>by Rule 1.6 and Business and Professions Code section 6068(e)(1).</u> Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6 <u>and Business and Professions Code section 6068(e)(1).</u> This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except ~~for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise~~<u>as</u> permitted by Rule 1.6 <u>or Business and Professions Code section 6068(e).</u>	Comment [3] is based on Model Rule 1.13, cmt. [2]. The Comment has been revised to provide appropriate reference to the governing provisions in California. The example provided in the second sentence has been deleted as unnecessary. In addition, that part of the comment that discusses a lawyer's implied authority to disclose client information has been deleted because the Commission has recommended the rejection of the implied authority provision in Model Rule 1.6 ("Confidentiality of Information").

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[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.	~~[3]~~ When constituents of ~~the an~~ organization make decisions for it, ~~the decisions a lawyer~~ ordinarily must ~~be accepted by~~ <u>accept those lawyer decisions</u> even if their utility or prudence is doubtful. ~~It is not within the lawyer's province to make decisions on behalf of the organization~~ concerning policy and operations, including ones entailing serious risk, ~~are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the~~. <u>A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i) violates a legal obligation to the organization or is in a violation of law that might be imputed reasonably imputable to the organization, and (ii) is likely to result in substantial injury to the organization. In those circumstances,</u> the lawyer must proceed as is reasonably necessary in the best <u>lawful</u> interest of the organization.	Comment [4] is based on Model Rule 1.13, cmt. [3]. The first two sentences have been modified to be in the active voice. The third sentence has been added not only to remind lawyers of their duties to inform the client of significant developments, but also to point out that, even if the ultimate decision is the client's, the lawyer generally is obligated to provide the client with information that will enable the client to make an informed decision. The last sentence has been revised to track the modifications to paragraph (b), i.e., the addition of romanettes, to better set forth the trigger for the lawyer's duties to go up the organization ladder.

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	<u>[5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. As defined in Rule 1.0(f) Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0.1(f).</u>	Comment [5] has no counterpart in the Model Rule. The first two sentences clarify that the lawyer is under no duty to investigate his or her client to uncover evidence of wrongdoing. However, the last sentence of the Comment, taken from Model Rule 1.13, cmt. [3], is a reminder that although a lawyer must have actual knowledge of the conduct, the lawyer cannot turn a blind eye to events that indicate a breach of duty or violation of law on the part of a constituent.
	<u>[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).</u>	Comment [6] has no counterpart in the Model Rule. It has been added to clarify that, although a lawyer must have actual knowledge of the constituent's action or inaction, (see Explanation for Comment [5]), the lawyer is held to an objective standard in analyzing the situation to determine whether the constituent's action or inaction is a violation of duty or law, and is likely to substantially injure the organizational client.

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[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of	[4~~7~~] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its <u>potential</u> consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter;~~f.~~ For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. ~~Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of~~ <u>For the responsibility of a subordinate lawyer in</u>	Comment [7] closely follows Model Rule 1.13, cmt. [4]. The last two sentences of the Model Rule comment have been deleted because they are expository practice pointers. In their place, a cross-reference to Rule 5.2, concerning the responsibilities of subordinate lawyers, has been added.

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sufficient importance to warrant doing so in the best interest of the organization.	~~representing an organization, see Rule 5.2, organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.~~	
[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.	[58] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.	Comment [8] is identical to Model Rule 1.13, cmt. [5].

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	<u>[9] Even in circumstances where a lawyer is not obligated to proceed in accordance with paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know or reasonably should know that such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068(e)(1), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while explaining its likely consequences to the organization; or (ii) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest authority, as determined by applicable law, that can act on behalf of the organization.</u>	Comment [9] has no counterpart in the Model Rule. It has been added to explain several alternatives a lawyer might take in order to vindicate the lawyer's duty to act "in the best lawful interest of the organization" under the conditions of paragraph (b). Much of the language included here can be found in current California rule 3-600(B). See also Explanation of Changes for paragraph (b) concerning the use of a "knows or reasonably should know" standard.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8]¹ A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.	~~[8]~~¹⁰ A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) ~~or (c)~~, or who <u>resigns or</u> withdraws ~~in circumstances that require or permit the lawyer to take action under either of these paragraphs~~<u>under circumstances described in paragraph (d)</u>, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal ~~and the reason for the lawyer's discharge or withdrawal~~.	Comment [10] is based on Model Rule 1.13, cmt. [8]. It is intended to provide guidance to lawyers on how to proceed under paragraph (e). The comment has been modified to conform to proposed paragraph (d), which diverges from the Model Rule. See Explanation of Changes for paragraph (e).
	<u>[11]Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.</u>	Comment [11] has no counterpart in the Model Rule. It has been added to remind lawyers that they are not authorized to substitute their judgment for that of the organization's constituents. See also Comment [4] and the Explanation of Changes thereto.

¹ **Commission Note:** The Commission recommends a slight reorganization of the proposed counterparts to Model Rule 1.13, cmts. [6] and [7]. Therefore, those Model Rule comments are found below, following proposed Comment [11].

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Relation to Other Rules [6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.	Relation to Other Rules ~~[6]~~^[12] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules <u>1.4, 1.6, 1.8, 1.16, 3.3, or 4.1, or the 1.8 series of rules.</u> ~~Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.~~	Comment [12] is based on the first two sentences of Model Rule 1.13, cmt. [6]. References to other rules that are applicable in the organizational context and are not superseded by proposed Rule 1.13 have been added. The reference to "1.8" has been replaced by a reference to "the 1.8 series of rules" because of the numbering convention the Commission recommends for those unrelated conflicts rules. The remainder of the Model Rule comment has been deleted because it addresses paragraphs (c) and (d) of the Model Rule, which the Commission has recommended be rejected. See also Explanation for Model Rule 1.13, cmt. [7].

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.	~~[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.~~	The Commission recommends rejection of Model Rule 1.13, cmt. [7], because it relates to paragraphs (c) and (d) of Model Rule 1.13, which the Commission has recommended be rejected. See also Explanation for Model Rule 1.13, cmt. [7].

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[13] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1 [1.2(d)] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).</u>	Comment [13] has no counterpart in the Model Rule. It has been added to provide guidance to lawyers proceeding under paragraph (d).

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Government Agency [9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.	Governmental Agency Organizations <del>[9]</del>~~[14]~~ ~~The duty defined in this Rule applies to In representing governmental organizations. Defining, it may be more difficult to define~~ precisely the identity of the client and <del>prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter</del>~~the lawyer's obligations. However, those matters are~~ beyond the scope of these Rules. ~~[See Scope [18].]~~ Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. ~~For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule.~~ Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. ~~Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.~~ In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. ~~See Scope~~ This Rule does not limit that authority.	The title of this section of the Comment has been revised to conform to the terms used in the following comment. Comment [14] is based on Model Rule 1.13, cmt. [9], with some revisions. The first two sentences have been revised for clarity. The references to "Scope [18]" and "Scope" have been deleted because the Commission does not recommend the adoption of the Scope section of the Model Rules. See Introduction and Explanation of Changes for proposed Rule 1.0 ("Purpose and Scope of the Rules of Professional Conduct"). The Commission recommends substituting Rule 1.0 for the concepts found in the Preamble and Scope of the Model Rules. Finally, the next to last sentence of the Model Rule comment has been deleted. The Commission has recommended that Model Rule 1.13(c) be rejected, so disclosure outside the organization is not permitted.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e)(1) or Rule 1.6, a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.</u>	Comment [15] has no counterpart in the Model Rule. It has been added to clarify that although proposed Rule 1.13 does not permit reporting outside an organizational client, a governmental organization can establish procedures for lawyers to report misconduct within the organization.
Clarifying the Lawyer's Role [10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.	Clarifying the Lawyer's Role ~~[10]~~^[16] There are times when <u>the lawyer knows or reasonably should know that</u> the organization's interest may be or become adverse to those of one or more of its constituents <u>or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent.</u> ~~Under paragraph (f),~~ in such circumstances the lawyer ~~should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest,~~ <u>must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the</u>	Comment [16] is based on Model Rule 1.13, cmt. [10]. The Comment has been revised to conform to the revisions made to Model Rule 1.13(f). See Explanation of Changes for paragraph (f), above.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>constituent</u> that the lawyer ~~cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions~~<u>does not represent the constituent and that communications</u> between the lawyer ~~for~~<u>and the constituent are not confidential as to</u> the organization and ~~the individual~~<u>may be disclosed to the organization or used for the benefit of the organization. See Rule 4.3.</u>~~not be privileged.~~	
[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.	~~[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.~~	The Commission recommends deleting Model Rule 1.13, cmt. [11], because it states the obvious.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Dual Representation [12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.	Dual Representation ~~[12]~~¹⁷ Paragraph (g) ~~recognizes that a~~^{allows} lawyer ~~for~~^{to represent both} an organization ~~may also represent a principal officer or major shareholder.~~^{and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. Paragraph (g) requires that the organization's consent to dual representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. When there is no appropriate official of the organization to provide consent and the appropriate body of the organization is deadlocked, consent may be given by the shareholders of the organization to the extent allowed by law or by the rules or regulations governing the conduct of the organization's affairs. When there is no appropriate official, body or ownership group that can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership.}	Comments [17] and [18] expand upon the terse Model Rule Comment [12] to provide guidance concerning an issue that often arises. The guidance provided in these comments is derived from State Bar Formal Opn. 1999-153.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[18]This Rule does not prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. ~~{(See State Bar Formal Opn. 2003-163.)}~~ In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See <i>Goldstein v. Lees</i> (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; <i>In re Banks</i> (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)</u>	See Explanation of Changes for Comment [17]. The case law citations after the next to last sentence are intended to provide specific examples of the kinds of situations that often require resolution in the organizational context. The last sentence replaces Model Rule 1.13, cmts. [13] and [14], concerning derivative actions. The Commission recommends the rejection of those comments in favor of this sentence and citation. Suitable guidance concerning a lawyer's duties when involved in a derivative action is beyond the scope of a rule comment.

<u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment	<u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Derivative Actions [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.	~~Derivative Actions~~ ~~[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.~~	See Explanation of Changes for Comment [18], paragraph 3.
[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.	~~[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.~~	See Explanation of Changes for Comment [18], paragraph 3.

Rule 1.13 Organization as Client
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068(e)(1).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official or body of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

- [1] This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to governmental organizations. See Comment [13]. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.
- [2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with the constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.
- [3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the communication is protected by Rule 1.6 and Business and Professions Code section 6068(e)(1). Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents

are covered by Rule 1.6 and section 6068(e)(1). This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except as permitted by Rule 1.6 or by section 6068(e).

- [4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i) violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and (ii) is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.
- [5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0.1(f).

- [6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).
- [7] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the

constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

- [8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.
- [9] Even in circumstances where a lawyer is not obligated to proceed in accordance with paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know or reasonably should know that such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068(e)(1), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the matter while

explaining its likely consequences to the organization; or (ii) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest authority, as determined by applicable law, that can act on behalf of the organization.

- [10] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal and the reason for the lawyer's discharge or withdrawal.
- [11] Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Relation to Other Rules

- [12] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4, 1.6, 1.16, 3.3, [4.1], or the 1.8 series of Rules.

- [13] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).

Governmental Organizations

- [14] In representing governmental organizations, it may be more difficult to define precisely the identity of the client and the lawyer's obligations. However, those matters are beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by

the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

- [15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Business and Professions Code section 6068(e)(1) or Rule 1.6, a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

Clarifying the Lawyer's Role

- [16] There are times when the lawyer knows or reasonably should know that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. Under paragraph (f), in such circumstances the lawyer must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communications between the lawyer and the constituent are not confidential as to the organization and may be disclosed to the organization or used for the benefit of the organization. See Rule 4.3

Dual Representation

- [17] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. Paragraph (g) requires that the organization's consent to dual representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. When there is no appropriate official of the organization to provide consent and the appropriate body of the organization is deadlocked, consent may be given by the shareholders of the organization to the extent allowed by law or by the rules or regulations governing the conduct of the organization's affairs. When there is no appropriate official, body or ownership group that can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership.
- [18] This Rule does not prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v.*

Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

Rule 1.13: Organization as 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.)

Arizona has adopted the 2003 version of ABA Model Rule 1.13 verbatim. Regarding entity clients, the Arizona Legislature has also enacted the following statute, A.R.S. §12-2234, to codify the attorney-client privilege for corporations and other entities in civil cases:

(B) ...[A]ny communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

(C) The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

The statute was passed in reaction to the Arizona Supreme Court's decision in *Samaritan Foundation v. Goodfarb*, 862 P.2d 870 (Ariz. 1993), which rejected the federal courts' broad view of the attorney-client privilege for corporations announced in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Samaritan court instead adopted a "functional" test for the attorney-client privilege and required a defendant hospital to disclose information that the defendant contended was privileged. The following year, after intense lobbying by corporate interests, the Arizona Legislature enacted §12-2234, which effectively overruled the *Samaritan* opinion and adopted *Upjohn*. However, in *Roman Catholic Diocese of Phoenix v. Superior Court*, 62 P.3d 970 (Ariz. App. 2003), a lower appellate court has held that §12-2334 applies only in civil proceedings and that *Samaritan* remains good law in criminal cases.

California: Rule 3-600 substantially follows the positions in Rule 1.13 as originally adopted. Among other things, it does not create an exception to confidentiality when conditions like those in Model Rule 1.13(c) are present but says only that the lawyer may, or must, resign.

District of Columbia omits paragraphs (c), (d) and (e) of ABA Model Rule 1.13.

Georgia: Rule 1.13 tracks the pre-2003 version of ABA Model Rule 1.13 verbatim, but Georgia adds the following paragraph (f): “‘Organization’ as used herein includes governmental entities.”

Maryland, Michigan, and New Jersey all retain verbatim the Kutak Commission’s 1981 draft of Rule 1.13(c), which provides that “remedial action” may, if necessary, include “revealing information otherwise protected by Rule 1.6” -- but “only if the lawyer reasonably believes that: (1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and (2) revealing the information is necessary in the best interest of the organization.”

Michigan: Rule 1.13(a) tracks the Kutak Commission’s 1980 draft by providing that a lawyer for an organization represents the organization “as distinct from” its directors, officers, employees, members, shareholders, or other constituents. Moreover, Michigan Rule 1.13(f) provides as follows:

For purposes of this rule “organization” includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Minnesota effectively deletes the requirement in ABA Rule 1.13(c)(2) that the lawyer “reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.” Minnesota also deletes ABA Model Rule 1.13(d).

Missouri: Missouri retains the 2002 version of ABA Model Rule 1.13 verbatim and thus has no equivalent to

paragraphs (d) and (e) of the current version of ABA Model Rule 1.13.

New Jersey: Rule 1.13(a), which borrows from the Kutak Commission’s 1980 draft, states that a lawyer employed or retained to represent an organization represents the organization “as distinct from its directors, officers, employees, members, shareholders or other constituents. In addition, New Jersey adds that for purposes of Rules 4.2 and 4.3 “the organization’s lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group,” which is defined as follows:

Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization’s legal position in the matter whether or not in litigation, provided, however, that “significant involvement” requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization’s lawyer but may at any time disavow said representation.

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 rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

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- ☐ 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.

* 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(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</u> <u>(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.</u>	Subparagraph (k)(6) has been added to protect the public in disciplinary proceedings to require lawyers to comply with State Bar Court ordered audits. This concept does not exist in Model Rule 1.15 and is needed for greater public protection. Subparagraph (k)(7) restates Model Rule 1.15(d), sentence 2 ("Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive...") The Commission has opted for a request of the client or other person as a trigger to the duty to distribute funds or property, because it is clearer and because it empowers the client or other person. The proposed rule has been clarified that only "undisputed" funds or property may be distributed by the lawyer.
	<u>(l) Scope and Application of Rule. This Rule does not apply to the following:</u> <u>(1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).</u>	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-California 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.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(2) <u>Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.</u> (3) <u>Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.</u> (4) <u>At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (1)(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.</u>	

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property	<u>Commission's Proposed Rule*</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons	<u>Explanation of Changes to the ABA Model Rule</u>
	(m) <u>Board of Governors' Standards.</u> 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.

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

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

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Definitions</u> <u>[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.</u>	New comment [1]: Added to clarify for guidance and enforcement purposes the fundamental issues of what "property" and whose "property" are governed by the Rule.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.	~~[2]- While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.~~ <u>[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.)</u>	Rejected entirely for redundancy: Sentence 1: This merely repeats the Rule and therefore is deleted as unnecessary. Sentence 2: This also merely repeats the Rule regarding record keeping and is deleted as unnecessary. New Comment [2]: Proposed for definition and clarification of another concept that is essential to the application of the Rule, which is that the Rule applies only when a lawyer acts "in connection with the performance of a legal service or representation". Other laws and regulations might apply to other fiduciary roles, such as when a lawyer acts as the personal representative of a probate estate. This clarification is for guidance and enforcement.

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

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

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

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

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

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Paragraphs (g) - (i) - Disputed fees</u> <u>[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.</u>	Added in place of Model Rule Comment [2] for clarification.
	<u>[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].)</u>	Added for public protection: This Comment clarifies that undisputed funds must be disbursed to prevent loss of use of the money by the owner.
	<u>[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.</u>	Added for public protection: This Comment clarifies that a lawyer may not unilaterally withdrawal entrusted funds.

<u>ABA Model Rule</u> Rule 1.15 Safekeeping Property Comment	<u>Commission's Proposed Rule</u> Rule 1.15 Handling Funds and Property of Clients and Other Persons Comments/Definitions*	<u>Explanation of Changes to the ABA Model Rule</u>
	<i>Paragraph (k) - Duties to maintain records and account for receipt of trust funds or property</i> [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.
	<i>Other Guidance</i> [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: 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 and Roy D. Simon. The text relevant to proposed Rule 1.8 is highlighted)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Rule 1.16 [3-700]

“Declining or Terminating Representation”

(Draft # 7, 9/19/09)

Summary: Proposed Rule 1.16 and the Model Rule 1.16 generally cover the same four topics: situations in which a lawyer must terminate a representation, situations in which a lawyer may do so, the requirement of court authorization when the court’s rules so require, and the lawyer’s conduct when a representation is terminated. The proposed Rule, however, involves several substantive changes to the Model Rule. 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 3-700.

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 11

Opposed Rule as Recommended for Adoption 0

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:

A representative from the Alameda Public Defender's Office expressed a concern that the Rule's requirement that a lawyer return the client's file have an exception for materials a criminal defense lawyer is prohibited by statute from providing a client. See Explanation of Changes for paragraph (e)(1).

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.16* Declining or Terminating Representation

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

This proposed Rule and the Model Rule generally cover the same four topics: situations in which a lawyer must terminate a representation, situations in which a lawyer may do so, the requirement of court authorization when the court's rules so require, and the lawyer's conduct in terminating a representation. However, the Commission's recommendation includes a number of substantive and drafting changes in the Model Rule. These generally can be summarized as designed to enhance client protection either by narrowing the situations in which a lawyer is permitted to withdraw or by making Rule language clearer and more detailed.

The most fundamental of these changes is the removal of Model Rule 1.16(b)(1), a provision that permits a lawyer to withdraw from a representation whenever this can be accomplished "without material adverse effect on the interest of the client". The Commission views this as nearly *carte blanche*, permitting a lawyer to abandon a client whenever it is profitable or convenient for a lawyer to do so, limited only by the indefinite, unexplained, and indefinable standard of "material adverse effect" on the client. As more fully explained in the accompanying comparison chart, the Commission believes that, because clients properly place heavy reliance on their lawyers, a lawyer's acceptance of a representation involves a serious commitment to the client. As a result, a lawyer should not make this commitment lightly or only for so long as it might suit the lawyer's convenience, and a lawyer should withdraw from a representation only as permitted by one of the express provisions of this Rule.

* Proposed Rule 1.16, Draft 7 (9/19/09).

INTRODUCTION (Continued):

Variations in other jurisdictions: There are a number of local variations in this Rule. These include the following: North Carolina includes in its paragraph (b) counterparts to our recommended paragraphs (b)(1) [client insists on taking a legally unsupported legal position] and (b)(6) [termination of a representation by client consent]. Ohio and New York also have provisions similar to the Commission's recommended (b)(6). North Dakota has added "reasonably believes" in paragraph (a)(1), like the Commission's recommendation. Virginia omits paragraph MR (b)(1), as does the Commission's recommendation. D.C. and New York have the equivalent of the Commission's recommended (b)(10) [the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal]. N.Y. in its (c)(7) has an equivalent to our recommended (b)(4) [the client renders it unreasonably difficult for the lawyer to provide effective legal services], in its (c)(8) an equivalent to our recommended (b)(7) [the difficulty of working with co-counsel makes it in the best interests of the client for the lawyer to withdraw], and in its (c)(9) an equivalent to our (b)(8) [the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively].

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law;	(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) <u>the lawyer knows or reasonably should know that</u> the representation will result in violation of ~~the rules of professional conduct~~<u>these Rules</u> or ~~other law~~<u>of the State Bar Act</u>;	Paragraph (a) is substantially the same as the Model Rule but makes two changes. First, the Model Rule requires a lawyer to withdraw from a representation if the representation “will” result in a violation by the lawyer. That standard appears to require withdrawal only when the lawyer can predict with certainty that a violation will occur. The Commission proposes to broaden this duty by requiring the lawyer to withdraw if the lawyer “knows or reasonably should know”. Second, the Model Rule phrase “of the rules of professional conduct” is changed to “of these Rules or the State Bar Act” in order to include the related statutory provisions and conform to our style.
(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or	(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client <u>competently</u>; or	Model Rule paragraph (a) implies but does not state that a lawyer must withdraw from a representation when the lawyer’s physical or mental condition impairs the lawyer’s ability to represent the client competently, but it omits the word “competently”. The Commission proposes to add that word for clarity.
(3) the lawyer is discharged.	(3) the <u>client discharges the</u> lawyer ~~—is discharged.~~	Paragraph (c) is substantively the same as the Model Rule but has been restated in the active voice to conform to the Guidelines for Drafting and Editing Court Rules.

* Proposed Rule 1.16, Draft 7 (9/19/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client;	(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: ~~(1) withdrawal can be accomplished without material adverse effect on the interests of the client;~~	Paragraph (b) lists a number of situations in which a lawyer may, but is not required to, withdraw from a representation. The first of these is that a lawyer may terminate a representation whenever doing so will have no "material adverse effect on the interests of the client", thus permitting withdrawal when it is in the lawyer's interests but not the client's. The Commission has rejected this broad authorization, primarily for client protection reasons but also because of the role of lawyers in the legal system. The Commission believes that lawyers generally should accept a representation only with the intent of seeing it through to completion, and that a lawyer's termination of a representation for the lawyer's benefit: (i) would be contrary to client expectations and would damage the reputation of lawyers generally and of the legal system; (ii) would allow lawyers to place their own convenience above the protection of the interests of their clients; and (iii) would give to lawyers the unacceptably broad discretion to terminate under the vague standard of a "material adverse effect" on the client (how much financial or other injury to the client would trigger the Model Rule standard?). In summary, a lawyer should not be permitted to terminate a representation for personal convenience, such as in order to accept another, more profitable or prestigious engagement.
	<u>(1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;</u>	In place of Model Rule paragraph (a)(1), the Commission proposes to add this paragraph (a)(1), which in substance tracks proposed Rule 3.1 (titled "Meritorious Claims and Contentions").

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;	(2) the client ~~persists in~~ <u>either seeks to pursue a criminal or fraudulent</u> course of ~~action involving~~ <u>conduct or has used</u> the lawyer's services <u>to advance a course of conduct</u> that the lawyer reasonably believes ~~is criminal~~ <u>was a crime</u> or ~~fraudulent~~ <u>fraud</u>;	Proposed paragraph (b)(2) combines the topics of Model Rule paragraph (b)(2) and (3) in a single paragraph, but with a broadening of Model Rule (b)(3). Model Rule paragraph (b)(3) permits a lawyer to terminate a representation if the "client has used" the lawyer's services to perpetrate a crime or fraud, a phrasing that would seem to require the lawyer's to be certain. This proposal expands the Model Rule to permit termination when the lawyer "reasonably believes" the client has acted in that way. In addition, the drafting of the Model Rule incorrectly has "criminal or fraudulent" modify "the lawyer's services", which is not intended and is eliminated by this revision.
(3) the client has used the lawyer's services to perpetrate a crime or fraud;	(3) the client ~~has used~~ <u>insists that</u> the ~~lawyer's services to perpetrate~~ <u>lawyer pursue a</u> ~~crime~~ <u>course of conduct that is criminal</u> or ~~fraud~~ <u>fraudulent</u>;	In place of Model Rule paragraph (b)(3), which now is part of paragraph (b)(2), this proposal adds the situation in which a client insists that the lawyer pursue a course of conduct that itself would be criminal or fraudulent. This supplements proposed paragraph (b)(2), which addresses the situation in which the lawyer's actions might be perfectly legal, such as simply forming a corporation for a client, but the client's actions are not proper.
(4) a the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;	(4) ~~a the client insists upon taking action that by other conduct renders it unreasonably difficult for the lawyer considers repugnant or with which to carry out the lawyer has a fundamental disagreement~~ <u>employment effectively</u>;	The Commission has rejected Model Rule paragraph (b)(4). The concept that a client's conduct is "repugnant" to a lawyer is divorced from the proper concern, which is the ability of the lawyer to competently and loyally represent the client and would give the lawyer a broad subjective basis for terminating representations. In its place, proposed paragraph (b)(4) identifies as a basis for permissive withdrawal conduct of the client that materials interferes with the lawyer's ability to act competently. The Commission's rejection was informed by the requirement of Bus. & Prof. C. § 6068(h).

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;	(5) the client ~~fails—substantially—to fulfill~~<u>breaches a material term of an agreement with or</u> obligation to the lawyer ~~regarding~~<u>relating to</u> the ~~lawyer's services~~<u>representation</u>, and <u>the lawyer</u> has ~~been~~ given <u>the client a</u> reasonable warning <u>after the breach</u> that the lawyer will withdraw unless the <u>client fulfills the agreement or performs the</u> obligation ~~is fulfilled~~;	Proposed paragraph (b)(5) narrows the Model Rule counterpart in order to advance the goal of better client protection. First, the lawyer's right to withdraw is limited to the client's breach of a <i>material</i> term of an agreement with the lawyer. Second, the lawyer's obligation to warn the client of possible termination must come after the client's breach so that, for example, it cannot be buried in a much earlier fee agreement.
	(6) <u>the client knowingly and freely assents to termination of the representation;</u>	The Model Rule and the Commission's proposal include as a mandatory withdrawal the situation in which the client discharges the lawyer. However, the Model Rule overlooks the possibility that a lawyer and client will agree to terminate a representation. Because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.
	(7) <u>the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;</u>	The Model Rule recognizes certain situations in which the lawyer's ability to represent the client might have been materially affected by the client's conduct. However, it overlooks the possibility that a lawyer will not be able to perform in the best interest of a client because of the conduct of co-counsel. As stated above, because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;</u>	The Model Rule also overlooks the possibility that a lawyer's own condition might interfere materially with the lawyer's ability to advance the interests of a client. As explained above, because Rule 1.16 is the exclusive statement of when a lawyer may terminate a representation, the Commission has included this alternative.
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or	~~(6)~~ <u>a continuation of the representation will likely to result in an unreasonable financial burden on the lawyer a violation of these Rules or has been rendered unreasonably difficult by the client</u> <u>State Bar Act</u>; or	The Commission rejected Model Rule paragraph (b)(6). As written, it appears to be broad enough to permit a lawyer to terminate a representation simply because of more profitable representation is available. See the explanation above for the Commission's rejection of Model Rule paragraph (b)(1). The lawyer's financial situation would come into play only when so grave that it would affect the lawyer's ability to fulfill the duty of competence.
(7) other good cause for withdrawal exists.	~~(7) other good cause for withdrawal exists.~~	Model Rule paragraph (b)(7) grants to the lawyer the unilateral authority to determine when it is ok to terminate a representation. The Commission has rejected that broad authority for the same reason that it rejected Model Rule paragraph (b)(1), as explained above.
	<u>(10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.</u>	Proposed paragraph (b)(10) is a narrow substitute for Model Rule paragraph (b)(7). This broadly allows a lawyer to seek court permission to withdraw, leaving the court to control its proceedings.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.	(c) ~~A lawyer must comply with applicable law requiring notice to or~~ permission <u>for termination</u> ~~of a tribunal when terminating a representation. When ordered to do so is~~ <u>required by the rules of</u> a tribunal, a lawyer shall ~~continue~~<u>not terminate a</u> representation ~~notwithstanding good cause for terminating the representation before that tribunal without its permission.~~	Proposed paragraph (c) is substantively the same as the Model Rule. However, it eliminates what appears to be a Model Rule assumption that there always is applicable law governing termination of a representation and clarifies that, when there is applicable law, that law takes precedence even if there is no court order directing the lawyer to continue a representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.	~~(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.~~	The Commission believes that a lawyer's conduct upon termination of a lawyer-client relationship involves client-protection issues of the highest importance. It therefore has rejected the generalized, unspecific language of Model Rule paragraph (d) in favor of the considerably more detailed requirements of proposed paragraphs (d) and (e). The Commission believes that the definition of a lawyer's duties in this situation should be robust so that lawyers will not be left in doubt as to their obligations and in order to facilitate discipline of lawyers who do not fulfill their obligations. The proposed replacement provisions also make substantive changes, as explained below.
	<u>(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).</u>	Model Rule paragraph (d) requires a lawyer to take certain protective steps upon termination of a representation. The Commission has rejected the timing of this obligation as coming too late. This proposed paragraph obligates the lawyer to take protective steps before terminating a representation.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation	<u>Explanation of Changes to the ABA Model Rule</u>
	(e) <u>Upon the termination of a representation for any reason:</u> (1) <u>Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and</u>	Proposed paragraph (e) contains a detailed elaboration of a lawyer's duties to a former client upon the termination of a representation. It is substantively consistent with Model Rule paragraph (d). In adding a reference to limitations imposed by applicable protective order, non-disclosure agreements or statutes, this recognizes, for example, the Proposition 15 limitations on the materials to which a criminal defendant is entitled. See proposed Comment [9], below.
	(2) <u>The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.</u>	Model Ruled paragraph (d) requires the lawyer to refund any advance payment of fee or expense that has not been earned or incurred. This proposal requires that the lawyer <i>promptly</i> refund. Also, this adds a reminder about true retainers because they have caused considerable confusion among lawyers.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].	[1] A lawyer should not accept <u>a representation unless the lawyer reasonably believes the lawyer can complete the representation in a matter unless it can be performed competently, promptly compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without improper conflict of interest and limitation, to completion any sale under Rules 1.17.</u> Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (See Rules [1.2(c)] and [6.5].) <u>A lawyer can be subject to discipline for improperly threatening to terminate a representation.</u> See ~~also Rule 1.3~~ <u>Matter of Shalant, Comment [4]</u> <u>Cal. State Bar Ct. Rptr. 829 (2005).</u>	This proposed Comment restates the Model Rule Comment as a declarative sentence in line with the Guidelines for Drafting and editing Court Rules. It adds the important substantive reminder that Rule 1.16 provides the exclusive statement of when and how a lawyer may terminate a lawyer-client relationship. Also, it adds references to the State Bar Act and California case law and uses the phrase “these Rules”

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Mandatory Withdrawal [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.	Mandatory Withdrawal [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that ~~is illegal or violates~~<u>would violate these Rules or other law</u><u>the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106.</u> The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client ~~may~~<u>might</u> make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. <u>Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. (See Rules 1.2(c) and 1.4.)</u>	This proposed Comment is substantively the same as the Model Rule Comment but tracks the Rule changes explained above and adds several references to pertinent California statutes.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.	[3] <u>[When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. (See also Rule 6.2. ~~Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.]~~</u>]	The Commission has rejected the last four sentences of the Model Rule Comment because it discusses topics covered by court rules and because it presumes to tell courts what standard of proof they should accept without regard to other facts and circumstances the court might be aware of. This Comment is bracketed because Rule 6.2 is not finalized.
	<u>[4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.</u>	Proposed Comment [4] has no Model Rule counterpart. It is based on Restatement § 32, Comment f.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Discharge [4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.	Discharge ~~[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.~~	The Commission has rejected Model Rule Comments [4] – [6]. The purpose of a Comment is to explain the Rule to which it is attached, and Model Rule Comments [4] – [6] do not do so. Instead, Comment [4] is a practice pointer together with a statement of other law. As a statement of other law, it is not entirely correct because it overlooks the wrongful discharge rights of house counsel under the <i>General Dynamics v. Superior Court</i> line of cases.
[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.	~~[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.~~	See the explanation of the rejection of Model Rule Comment [4], above.
[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.	~~[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.~~	See the explanation of Model Rule Comment [4], above. Also, because of the extreme sensitivity of the Rule 1.14 treatment of a lawyer's relationship to a client with diminished capacity, the Commission believes the entire discussion of that subject should be in a single place where the drafters' and the readers' attention can be focused.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Optional Withdrawal [7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.	Optional Withdrawal ~~[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.~~ <u>[5] A Paragraph (b)(2) permits a lawyer to withdraw from a representation even if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or must comply with which the lawyer has a fundamental disagreement.</u> <u>this or her duties under Business and Professions Code, section 6068(e)(1) and [Rule 1.6].</u>	This proposed Comment substantially revises Model Rule Comment [7] because of the Commission's rejection of Model Rule paragraph (b)(1). Instead, this provision is directed only to proposed paragraph (b)(2), which as explained above is a combination of Model Rule paragraphs (b)(2) and (b)(3).

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.	[86] ~~A~~Paragraph (b)(5) allows a lawyer ~~may to~~ withdraw <u>from a representation</u> if the client refuses to abide by ~~the terms~~<u>a material term</u> of an agreement relating to the representation, such as an agreement concerning fees ~~or~~ court costs <u>or other expenses</u>, or an agreement limiting the objectives of the representation.	This paragraph is substantially the same as the corresponding Model Rule Comment but tracks the two substantive changes in the Commission's proposed Rule: (i) the lawyer may terminate a representation under paragraph (b)(5) only if the client has breached a <i>material</i> term of an agreement with the lawyer; and (ii) the Commission's proposed paragraph (b)(5) specifies that an agreement regarding <i>expenses</i> is within the scope of the provision.
	<u>Permission to Withdraw</u> [7] <u>Lawyers must comply with their obligations to their clients under [Rule 1.6] and to the courts under [Rule 3.3] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. (See Business and Professions Code sections 6068(b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).</u>	Paragraph (c) of both the Model Rule and the Commission's proposed Rule requires that the lawyer comply with any applicable court rules regarding termination of a representation. However, the Model Rule has no explanatory Comment. The Commission has added this paragraph for that purpose and has included references to potentially applicable California statutes and court rules. The references to Rules 1.6 and 3.3 are bracketed because they have not been finalized.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Assisting the Client upon Withdrawal [9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.	Assisting the Client upon Withdrawal ~~[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.~~	Model Rule Comment [9] expresses a general principle with which the Commission agrees, but it instead recommends the adoption of Comments [8] – [10] in order to more fully explain the extremely important topic of what a lawyer is required to do after the termination of a lawyer-client relationship. This elaboration is believed to advance client protection materially.
	<u>[8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.</u>	Proposed Comment [8] is much the same as Model Rule Comment [9], but with two changes. First, this does not include the Model Rule to retaining liens because they are prohibited under California law. Second, this adds the explanation that a lawyer's post-termination duty to a former client normally does not include an obligation to provide additional legal services – a duty that arguably is implied by the Model Rule's language.
	<u>[9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See <i>Academy of California Optometrists v. Superior Court</i> (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; <i>Weiss v. Marcus</i> (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal Code sections 1054.2 and 1054.10 for examples of</u>	Proposed Comment [9] adds a detailed explanation of the extremely important question of how a lawyer is obligated to handle client files post-termination. It also adds references to important California statutory and case law authority. Finally, it adds a reference to Rule 1.15 with respect to the lawyer's handling of unearned fees when the lawyer and client disagree as to the lawyer's entitlement to additional payment. The reference to Rule 1.15 is bracketed because it has not yet been finalized.

<u>ABA Model Rule</u> Rule 1.16 Declining Or Terminating Representation Comment	<u>Commission's Proposed Rule</u> Rule 1.16 Declining or Terminating Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with [Rule 1.15].</u>	
	<u>[10]A lawyer's duty under paragraph (e)(1) to release "writings" to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.</u>	Proposed Comment [10] further elaborates on the lawyer's post-termination duties with respect to the former client's file. It: (i) further explains what is included in the client's file by referring to the Evidence Code definition of "writing"; (ii) clarifies that the lawyer's duty to make the file available to the former client does not mean that the lawyer is not permitted to copy the file at the lawyer's own expense; and (iii) explains that, although the Rule does not grant the lawyer the right to copy the file, there might be contractual, court order, or other reasons why the lawyer does not have the right to copy.

Rule 1.16 Declining or Terminating Representation
(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the lawyer knows or reasonably should know that the representation will result in violation of these Rules or of the State Bar Act;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or
 - (3) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;
 - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;
 - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
 - (5) the client breaches a material term of an agreement with or obligation to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
 - (6) the client knowingly and freely assents to termination of the representation;
 - (7) the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;
 - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;
 - (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or
 - (10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.
- (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.

- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
 - (1) Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
 - (2) The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

COMMENT

- [1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without limitation, to any sale under Rule 1.17. Ordinarily, a representation in

a matter is completed when the agreed-upon assistance has been concluded. (See Rules [1.2(c)] and [6.5].) A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *Matter of Shalant*, 4 Cal. State Bar Ct. Rptr. 829 (2005).

Mandatory Withdrawal

- [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate these Rules or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. (See Rules 1.2(c) and 1.4.)
- [3] [When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. (See also Rule 6.2.)]
- [4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

Optional Withdrawal

- [5] Paragraph (b)(2) permits a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Business and Professions Code, section 6068(e)(1) and [Rule 1.6].
- [6] Paragraph (b)(5) allows a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.

Permission to Withdraw

- [7] Lawyers must comply with their obligations to their clients under [Rule 1.6] and to the courts under [Rule 3.3] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order. (See Business and Professions Code sections 6068(b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

- [8] Paragraph (d) requires the lawyer to take “reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client.” These steps will vary according to the circumstances. Absent special circumstances, “reasonable steps” do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.
- [9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to “promptly” return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with [Rule 1.15].

- [10] A lawyer's duty under paragraph (e)(1) to release "writings" to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

Rule 1.16: Declining or Terminating Representation

STATE VARIATIONS

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

Arizona: Rule 1.16(d) adds that “upon the client’s request, the lawyer shall provide the client with all of the client’s documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client’s rights.”

California: Rule 3-700 allows a lawyer to withdraw if a client “by other conduct renders it unreasonably difficult for the member to carry out the employment effectively” or if the client “breaches an agreement or obligation to the member as to expenses or fees.” A lawyer may also withdraw if the “inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.”

Connecticut: Connecticut adds the following sentence at the end of Rule 1.16(d): “If the representation of the client is terminated either by the lawyer withdrawing from representation or by the client discharging the lawyer, the lawyer shall confirm the termination in writing to the client before or within a reasonable time after the termination of the representation.”

Florida: In Rule 1.16(a), Florida also requires withdrawal if:

(4) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or

(5) the client has used the lawyer’s services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

Florida Rule 1.16(b)(2) permits withdrawal if the client insists upon taking action that the lawyer considers repugnant, “imprudent,” or with which the lawyer has a fundamental disagreement. Rule 1.16(d) provides that, upon termination, a lawyer may retain papers “and other property relating to or belonging to the client” to the extent permitted by law.

Illinois: Rule 1.16 is substantially the same as DR 2-110 in the old ABA Model Code of Professional Responsibility.

Louisiana: Rule 1.16(d) adds the following:

Upon written request by the client, the lawyer shall promptly release to the client or the client’s new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or

for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Maryland: Rule 1.16(b)(4) permits withdrawal if the client insists upon taking action “or inaction” that the lawyer considers repugnant.

Massachusetts: Rule 1.16(e) provides as follows:

A lawyer must make available to a former client, within a reasonable time following the client’s request for his or her file, the following:

1. all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials.

2. all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer’s actual cost for these materials, unless the client has already paid for such materials.

3. all investigatory or discovery documents for which the client has paid the lawyers out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.

4. if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer’s work product (as

defined in subparagraph (6) below) for which the client has paid.

5. if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer’s work product (as defined in sub-paragraph (6) below). The client may be required to pay any copying charge consistent with the lawyer’s actual cost for the copying of these materials.

6. for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer’s direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

7. notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client’s file when retention would prejudice the client unfairly.

Minnesota deletes the last sentence of Rule 1.16(d) (“The lawyer may retain papers relating to the client to the extent permitted by other law”) and adds a detailed set of rules regarding a client’s right to documents.

Missouri: In the rules effective July 1, 2008, 1.16(c) provides that, when a lawyer has filed a limited appearance pursuant to Missouri’s version of Rule 1.2(c), the lawyer is not subject to the usual rule regarding termination of representation. Rule 1.16(c) provides as follows:

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation unless the lawyer has filed a notice of termination of limited appearance. Except when such notice is filed, a lawyer shall continue representation when ordered to do so by a tribunal notwithstanding good cause for terminating the representation.

New Hampshire: New Hampshire makes the protective steps in Rule 1.16(d) a “condition” to terminating a representation.

New York: DR 2-110 tracks DR 2-110 of the ABA Model Code.

North Carolina: Rule 1.16(b)(4) retains the word “imprudent” and permits withdrawal if the client insists upon taking action “contrary to the advice and judgment of the lawyer....” North Carolina also adds Rule 1.16(b)(8), which permits withdrawal if “the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.”

Texas: Rule 1.15(d) permits a lawyer to retain papers relating to the client to the extent permitted by other law “only if such retention will not prejudice the client in the subject matter of the representation.”

Virginia: Rule 1.16(b)(1) replaces “criminal or fraudulent” with “illegal or unjust.” Rule 1.16(e) specifies in detail the papers to which a client is entitled after a lawyer withdraws and whether the client or the lawyer must bear the cost of duplication. The client’s entitlement does not depend upon “whether or not the client has paid the fees and costs owed a lawyer.”

Proposed Rule 1.4 [RPC 3-500, 3-510]

“Communication”

(Draft #8, 9/14/09)

Summary: Proposed Rule 1.4 sets forth a lawyer’s duties to keep a client informed of significant developments in the representation, including offers of settlement. It largely tracks Model Rule 1.4 but retains concepts found in current California rules 3-500 and 3-510, as well as Bus. & Prof. Code §§ 6068(m) and 6103.5.

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

Rule

RPC 3-500, 3-510

Statute

Bus. & Prof. Code §§ 6068(m) and 6103.5.

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

(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 9
Opposed Rule as Recommended for Adoption 4
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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.4* Communication

October 2009

(Draft rule revised following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.4 tracks Model Rule 1.4 with some notable exceptions. The proposed Rule differs from the Model Rule in that it clarifies that a lawyer must consult with a client concerning accomplishing the client's objectives only as they relate to the representation. The proposed Rule also limits the duty to keep the client informed by requiring the lawyer to do so only as to significant developments relating to the representation; this change conforms the Rule to the language of Bus. & Prof. Code § 6068(m). Model Rule 1.4 provides broader obligations insofar as it requires the lawyer to “keep the client reasonably informed about the status of the matter” generally. The draft Rule also requires that a lawyer promptly comply with reasonable client requests for information.

There is no Model Rule counterpart to paragraph (c), which incorporates the general requirements in current Rule 3-510 that pertain to the specific duty of communications of settlement offers in criminal and civil matters. As to civil matters, retention of current rule 3-510 conforms proposed Rule 1.4 to Bus. & Prof. Code § 6103.5. The Commission determined that retaining these specific provisions will enhance public protection by clearly delineating a lawyer's duty when presented with offers to settle.

* Proposed Rule 1.4, Draft 8 (9/14/09).

<u>ABA Model Rule</u> Rule 1.4 Communication	<u>Commission's Proposed Rule*</u> Rule 1.4 Communication	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;	(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which <u>written disclosure or</u> the client's informed consent, as defined in Rule 1.0(e), is required by these Rules <u>or the State Bar Act</u>;	Subparagraph (a)(1) is based on Model Rule 1.4(a)(1). The Commission has added "written disclosure" to the Model Rule language because, under some California rules, disclosure and not informed consent is required, and it is just as important to promptly provide the client with an appropriate disclosure. The addition of "the State Bar Act" emphasizes that a lawyer also has duties under that Act.
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;	(2) reasonably consult with the client about the means by which <u>to accomplish</u> the client's objectives ~~are to be accomplished~~ <u>in the representation</u>;	Subparagraph (a)(2) is based on Model Rule 1.4(a)(2). Proposed subparagraph (a)(2) differs from the Model Rule in that it clarifies that a lawyer's duty is limited to consultations with the client concerning accomplishing the client's objectives only as they relate to the representation. This change also conforms the language of the Rule to Bus. & Prof. Code § 6068(m). In addition, proposed subparagraph (a)(2) is in the active voice to conform to California rules style. See, Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996). No change in substance is intended.

* Proposed Rule 1.4, Draft 8 (9/14/07). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.4 Communication	<u>Commission's Proposed Rule*</u> Rule 1.4 Communication	<u>Explanation of Changes to the ABA Model Rule</u>
(3) keep the client reasonably informed about the status of the matter;	(3) keep the client reasonably informed about <u>significant developments relating to the</u>~~status of the matter~~<u>representation</u>;	Subparagraph (a)(3) diverges from Model Rule 1.4(a)(3) in that it limits the duty to keep the client reasonably informed only as to significant developments relating to the representation. Model Rule 1.4 provides broader obligations insofar as it requires the lawyer to "keep the client reasonably informed about the status of the matter" generally. As previously noted, limiting the lawyers' obligations to developments "relating to the representation" conforms the Rule to Bus. & Prof. Code § 6068(m). A majority of the Commission believe that the ABA standard is somewhat vague and that retaining the "significant developments" standard found in current rule 3-500 provides better guidance to lawyers as to their duty without unduly restricting clients' access to information about their matters. For an explanation of what is intended by "significant development," see proposed Comment [1].
(4) promptly comply with reasonable requests for information; and	(4) promptly comply with reasonable requests for information;~~and~~	Subparagraph (a)(4) is identical to Model Rule 1.4(a)(4).
	(5) <u>promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed about significant developments relating to the representation, which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and</u>	Subparagraph (a)(5) has no counterpart in the Model Rule. Its concept, however, can be found in current rule 3-500 and Bus. & Prof. Code § 6068(m), which include the requirement that a lawyer promptly comply "with reasonable requests for information and copies of significant documents when necessary to keep the client [reasonably] informed." The last clause of the subparagraph specifies that a lawyer can achieve compliance by permitting inspection. See also Comment [2] concerning compliance with this subparagraph by providing the client with electronic copies.

<u>ABA Model Rule</u> Rule 1.4 Communication	<u>Commission's Proposed Rule*</u> Rule 1.4 Communication	<u>Explanation of Changes to the ABA Model Rule</u>
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.	~~(5)~~(6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by ~~the~~<u>these</u> Rules ~~of Professional Conduct~~ or other law.	Subparagraph (a)(6) is identical to Model Rule 1.4(a)(5), except that "these Rules," a California rules style convention, has been substituted for "the Rules of Professional Conduct." Although the Model Rules use "these Rules" and "the Rules of Professional Conduct" interchangeably, the Commission consistently uses "these Rules."
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.	(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.	Paragraph (b) is identical to Model Rule 1.4(b).
	<u>(c) A lawyer shall promptly communicate to the lawyer's client:</u> <u>(1) all terms and conditions of any offer made to the client in a criminal matter; and</u> <u>(2) all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.</u>	Paragraph (c) has no counterpart in the Model Rule. The Commission included in this draft rule (as subparagraphs (c)(1) and (2)), the requirements in current rule 3-510, which pertain to the specific duty of communications of settlement offers in criminal and civil matters. It was determined that retaining these specific sections will enhance public protection by clearly delineating a lawyer's duty when presented with offers to settle. The Commission believes including this requirement in the Rule itself is preferable to the hortatory language of Model Rule 1.4, cmt. [2]. With respect to written offers of settlement in civil matters, paragraph (c) conforms the Rule to Bus. & Prof. Code § 6103.5.

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.	~~[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.~~	The Commission recommends not adopting MR 1.4, cmt. [1], because it is unnecessary exposition.
<i>Communicating with Client</i> [2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).	~~<i>Communicating with Client</i>~~ ~~[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).~~	The Commission recommends not adopting MR 1.4, cmt. [2]. It determined that the concept of the first sentence of MR 1.4, cmt. [2] is better placed in the Rule itself. See Explanation of Changes for paragraph (c). The Commission has moved the concept encompassed by the second sentence of MR 1.4, cmt. [2] to the second sentence of proposed Comment [6], below.
[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an	~~[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an~~	The Commission recommends not adopting the language of MR 1.4, cmt. [3]. Instead, the Commission recommends the adoption of proposed Comment [1], below, which is a more accurate statement of the lawyer's duties under paragraphs (a)(2) and (a)(3). See Explanation of Changes for proposed Comment [1], below.

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.	~~immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.~~	
[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.	~~[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.~~	The Commission recommends not adopting MR 1.4, cmt. [4] because paragraph (a)(4) is self-explanatory, rendering the Model Rule comment unnecessary exposition.

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[1] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in a criminal abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in, and the advantages and disadvantages of, alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.</u>	Comment [1] is based on the concepts in MR 1.4, cmt. [3], but it is a more accurate statement of the lawyer's duties under paragraphs (a)(2) and (a)(3). Comment [1], by providing illustrative examples, is intended to give guidance to lawyers in determining what constitutes a "significant development relating to the representation" within the meaning of (a) (3). One of the examples included is whether an opportunity to engage in alternative dispute resolution constitutes a significant development under the circumstances then existing. There was strong sentiment expressed by the ADR community that the modern ubiquity of ADR justified it being included the text of the rule itself. Although the Model Rule does not limit communications to "significant developments," there is a reference to "significant developments" in MR 1.4, cmt. [3].

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.	Comment [2] has no counterpart in the Model Rule because it is concerned with a rule provision without a Model Rule counterpart. The comment clarifies how the costs of providing "significant documents" to the client may be allocated. It also clarifies that even where the costs are to be borne by the client, the failure of the client to pay does not relieve the lawyer of the lawyer's obligations under (a)(5).
<i>Explaining Matters</i> [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily	~~<i>Explaining Matters</i>~~ ~~[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily~~	The Commission recommends only the first sentence of Model Rule 1.4, cmt. [5] as accurately reflecting California law and explaining the Rule. The second sentence is not helpful without the examples that follow. The third sentence is an incorrect statement of law; a lawyer has no authority to accept an agreement without client consent. The fourth sentence relates to competence, not the lawyer's fiduciary duty of full disclosure. The fifth and sixth sentences of the comment are merely practice pointers.

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).	~~will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).~~	
	<u>[4] As used in paragraph (c), "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.</u>	Comment [4], which clarifies who is the "client" for purposes of this Rule, has no counterpart in the Model Rule. Nevertheless, the Commission deemed this clarification necessary guidance for lawyers handling representative matters and matters where the lawyer reports to more than one person on behalf of an represented entity.
	<u>[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral. As used in this Rule, "criminal matters" includes all legal proceedings where violations of criminal laws are alleged, and liberty interests are involved, including juvenile proceedings.</u>	Comments [5], [6] and [7] clarify a lawyer's duties concerning the communication of settlement offers. A carryover from current rule 3-510, it requires that in criminal matters, <i>all</i> offers, whether made orally or in writing, must be communicated. The second sentence has been added to clarify that although juvenile proceedings are not technically considered "criminal matters," the same duty of communication as in criminal cases is imposed on lawyers in juvenile proceedings.

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)].	Comment [6] clarifies under what circumstances written offers to settle in civil matters must be communicated. The last sentence of Comment [6] incorporates the concept in the last sentence of Model Rule 1.4, cmt. [2]. The language has been revised to recognize that the lawyer must consider whether circumstances have changed before invoking the client's pre-settlement offer authority. This is an important qualification intended to protect the client's interests.
	[7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.	Comment [7] has no counterpart in the Model Rule. A carryover provision from current rule 3-510, it clarifies when an oral settlement offer must be communicated, leaving it to the lawyers reasonable judgment whether such an offer is a "significant development."
[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials	~~[6]~~ Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials	Comment [8] is identical to Model Rule 1.4, cmt. [6]

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.	of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.	
<i>Withholding Information</i> [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.	~~<i>Withholding Information</i>~~ ~~[7]~~ <u>[9]</u> In some circumstances, a lawyer may be justified in delaying <u>or withholding</u> transmission of information when the client would be likely to react imprudently to an immediate communication. ~~Thus~~ <u>For example</u>, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the ~~lawyer's~~ <u>lawyer's</u> own interest or convenience or the interests or convenience of another person. ~~Rules or court orders governing litigation may provide that information supplied to~~ <u>This Rule does not require a lawyer may not be disclosed to disclose to the a client. Rule 3.4(c) directs compliance with such rules any information or document that a court order or orders non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. Compare Rule [1.16(e)(1) and Comment [9]].</u>	Comment [9] is based on MR 1.4, cmt. [7]. The phrase, “or withholding” has been added to clarify that under some circumstances, a lawyer may be obligated to withhold certain information from the client and not only delay its transmission. ~~#~~ The Rule also clarifies that client disclosures must not violate court orders or other laws limiting or prohibiting client access to certain information or documents. It also cautions that the rule does not override legal requirements to make disclosures to criminal clients. The Commission has included a cross-reference to proposed Rule 1.16 and its comment, which provide similar guidance to lawyers on their obligations to provide clients with the contents of files when the representation is terminated.

<u>ABA Model Rule</u> Rule 1.4 Communication Comment	<u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[10] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.	Comment [10] has no counterpart in the Model Rule. It was added to clarify that the rule does not override the attorney work product doctrine, which in California, is subject to statutory regulation.

Rule 1.4 Communication
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which written disclosure or the client's informed consent, as defined in Rule 1.0(e), is required by these Rules or the State Bar Act;
 - (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;
 - (3) keep the client reasonably informed about significant developments relating to the representation;
 - (4) promptly comply with reasonable requests for information;
 - (5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed about significant developments relating to the representation, which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and
 - (6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

- (c) A lawyer shall promptly communicate to the lawyer's client:
- (1) all terms and conditions of any offer made to the client in a criminal matter; and
 - (2) all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

COMMENT

- [1] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in a criminal abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in, and the advantages and disadvantages of, alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and

the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.

- [2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.
- [3] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.
- [4] As used in paragraph (c), "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.
- [5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral. As used in this Rule, "criminal matters" includes all legal proceedings where violations of criminal laws are alleged, and liberty interests are involved, including juvenile proceedings.
- [6] Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are

considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)].

- [7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.
- [8] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.
- [9] In some circumstances, a lawyer may be justified in delaying or withholding transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. This Rule does not require a lawyer to disclose to a client any information or document that a court order or non-disclosure

agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. Compare Rule [1.16(e)(1) and Comment [9]].

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

Rule 1.4: Communication

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 adds Rule 1.4(c), which provides: “In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.”

Arkansas adds the following Rule 1.4(c), which describes a lawyer’s obligation to “promptly notify a client in writing of the actual or constructive receipt by the attorney of a check or other payment... of a settlement, judgment, or other monies to which the client is entitled.”:

A lawyer shall promptly notify a client in writing of the actual or constructive receipt by the attorney of a check or other payment received from an insurance company, an opposing party, or from any other source which constitutes the payment of a settlement, judgment, or other monies to which the client is entitled.

California: Rule 3-500 provides:

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Rule 3-510 provides:

(A) A member shall promptly communicate to the member’s client:

(1) All terms and conditions of any offer made to the client in a criminal matter; and

(2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

(B) As used in this rule, “client” includes a person who possesses the authority to accept an offer of settlement or plea, or in a class action, all the named representatives of the class.

California Business & Professions Code §6068(m) describes the same duties.

District of Columbia: D.C. adds Rule 1.4(c), which requires a lawyer “who receives an offer of settlement in a civil case or a proffered plea bargain in a criminal case” to “promptly” inform the client of its “substance.”

Florida: Rule 4-1.5(f)(4)(C) requires every lawyer entering into a contingent fee agreement in a case involving personal injury or property damage to provide the client with

a Statement of Client's Rights for Contingency Fees that contains the following paragraph:

10.... Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

Louisiana: Rule 1.4(c) provides as follows:

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Massachusetts: The Comment to Rule 1.4 states: "There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options...."

Michigan adds to Rule 1.4(a): "A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains."

Missouri deletes subparagraphs (a)(1) and (a)(2) from ABA Model Rule 1.4.

Nevada has a Rule 1.4(c) entitled "Lawyer's Biographical Data Form." Among other details, it requires each lawyer or law firm to maintain a form containing "a factual statement

detailing the background, training and experience of each lawyer or law firm." The form must list certain basic information and requires a lawyer or law firm to provide additional information upon request.

New York has no counterpart to ABA Model Rule 1.4 in its Disciplinary Rules, but EC 7-8 provides, in pertinent part, as follows:

A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so.... A lawyer should advise the client of the possible effect of each legal alternative....

Ohio: Rule 1.4(c) provides:

A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

Rule 1.4(c) does not apply to government lawyers or to in-house counsel.

Virginia adds Rule 1.4(c), which requires a lawyer to "inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter."

Proposed Rule 1.5 [4-200] “Fees for Legal Services”

(Draft #11, 12/14/09)

Summary: Proposed Rule 1.5, together with proposed Rule 1.5.1 and to a limited extent, proposed Rule 1.8.1, regulates fee arrangements between lawyers and their clients. The principal difference between the proposed Rule and Model Rule 1.5 is the former’s retention of the “unconscionability” standard for imposing discipline relating to legal fees. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted ☒ ABA Model Rule substantially rejected ☐ Some material additions to ABA Model Rule ☐ Some material deletions from ABA Model Rule ☐ No ABA Model Rule counterpart	☐ ABA Model Rule substantially adopted ☐ ABA Model Rule substantially rejected ☒ Some material additions to ABA Model Rule ☒ Some material deletions from ABA Model Rule ☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 4-200, 2-200

Statute

Bus. & Prof. Code §§ 6147, 6148

Case law

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].

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

Washington Rule 1.5 (2008).

☐ 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 9
Opposed Rule as Recommended for Adoption 3
Abstain 0

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

[*NOTE: The above vote records the position of the Commission on the version of Rule 1.5 submitted to the Board of Governors for consideration at its January 7–9, 2010 meeting. The version of Rule 1.5 submitted by the Commission was modified by the Board at that meeting to include paragraph (f) and related comments. Although paragraph (f) and the related comments were not a part of the Commission's recommended rule reflected in the above vote, they were adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Paragraph (f) and the related comments were drafted by a minority of the Commission to enhance protection for clients who might encounter proposed fee agreement modifications that are adverse to their interests.]

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

California Attorneys for Criminal Justice (Rickard Santwier); San Diego Criminal Defense Bar Association (Michael L. Crowley); National Association of Criminal Defense Lawyers (John Wesley Hall); and members of the California criminal defense bar. See Public Comment Chart for a complete list of those who commented on proposed Rule 1.5.

☒ Very Controversial – Explanation:

During the public comment period, members of the California criminal defense bar and some of their representative organizations disagreed with the Commission's proposed paragraph (f), which provided that a lawyer shall not charge, contract for or collect a non-refundable fee, except for a true retainer. After public comment, the Commission revised the Rule to also permit non-refundable flat fees, so long as certain requirements are met. See Introduction & Explanation for paragraph (e)(2). The Commission believes the changes made may assuage the concerns raised by the criminal defense bar.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.5* Fees for Legal Services

February 2010

(Draft rule revised following consideration of public comment and conformed to Board action.)

INTRODUCTION:

Proposed Rule 1.5 diverges from Model Rule 1.5 in several important respects: (1) An unconscionability standard is incorporated into the Rule rather than the Model Rule's "reasonable" fee standard as the bench mark for imposing discipline on lawyers, thus carrying forward the standard in current California Rule 4-200; (2) Model Rule 1.5(b), which identifies requirements for fee agreements and Model Rule 1.5(c), which sets forth requirement for contingent fee agreements, have both been deleted because those topics are already covered in Business & Professions Code §§ 6148 and 6147, respectively [see Explanation of Changes for Model Rule 1.5(b) and (c)]; (3) Model Rule 1.5(e), which concerns fee divisions among lawyers, has been deleted because that topic is covered in a separate rule, proposed Rule 1.5.1 [see Explanation of Changes for Model Rule 1.5(e)]; (4) It adds new paragraph (e), which prohibits lawyers from contracting for, charging, or accepting a non-refundable fee, except for two exceptions, one for "true" retainers and the other for flat fees that conform to the strict requirements of subparagraph (e)(2) [see Explanation of Changes for paragraph (e), in part, explaining that fee arrangements used by criminal defense lawyers under the existing California rules could be perpetuated under the "flat fee" exception]; and (5) It adds new paragraph (f), which prohibits a lawyer from making a material fee agreement modification that is adverse to a client's interests unless: (i) the client is represented by an independent lawyer regarding the modification; or (ii) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. New paragraph (f) was added by the Board to enhance public protection and was based upon a recommendation by a minority of the Commission [see Explanation of Changes for paragraph (f); see also, Introduction to proposed Rule 1.8.1].

* Proposed Rule 1.5, Draft 11 (12/14/09).

The Commission recommends that California retain the unconscionability standard for disciplining lawyers that is found in current rule 4-200. Seventy-five years ago, in a case seeking disbarment of an attorney, the California Supreme Court rejected a “reasonable fee” standard in discipline:

We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action. As was said by the Washington court in *Re Wiltsie*, 109 Wash. 261, 186 P. 848: “The board also found, as one of the grounds for his disbarment, that the charges made for these services were excessive. We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis for disbarment, except in the most aggravated and extreme case. So far as the record discloses, the fees were voluntarily paid, and, were it the only charge here that such fees were excessive, the extreme penalty would not be merited.”

See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403 [49 P.2d 832] (citations omitted). The Court then went on to state what it believed was the appropriate test for imposing discipline on a lawyer:

In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees.

Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. *It is our opinion that the disciplinary machinery of the bar should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present.* (Emphasis added) (Citations omitted).

Nothing in the intervening 75 years warrants changing that standard. The public is provided sufficient protection against avaricious lawyers through the civil court system and, in extreme cases such as those described in the preceding paragraphs, through imposing discipline on lawyers who charge, contract for or collect an unconscionable fee.

Minority. A minority of the Commission takes the position that proposed Rule 1.5 falls short of the Commission's charge to update the California Rules of Professional Conduct to "[a]ssure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended" and to "[p]romote confidence in the legal profession and the administration of justice." It contends that by retaining "unconscionability" as the standard for imposing discipline under the Rule, the majority sends a regrettable message to the public and profession alike that California tolerates lawyers charging their clients unreasonable fees. This is an area where the Commission and the Board of Governors should reassess the continued viability of the *Herrscher* decision, on which the Commission majority has placed great reliance. The concerns the Supreme Court expressed 75 years ago about the efficacy of inquiring into the reasonableness of fees should not control the debate for a self-regulating profession in this sensitive area of lawyer-client relations. Moreover, the proposed Rule is out of step with virtually all other states on the subject of lawyer's fees. Only California and Texas adhere to an "unconscionable fee" standard. A clear majority of the remaining jurisdictions states have adopted the more public protective Model Rule standard which prohibits lawyers from charging "unreasonable fees," while a handful have retained the "clearly excessive" standard from the 1969 ABA Code of Professional Responsibility.

The minority further contends that even if *Herrscher* remains sound public policy in modern practice, there is no support in the law or in the rules of any jurisdiction for the provision in proposed rule 1.5(a) that permits lawyers to make an agreement, charge and collect unreasonable or excessive expenses so long as the expenses are not "unconscionable." The prohibition against charging unreasonable expenses is generally accepted in all jurisdictions including California. See current rule 4-210 (lawyer may advance reasonable expenses of litigation or in providing any legal service to the client); ABA Formal Opinions 93-379. There is no sound reason for departing from the Model Rule on this important issue of public protection.

Non refundable fees. During the public comment period, members of the California criminal defense bar and some of their

representative organizations disagreed with the Commission's proposed paragraph (f), which provided that a lawyer shall not charge, contract for or collect a non-refundable fee, except for a true retainer. See Public Comment Chart, below, for a complete list of those who commented on the public comment draft of the Rule. The Commission believes that the commenters who disagreed with paragraph (f) of the public comment draft misinterpret current California law, which does make fixed and flat fees refundable. Nevertheless, to address the concerns stated by those in the legal community who opposed the revision, after public comment the Commission revised paragraph (f) [now lettered "(e)"] to also permit non-refundable *flat* fees, so long as the requirements set forth in paragraph (e)(2) are satisfied. See Explanation of Changes for paragraph (e)(2), below. Stating the requirements for a non-refundable flat fee in the Rule itself explicitly brings current California standards into the Rule. The Commission believes the changes made should assuage the concerns raised by the criminal defense bar.

Minority. A minority of the Commission believes that proposed paragraphs (e) and (e)(2) as drafted would be a source of overreaching and confusion. The minority argues that there are many different fee arrangements involving flat or fixed fees. While a lawyer may require advance payment of a fixed or flat fee, the lawyer remains obligated under the rules in all jurisdictions, including Washington, to return any unearned portion. See Model Rule 1.16(d); current California Rule 3-700(D)(2) and Washington Rule 1.5(f)(2). Washington Rule 1.5(f) is not intended to authorize lawyers to charge "non-refundable fees" as proposed rule 1.5(e) purports to do. Rather, Washington's rule provides that the client and the lawyer may agree in writing that a flat or fixed fee paid in advance is the lawyer's property and, therefore, need not be placed in the lawyer's client trust account, which Washington's rule would otherwise require. Unlike the rule in most jurisdictions, California does not required advance fee payments to be place in a client trust account. However, California law does not permit lawyers to make an agreement, charge or retain a "non-refundable" flat or fixed fee that has not been earned. *Matthew v. State Bar* (1989) 49 Cal. 3d 784, 787-788; *Matter of Lais* (Rev.Dept 1998) 3 Cal. State Bar Ct. Rptr. 907, 923; *Federal Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea* (9th Cir. 1988) 838 F.2d 395, 397 (applying California law). A rule that authorizes lawyers to charge "non-refundable" flat or fixed fees is not good public policy. "Non-refundable" when used to signify a prepaid fee is misleading because the lawyer's fee is never truly nonrefundable until earned. When used in connection with a "true" or "classic" retainer, the term "nonrefundable" is redundant. Not only is the label not controlling, the term "non-refundable" retainer has been the source of confusion and should not be encourage in a rule of professional conduct. Most authorities are in agreement. See, Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where*

Should it be Deposited?, 1 Fla. Coastal L. J. 293 (1999), ABA Manual on Professional Responsibility 45:109 (1993), *In re Mance*, D.C. Ct. of Appeals, 06-BGT-890 (09-24-2009). Many criminal defense lawyers, including some who submitted comments to the earlier version of proposed Rule 1.5, said they would agree to refund a portion of a flat or fixed fee to a client who changed counsel shortly after paying the fixed fee or if charges were dismissed soon after the lawyer was retained.

A separate minority of the Commission takes the position that by limiting an availability fee only to circumstances where the lawyer will additionally bill fully for his or her services when working on the engagement without giving any credit to the client for the “availability fee” payment, the proposed Rule changes existing law, limits the availability fee to situations which rarely if ever occur in real life, makes other “advance fees” subject to third party sequestration, and serves neither client nor lawyer well. The minority concludes that there are alternative means of protecting a client who becomes entitled to return of all or part of an advance fee, as explained in the attached dissent, below.

Variations in Other Jurisdictions. Forty-one jurisdictions have adopted a reasonable fee standard. Eight jurisdictions have retained the “clearly excessive or illegal” standard from the 1969 ABA Model Code of Professional Responsibility. Two jurisdictions have the “illegal or unconscionable” standard. See also State Variations, below.

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:	(a) A lawyer shall not make an agreement for, charge, or collect an ~~unreasonable~~ <u>unconscionable or illegal</u> fee or an ~~unreasonable amount for expenses. The factors to be considered~~ <u>unconscionable or illegal</u> in determining the reasonableness of a fee include the following: <u>house expense.</u>	The first sentence of paragraph (a) has been revised to substitute the recommended standard – unconscionable or illegal – for the Model Rule's "reasonable" standard. See Introduction. The second sentence has been similarly revised and moved to paragraph (c) as that paragraph's introductory clause. The limitation in paragraph (c) on charging an unconscionable or illegal expense is limited those expenses charged that incurred in-house by a lawyer, over which the lawyer has control. The Commission was concerned that some expenses incurred, for example from retaining consultants and experts, might be viewed as unconscionable. However, the cost of such expenses are often beyond the ability of a lawyer to control.
	(b) <u>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.</u>	The Commission recommends including a definition for "unconscionable" fee, a definition not provided in current rule 4-200. The language of the definition is taken from California decisional law, including two Supreme Court cases. See <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; <i>Goldstone v. State Bar</i> (1931) 214 Cal. 490 [6 P.2d 513]. Paragraph (b) is intended to be used in conjunction with the factors set forth in paragraph (c) as an analytical framework for determining whether a fee is unconscionable. The last sentence specifies the time at which the conscionability of a fee is to be determined.

* Proposed Rule 1.5, Draft 11 (12/14/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:</u>	Paragraph (c) is based on the second sentence and subparagraphs of Model Rule 1.5(a), revised by substituting the recommended “unconscionable” standard.
	<u>(1) the amount of the fee or in-house expense in proportion to the value of the services performed;</u>	Subparagraph (1) has no counterpart in the Model Rule. Carried forward from current rule 4-200(B)(1), subparagraph (1) recognizes that a lawyer should assess the costs and benefits of the lawyer’s services in determining what tasks to perform.
	<u>(2) the relative sophistication of the lawyer and the client;</u>	Subparagraph (2) has no counterpart in the Model Rule. Carried forward from current rule 4-200(B)(2), subparagraph (1) recognizes that the experience of a client in using legal services can be relevant in determining the conscionability of a fee.
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;	~~(13) the time and labor required,~~ the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;	Subparagraph (3) is identical to Model Rule 1.5(a)(1), except that the phrase “the time and labor required” has been given status as a separate factor for consideration. See subparagraph (10).
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;	~~(24)~~ the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;	Subparagraph (4) is identical to Model Rule 1.5(a)(2).

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
(3) the fee customarily charged in the locality for similar legal services;	~~(3) the fee customarily charged in the locality for similar legal services;~~	The Commission recommends that Model Rule 1.5(a)(3) be rejected because the identified factor, while relevant to determining the reasonableness of a fee, is not relevant to determining the conscionability of a fee.
(4) the amount involved and the results obtained;	(4 ⁵) the amount involved and the results obtained;	Subparagraph (5) is identical to Model Rule 1.5(a)(4).
(5) the time limitations imposed by the client or by the circumstances;	(5 ⁶) the time limitations imposed by the client or by the circumstances;	Subparagraph (6) is identical to Model Rule 1.5(a)(5).
(6) the nature and length of the professional relationship with the client;	(6 ⁷) the nature and length of the professional relationship with the client;	Subparagraph (7) is identical to Model Rule 1.5(a)(6).
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and	(7 ⁸) the experience, reputation, and ability of the lawyer or lawyers performing the services; and	Subparagraph (8) is identical to Model Rule 1.5(a)(7).
(8) whether the fee is fixed or contingent.	(8 ⁹) whether the fee is fixed or contingent ¹ ;	Subparagraph (9) is identical to Model Rule 1.5(a)(8).

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(10) the time and labor required;</u>	Subparagraph (10) consists of language that has been moved from Model Rule 1.5(a)(1) and given its own subparagraph.
	<u>(11) whether the client gave informed consent to the fee or in-house expense.</u>	Subparagraph (11) has no counterpart in the Model Rule. It is carried forward from current rule 4-200(B)(11), which provides: "(11) The informed consent of the client to the fee."
(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.	~~(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.~~	The Commission recommends deletion of Model Rule 1.5(b), which prescribes what a lawyer is obligated to communicate to a client about the scope of representation and basis or rate of the fee. Those requirements are already addressed in Business & Professions Code § 6148. Under that statute, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. Section 6148(c). The Commission does not recommend that a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute.
(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue	~~(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue~~	The Commission recommends deletion of Model Rule 1.5(c), which prescribes a lawyer's duties when the lawyer is retained on a contingent fee basis. Those requirements are already addressed in Business & Professions Code § 6147. Under that statute, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. Section 6147(b). The Commission does not recommend that a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.	~~to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.~~	remedy provided in the statute.
(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.	(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a ~~domestic relations~~<u>family law</u> matter, the payment or amount of which is contingent upon the securing of a ~~divorce~~<u>dissolution or declaration of nullity of a marriage</u> or upon the amount of ~~alimony~~<u>spousal</u> or <u>child</u> support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.	Paragraph (d) is based on Model Rule 1.5(d), except that the language in subparagraph (1) has been revised to conform to the language used in that area of law in California, e.g., “family law” in place of “domestic relations”. The Commission recommends adoption of Model Rule 1.5(d) as revised. The Commission recognizes that there are other kinds of contingent fee cases that might be prohibited, for example, the representation of a governmental entity by a private lawyer or firm on a contingent basis, (see, e.g. County of Santa Clara v. Superior Court (2008) 74 Cal.Rptr.3d 842, review granted, 80 Cal.Rptr.3d 629 (7/23/2008)). However, the two kinds of cases regulated under Model Rule 1.5(d) have traditionally been viewed as implicating important Constitutional rights or public policy. See, e.g., Restatement (3d) Law of Lawyers § 35, comments f.(i), f.(ii) and g.

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
		In the family law matters, California has a strong public policy of promoting reconciliation and maintaining the family unit. Because a lawyer who is being paid on a contingent basis would recover a fee only if the marriage is dissolved and property apportioned, permitting contingent fees in these cases would undermine the California policy. In criminal cases, a lawyer who is being paid on a contingent basis would recover a fee only if the client is found not guilty. That would create a conflict for a lawyer if the best interests of the client, in light of the evidence, warrant the client entering a plea.
(e) A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.	~~(e) A division of a fee between lawyers who are not in the same firm may be made only if:~~ ~~(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;~~ ~~(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and~~ ~~(3) the total fee is reasonable.~~	The Commission recommends deletion of Model Rule 1.5(e) because the subject of fee divisions between lawyers is addressed in a separate rule. See proposed Rule 1.5.1. The Commission determined that fee divisions should be addressed in a free-standing rule because: (i) proposed Rule 1.5.1 is a substantial departure from the Model Rule (ii) the Commission is recommending several revisions to current rule 2-200 to impose more obligations on lawyers and enhance client protection, and (iii) of the large amount of litigation this Rule has traditionally engendered. See proposed Rule 1.5.1, Introduction, ¶. 8.

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:</u>	Paragraph (e) has no counterpart in the Model Rule. The Commission recommends its adoption because charging a non-refundable fee is inimical to California's strong policy of client protection. The prohibition stated in the introductory clause of paragraph (e) is subject to two traditional exceptions, as discussed below. Much of the language used in this paragraph is taken from Washington Rule 1.5(f).
	<u>(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.</u>	Subparagraph (1) provides one exception to the non-refundable fee prohibition in paragraph (e): a true retainer, which carries forward an exception traditionally recognized in the profession and already found in current rule 3-700(D)(2). Much of the language used in this subparagraph is taken from Washington Rule 1.5(f).
	<u>(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</u>	Subparagraph (2) provides the second exception to the non-refundable fee prohibition in paragraph (e): a flat fee that satisfies the requirements set forth in the subparagraph. Subparagraph (1) was added following public comment to address concerns raised by members of the California criminal defense bar that prohibiting such earned-on-receipt flat fees and requiring all such fees paid to criminal defense lawyers to be advance fees, could result in the government impounding the fee advance, thereby preventing a criminal defendant from retaining the defendant's counsel of choice. The Commission believes the conditions marked by

<u>ABA Model Rule</u> Rule 1.5 Fees	<u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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.</u>	romanettes in the subparagraph will operate to prevent abuses of the flat fee exception and avoid the problems envisioned by the defense bar. As with subparagraph (1), much of the language used in subparagraph (2) is derived from Washington Rule 1.5(f). See the Public Comment chart for a complete list of the members of the California criminal defense bar who submitted public comment on proposed Rule 1.5.
	<u>(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.</u>	Paragraph (f) addresses fee agreement modifications that occur during the course of a representation. Paragraph (f) has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. In response to Board member concerns about the Commission's initial proposal for limited applicability of Rule 1.8.1 to fee agreement modifications, paragraph (f) was drafted and garnered the support of a minority of the Commission. The minority drafted paragraph (f) to afford new public protection by prohibiting a lawyer from making a material fee agreement modification that is adverse to a client's interests unless: (1) the client is represented by an independent lawyer regarding the modification; or (2) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. Fee agreement modifications that are not adverse to a client's interests are not prohibited by paragraph (f) and, in this regard, there are new comments that provide guidance for applying the rule. See also Explanation of Changes for Comments [3] – [3C].

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
<i>Reasonableness of Fee and Expenses</i> [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. . . . [COMMENT [1] is continued in the next row]	~~Reasonableness~~<u>Unconscionability</u> of Fee ~~and Expenses~~ <u>[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., <i>Kallen v. Delug</i> (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., <i>In re Shalant</i> (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; <i>In re Harney</i> (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., <i>Birbrower, Montalbano, Condon and Frank v. Superior Court</i> (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; <i>In re Wells</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.)</u>	The title for this section of the Rule has been revised to reflect the standard being recommended. The Commission recommends that Model Rule 1.5, cmt. [1] be rejected because it addresses the reasonable fee standard, which the Commission has recommended be rejected. See Introduction. In its place, the Commission has proposed Comment [1] and [1B], which clarifies paragraphs (a) and (b) and provides additional guidance for their application by citing to California decisional law concerning illegal or unconscionable fees.
[COMMENT [1] continued] The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses	<u>[1B] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances defines an unconscionable fee. (See <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; <i>Goldstone v. State Bar</i> (1931) 214 Cal.</u>	Comment [1B] emphasizes that the eleven factors in paragraph (c) are not exclusive, and that not all of them will necessarily be relevant in every instance. The next-to-last sentence observes that contingent fees are subject to the same unconscionability standard as other fee arrangements. Finally, the last sentence

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.	490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (811) <u>that are to be considered in determining whether a fee is conscionable</u> are not exclusive. Nor will each factor necessarily be relevant in each instance. ~~Paragraph~~ <i>Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a)</i> ~~also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in this Rule. In-house, such as copying, or for other expenses incurred in-house, such as telephone~~ <u>are</u> charges, ~~either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred~~ by the lawyer <u>or firm as opposed to third-party charges</u>.	explains what is meant by an “in-house expense.”
<i>Basis or Rate of Fee</i> [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total	<i>Basis or Rate of Fee</i> ~~[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total~~	The Commission recommends that Model Rule 1.5, cmt. [2] be rejected for the reasons given in the Explanation of Changes for Model Rule 1.5(b).

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.	~~amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the fee terms of the engagement reduces the possibility of misunderstanding.~~	
[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.	~~[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.~~	The Commission recommends that Model Rule 1.5, cmt. [3] be rejected for the reasons given in the Explanation of Changes for Model Rule 1.5(c).
	<u>[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., <i>In re Harney</i> (1995) 3 Cal. State Bar Ct. Rptr. 266.)</u>	Comment [2] has no counterpart in the Model Rule. It contains cross-references to Bus. & Prof. Code §§ 6147 and 6148, which govern contingent and other fee agreements in California. See also Explanation of Changes Model Rule 1.5(b) and (c).

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u><i>Modifications of Agreements by which a Lawyer is Retained by a Client</i></u> <u>[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.</u>	See above explanation of paragraph (f). Comment [3] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3] clarifies that the Paragraph (f) prohibition applies only to a material fee agreement modification with a current client that is adverse to the client's interests, provides a standard for determining whether a modification is material, and clarifies a common agreement that would not be material.
	<u>[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</u>	See above explanation of paragraph (f). Comment [3A] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3A] addresses the issue of whether a particular fee agreement modification is "material" and "adverse." It provides an example of a modification that is material and adverse and an example of a modification that is not material and not adverse.

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.</u>	
	<u>[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. <i>Setzer v. Robinson</i> (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., <i>Ramirez v. Sturdevant</i> (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; <i>Berk v. Twentynine Palms Ranchos, Inc.</i> (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; <i>Carlson, Collins, Gordon & Bold v. Banducci</i> (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.</u>	See above explanation of paragraph (f). Comment [3B] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3B] clarifies that while only certain fee agreement modifications are subject to paragraph (f), lawyers still have professional responsibilities to clients with respect to all fee modifications. In general, these responsibilities arise from the lawyer's fiduciary duties and are addressed in ethics opinions and case law. 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. The Comment also provides cross references to Rule 1.4 regarding client communication, Rule 1.7 regarding conflicts of interests, and the statutory prohibition against conduct constituting moral turpitude found in the State Bar Act.
	<u>[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</u>	See above explanation of paragraph (f). Comment [3C] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.	Commission. Comment [3C] explains that Rule 1.8.1 applies to a fee agreement modification that confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. Such fee modifications would be subject to the full rigorous protocol of Rule 1.8.1.
<i>Terms of Payment</i> [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.	<i>Terms of Payment</i> [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. (See Rule 1.16(de)-(2)) ~~A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client~~1.8.1.	Comment [4] is based on Model Rule 1.5, cmt. [4]. The second sentence has been deleted because it concerns Model Rule 1.8(i), which the Commission has not recommended be adopted. The other changes are to correct the cross-references to the appropriate proposed Rule or provision of a proposed Rule.
[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	[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	Comment [5] is identical to Model Rule 1.5, cmt. [5] except that the last, hortatory sentence of the Model Rule comment has been deleted.

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.	a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. ~~A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.~~	
<i>Prohibited Contingent Fees</i> [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.	<i>Prohibited Contingent Fees</i> [6] Paragraph (d) ~~prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision~~ (1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of ~~post-judgment~~ balances <u>past</u> due under <u>child or spousal</u> support; ~~alimony~~ or other financial orders because such contracts do not implicate the same policy concerns.	Comment [6] is based on Model Rule 1.5, cmt. [6]. The first sentence has been deleted because it simply restates the prohibition in paragraph (d)(1) and uses terminology different from that used in California. See Explanation of Changes for paragraph (d). The second sentence has been revised to substitute terminology used in California for the Model Rule terminology.
	<u><i>Payment of Fees in Advance of Services</i></u> <u>[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.</u>	Comment [7] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [10].

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[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.</u>	Comment [8] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [13]. It carries forward the substance of the definition for "true retainer" in current rule 3-700(D)(2). The Comment also provides guidance on determining whether a particular fee arrangement is a true retainer.
	<u>[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.</u>	Comment [9] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [14]. The Comment clarifies that if all the requirements set forth in subparagraph (e)(2) are not satisfied, the flat fee must be treated as if it were an advance fee under Rule 1.15.
	<u>[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</u>	Comment [10] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [15]. The Comment clarifies the legal effect of satisfying the requirements set forth in paragraphs (e)(1) and (2). Brackets have been placed around

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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).	"1.0(n)" pending the Commission's final recommendation on whether to adopt that rule.
	[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).	Comment [11] has no counterpart in the Model Rule. Comment [11] points lawyers to Rule 1.15(d)(2) for their obligations when disputes arise concerning fees advanced under paragraph (e)(1) or (e)(2).
<i>Division of Fee</i> [7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the	<i>Division of Fee</i> ~~[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the~~	Model Rule 1.5, cmts. [7] and [8] have been deleted because they relate to fee divisions, which are covered separately under proposed Rule 1.5.1. See also Explanation of Changes for paragraph (c).

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.	~~representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.~~	
[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.	~~[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm~~	See Explanation of Changes for Model Rule 1.5, cmt. [7].
<i>Disputes over Fees</i> [9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.	~~<i>Disputes over Fees</i>~~ ~~[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.~~	The Commission has recommended that Comment [9] be deleted because arbitration of fee disputes in California is largely governed under the Mandatory Fee Arbitration Act, Bus. & Prof. Code § 6200 et seq.

<u>ABA Model Rule</u> Rule 1.5 Fees Comment	<u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[12] A division of fees among lawyers is governed by Rule 1.5.1.	Comment [12] provides a cross-reference to Rule 1.5.1, the proposed Rule that governs fee divisions.

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.

Proposed Rule 1.5 Fees for Legal Services Rules Revision Commission – Minority Dissent

Availability Fees, Advance Fees, and Flat Fees Paid in Advance

First, availability fees are clearly earned by the lawyer upon receipt, not subject to trust account deposit, and nonrefundable. *Baranowski v. State Bar* (1979) 24 Cal. 3d 153, 163 et seq., plainly so held. However, since that decision the State Bar Court (not the Supreme Court, whose *Baranowski* case stands unassailed and has been cited elsewhere as authoritative, see, eg., *In re McDonald Bros. Const. Inc.* (Bk. N.D. Ill. 1990) 114 B.R. 989, 997-1002) has whittled away at its holding in *Matter of Fonte* (1994) 2 Cal. St. Bar Rptr. 752, and *In re Brockway* (2006) 4 Cal. St. Bar Rptr. 944. Thus, in practice, the protection a lawyer has on receipt of an availability fee under *Baranowski* has been eroded and scarcely exists.

Secondly, in real life there is no point or almost no point in an availability fee as we have narrowly defined that term, i.e., a fee purely for having the lawyer available – presumably, by refusing other work which may or may not come along – **but** where the lawyer is also required to charge the client separately for the work when the lawyer performs that work. Under what circumstances would a lawyer institute this arrangement, and what would be the required non-unconscionable level at which such a second fee could be established? Or how would one measure the value of time (i.e., of availability), except by the work to be done and separately billed for?

Yet, as criminal defense lawyers have made amply clear to the Commission. and as applies equally to lawyers representing bankrupts and certain other debtors, and perhaps other relationships which have not been brought forward to the Commission's attention, such lawyers need to have a fully earned fee upon engagement, because to the extent that the fee has not been fully earned (i.e., that it may be refunded), it does not wholly belong to the lawyer; and law enforcement or similar adverse parties may seize the funds from the lawyer, leaving the lawyer unpaid and, unless a court orders the lawyer to work without fee, leaving the client unrepresented.

Thus, one defect in the proposed Rule is that in the praiseworthy effort to protect clients against certain potential improprieties – the lawyer's being paid and then not performing the work, or the client changing her mind and not being able to recover an advance fee so that she can pay a successor – we are creating another, serious trap for lawyer and client alike.

The same fault underlies the proposed Rule that provides that when a lawyer accepts an availability fee, there must also be a separate charge for the work being done, beyond the availability fee: if that is not the case, it is not a true availability fee. The availability fee may thus never be used to pay the lawyer for actual work on the client's matter.

This concept comes out of early case law; and indeed, in the early days of California jurisprudence, there may have been situations where a client came to a lawyer to say that the client would pay the lawyer just to be able to call on him if needed. However, this was before the rise of the billable hour; and there is no authority and to my knowledge no anecdotal experience which indicates that more recent history (say, since WW II) actually shows such situations, where an availability fee was followed by hourly or other pro rata charges for the work when done.

So, the Commission is either carrying forward into the 21st century a formulation which has had no meaning since the 19th, or ignoring the true meaning of an availability fee.

The motive behind this approach is client protection – as is true with the post-*Baranowski* cases cited above. However, lawyers in fact use the availability fee, or a

“fully earned at the time of payment” version of a flat fee, for legitimate and client-beneficial purposes. The Commission’s formulation undercuts both points of this established practice, which is allowed under the current California Rule. In the interest of one aspect of client protection, the proposed Rule deprives both client and lawyer of an important and necessary means to allow clients to retain lawyers, and lawyers to accept certain engagements, in socially valuable situations.

There are other ways to solve this problem. One, but not necessarily the only one, is **not** to limit or forbid “true retainer” fees or fully earned advance fees which also include payment for work to be done, **but rather** to require that lawyers may not willfully (a) fail to do the work whose value is included in the flat fee or availability retainer, or (b) refuse to refund a prorated portion if the contemplated work is not done.

Rule 1.5: Fees for Legal Services

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 1.5 is highlighted)

Arizona: Rule 1.5(b) requires lawyers to enter written fee agreements “before or within a reasonable time after commencing the representation.” Arizona adds Rule 1.5(d)(3), which provides that when a lawyer denominates a fee as “earned upon receipt” or “nonrefundable,” the client must be informed “in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).” Finally, Comment 6 says that Rule 1.5(d) allows a contingent fee “for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns” as other domestic relations matters.

Arkansas: Rule 1.5(d)(1) adds that in a domestic relations matter, “after a final order or decree is entered a lawyer may enter into a contingent fee contract for collection of payments which are due pursuant to such decree or order.”

California: Rule 4-200 forbids lawyers to “enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability is determined based on facts “existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.” The rule contains 11 factors to weigh in determining

conscionability, many of them derived from the Model Rules. In addition, see Business & Professions Code §§ 6147-6149 (governing contingency fee contracts and other fee arrangements), and Business & Professions Code §§ 6200-6206 (establishing a system and procedures for arbitrating fee disputes).

Colorado: Rule 1.5(b) requires a lawyer who has not regularly represented a client to communicate the basis or rate of the fee and expenses “in writing.” Rule 1.5(b) also provides: “Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a),” which imposes stringent requirements on business transactions with clients. Colorado Rule 1.5(c) also requires more elaborate disclosures in contingency fee cases than ABA Model Rule 1.5.

Delaware: Rule 1.5(e) does not require that the client know how lawyers in different firms are dividing a fee. Delaware adds Rule 1.5(f), which allows the lawyer to require the client to pay fees in advance, provided that the lawyer gives the client “a written statement” explaining, among other things, that “the fee is refundable if not earned.”

District of Columbia: D.C. Rule 1.5(b) requires a written fee agreement where the lawyer has not “regularly represented” the client. Rule 1.5(d) forbids contingent fees in

criminal cases but not in matrimonial cases. Rule 1.5(e) does not require that the client be told how much each lawyer is to receive when fees are divided between lawyers not in the same firm, but the client must be told “the effect of the association of lawyers outside the firm on the fee to be charged.”

Florida: Rule 4-1.5(a) prohibits any fee “generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar” or that is “clearly excessive.” A clearly excessive fee includes (1) a fee that exceeds a reasonable fee by so much that it constitutes “clear overreaching or an unconscionable demand,” or (2) a fee sought or secured “by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.” Florida also caps the percentage amount of any contingent fee.

Regarding fee sharing between lawyers in different firms, Rule 4-1.5(f)(2) requires that each participating lawyer “shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved.” Florida also tightly controls the terms on which lawyers in different firms may share fees. Rule 4-1.5(f)(4)(D) provides that “the lawyer assuming primary responsibility for the legal services” must receive “a minimum of 75% of the total fee,” and “the lawyer assuming secondary responsibility” can receive “a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.” But if two or more lawyers expect to “accept substantially equal active participation in the providing of legal services,” then they may seek court authorization to divide the fee however they propose “based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed.”

Florida Rule 4-1.5(g) provides that if lawyers in different firms share fees on a basis not in proportion to the amount of work done, then each lawyer must not only agree to assume “joint legal responsibility for the representation” but must also agree “to be available for consultation with the client.

The Florida Supreme Court may also order any lawyer found guilty of violating the fee rules “to forfeit the fee or any part thereof,” either by returning the excessive part of any fee to the client or by forfeiting all or part of an otherwise improper fee to the Florida Bar Clients’ Security Fund. See Florida Supreme Court Rule 3-5.1(h).

Finally, Rule 4-1.5(i) provides that, if a retainer agreement includes a mandatory arbitration clause, the agreement must include a verbatim, bolded recitation of the notice that appears at the end of Rule 1.5(i).

Georgia adds to Rule 1.5(c) that a lawyer must include in the written statement at the conclusion of a contingent fee matter the amount of the attorney’s fee and “(D) if the attorney’s fee is divided with another lawyer who is not a partner in or an associate of the lawyer’s firm or law office, the amount of fee received by each and the manner in which the division is determined.” Georgia also adds to Rule 1.5(e)(2) that the client must be “advised of the share that each lawyer is to receive” when lawyers in different firms share a fee.

Illinois provides that “the prohibition set forth in Rule 1.5(d)(1) shall not extend to representation in matters subsequent to final judgments in such cases.” Illinois also adds the following subparagraphs:

(e) Notwithstanding Rule 1.5(c), a contingent fee agreement regarding the collection of commercial accounts or of insurance company subrogation claims may be made in accordance with the customs and practice in the locality for such legal services....

(g) A division of fees [between lawyers not in the same firm] shall be made in proportion to the services performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and

(1) the receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and

(2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer....

(i) For purposes of Rule 1.5 "economic benefit" shall include:

(1) the amount of participation in the fee received with regard to the particular matter;

(2) any other form of remuneration passing to the referring lawyer from the receiving lawyer, whether or not with regard to the particular matter; and

(3) an established practice of referrals to and from or from and to the receiving lawyer and the referring lawyer.

(j) Notwithstanding Rule 1.5(f), a payment may be made to a lawyer formerly in the firm, pursuant to a separation or retirement agreement.

Massachusetts: Rule 1.5(c) does not require a contingent fee to be in writing if it concerns "the collection of commercial accounts" or "insurance company subrogation claims," but all other contingent fee agreements must be in writing and must

contain greater detail than ABA Model Rule 1.5(c) requires.

Rule 1.5(e) permits a lawyer to pay a fee to a referring lawyer even when the referring lawyer does not perform any services or take joint responsibility for the matter. Although the client must consent to such a referral fee, the client's consent need not be in writing, and a comment indicates that the lawyer does not have to disclose the size of the referral fee unless the client asks.

Michigan: Rule 1.5(d) forbids contingent fees in "a domestic relations matter" without qualification. In personal injury and wrongful death claims, Michigan Court Rule 8.121 sets a maximum contingent fee of "one-third of the amount recovered" and provides that receiving, retaining, or sharing a larger contingent fee "shall be deemed to be the charging of a 'clearly excessive fee' in violation of" Rule 1.5(a). Michigan omits ABA Model Rule 1.5(e)(1).

New Hampshire: Rule 1.5(e) permits fee sharing between lawyers in different firms if the division is made "either: (a) in reasonable proportion to the services performed or responsibility or risks assumed by each, or (b) based on an agreement with the referring lawyer," provided that in either case the lawyers obtain the client's signed written agreement to the division of fees and the total fee charged by all lawyers "is not increased by the division of fees and is reasonable."

New Jersey: Rule 1.5(b) requires a fee agreement to be in writing if the lawyer has not regularly represented the client. In addition, New Jersey has adopted various court rules that tightly control contingent fees, especially in tort cases.

New York: DR 2-106 forbids an "illegal or excessive fee" and lists eight factors to determine whether a fee satisfies the rule. New York provides heightened protection for clients in domestic relations matters, including a prohibition on nonrefundable fees.

In civil matters, New York lawyers must resolve fee disputes “by arbitration at the election of the client” pursuant to 22 N.Y.C.R.R. Part 137, which requires New York attorneys to offer fee arbitration to clients in most civil matters, and to submit to fee arbitration if a client in a civil matter requests it. Under §137.1(b), the fee arbitration program does not apply to (1) criminal matters; (2) fee disputes involving “less than \$1,000 or more than \$50,000” (unless an arbitral body and the parties all consent); (3) “claims involving substantial legal questions, including professional malpractice or misconduct”; (4) claims for relief other than adjusting a legal fee; (5) disputes over a legal fee set by a court; (6) disputes where no legal services have been rendered for more than two years; (7) disputes with out-of-state attorneys who either have no office in New York or did not render any material portion of the services in New York; and (8) disputes where the person requesting arbitration is neither the client nor the client's legal representative.

Moreover, 22 N.Y.C.R.R. Part 1215 provides as follows:

Part 1215 Written Letter of Engagement

§1215.21 Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term “client” shall mean the entity that engages the attorney. Where there is a

significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and,

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

§1215.2 Exceptions

This section shall not apply to

(a) representation of a client where the fee to be charged is expected to be less than \$3000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

North Carolina: Rule 1.5(a) forbids a “clearly excessive fee” but otherwise substantially tracks ABA Model Rule 1.5(a). North Carolina adds Rule 1.5(f), which provides as follows:

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bars program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

Ohio: Rule 1.5(b) requires fee agreements to be in writing unless the lawyer has “regularly represented” the client and is charging on the same basis or the fee is \$500 or less. Any change in the basis of a fee previously communicated must be “promptly communicated to the client in writing.” Rule 1.5(e), in permitting division of fees, does not require that the client be informed of the amount each lawyer is receiving.

Oregon: Among other variations, Rule 1.5(d) permits a division of fees between lawyers in different firms if “(1) the client gives informed consent to the fact that there will be a division of fees, and (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.”

Pennsylvania: Rule 1.5(a) prohibits an “illegal or clearly excessive fee” (rather than an “unreasonable” one) and makes

no reference to expenses. Rule 1.5(b) requires a fee agreement to be “in writing” if a lawyer has not “regularly represented a client.” Pennsylvania Rule 1.5(e) requires only that “(1) the client is advised of and does not object to the participation of an the lawyers involved, and (2) the total fee of the lawyers is not illegal or clearly excessive....”

Rhode Island: Rule 1.5(b) provides that if a lawyer has not regularly represented a client, the basis or rate of the fee “shall be communicated to the client in writing.” The same rule requires lawyers to send quarterly bills unless the client agrees to a different billing schedule or the fee is fixed or contingent.

South Carolina: Rule 1.5(d)(1) expressly permits a lawyer to charge a contingency fee “in collection of past due alimony or child support.”

Texas: Rule 1.04(a) forbids “illegal” or “unconscionable” fees and lists the same considerations as in ABA Model Rule 1.5. The Texas Rules do not forbid contingent fees in family law matters but the Comment says they are “rarely justified.” Rule 1.04(f), which governs the division of fees between lawyers in different firms, generally parallels ABA Model Rule 1.5(e) but requires client consent “in writing to the terms of the arrangement prior to the time of the association or referral proposed...”

Virginia: Rule 1.5(b) provides in part: “The lawyer’s fee shall be adequately explained to the client.” Rule 1.5(d)(1) forbids contingent fees in “a domestic relations matter, except in rare instances.” Comment 3a says that those rare instances include situations where “the parties are divorced and reconciliation is not a realistic prospect.” Rule 1.5(e) requires full disclosure to the client when lawyers are dividing a fee. The “terms of the division of the fee” must be “disclosed to the client,” the client must consent, the total fee must be reasonable, and the fee division and client consent must be

“obtained in advance of the rendering of legal services.”
However, while a writing is said to be preferable, none is required.

Wisconsin: Rule 1.5(e) permits lawyers in different firms to divide a fee only if the total fee is reasonable and the lawyers satisfy several other specific requirements.

Proposed Rule 1.5.1 [RPC 2-200]
“Financial Arrangements Among Lawyers”
(Draft #9, 10/13/09)

Summary: Proposed Rule 1.5.1 governs the division of fees among lawyers. Unlike Model Rule 1.5(e), which permits lawyers to divide fees only in proportion to the work each lawyer does or if the referring lawyer assumes responsibility for the matter, the California Rule, like the rules in many other states (see State Rule(s) Variations, below), permits a referring lawyer to divide a fee without providing services or assuming responsibility, so long as the lawyer complies with the Rule’s requirements.

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 2-200

Statute

Bus. & Prof. Code §§ 6147-6149, 6200-6206

Case law

Chambers v. Kay; Mink v. Maccabee; Moran v. Harris

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

AZ, AR, DE, D.C., FL, GA, IL, MI, NH, NJ, NY, NC, OH, OR, PA, RI, SC, VA, WI

☐ 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 9
Opposed Rule as Recommended for Adoption 4
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:

☒ Moderately Controversial – Explanation:

The proposed Rule will change prerequisites for a valid fee sharing agreement.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.5.1* Financial Arrangements Among Lawyers

October 2009

(Draft rule revised following consideration of public comment.)

INTRODUCTION:

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

The key difference between ABA Model Rule 1.5(e) and rule 2-200 is that the ABA Rule does not permit “pure” referral fees while the California rule does. A “pure” referral fee is one in which the referring lawyer does not continue to represent the client in the matter being referred. The Model Rule requires that both lawyers represent the client in the matter and that the division occur either in proportion to their work on the matter or on the basis that both are responsible for the client’s matter. Current rule 2-200 allows for a referral fee where the referring lawyer is not involved in the client’s representation. The Commission concluded that the current rule should be retained with revisions.

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

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

* Proposed Rule, Draft 9 (10/13/09).

INTRODUCTION (Continued):

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

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

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

INTRODUCTION (Continued):

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

Proposed Rule 1.5.1 is also a departure from current California rule 2-200. The proposed Rule will require that the agreement to divide a fee be in writing and that the client consent to the division after full disclosure at the time the lawyers enter into the agreement to divide the fee. These changes were made because an underlying reason for the rule is to assure that the client's representation is not adversely affected as a result of an agreement to divide a fee. Under the current rule, disclosure and client consent are not required until the fee is to be divided. The Commission concluded that deferring disclosure and client consent to the time the fee is divided denies the client a meaningful opportunity to consider the concerns the rule is intended address.

Minority. A minority of the Commission disagrees with the majority. The minority concludes that the amount of the fee to be divided is an important consideration in the client's decision to consent to a division of a fee. In the minority's view the client's consent should be obtained prior to the division of the fee when the amount of the fee that is being divided is known, as the current rule provides.

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

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

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

* Proposed Rule 1.8.1, Draft 9 (10/13/09). Redline/strikeout showing changes to the ABA Model Rule
RRC_-_2-200_[1-5-1]_-_Compare_-_Rule_&_Comment_Explanation_-_DFT5.1_(10-18-09)KEM-JS-HBS-LM.doc

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Financial Arrangements Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;	~~(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;~~ <u>(1) The lawyers enter into a written agreement to divide the fee;</u>	Proposed paragraph (a)(1) is new. It differs from paragraph (e)(1) of the Model Rule, which restricts fee divisions to lawyers who work on a client's matter or assume joint responsibility for it, and so precludes referral fees and other types of fee division arrangements. Proposed paragraph (a)(1) adds a requirement that the lawyers dividing a fee enter into a written agreement for the division. The requirement was added to aid in the enforcement of the rule. The overall concept in the proposed rule is that the client consent to the division at the time the lawyers agree to divide the fee. Requiring the lawyers to enter into an agreement sets the point at which consent is obtained. Requiring the agreement to be in writing makes the existence of the agreement verifiable in disciplinary proceedings and assures that compliance will occur when the agreement is made.
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and	~~(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and~~ <u>(2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and</u>	Proposed paragraph (a)(2) provides better client protection than Model Rule 1.5(e) by requiring full written disclosure and setting out the specific matters that must be disclosed to the client. The Model Rule states that the client must merely "agree to the arrangement, including the share each lawyer receives." Under the Model Rule, while the client's agreement must be in writing, the disclosure is not required to be in writing. Proposed paragraph (a)(2) requires not only client consent in writing, but also full disclosure in writing that a division will be made, the identity of the lawyers who are parties to the agreement and the terms of the division. Paragraph (a)(2) also substantially changes the requirements in current Rule 2-200 with respect to the timing of client consent. A division of fees raises concerns that should be disclosed to the client at the time the lawyers entered into the agreement to divide the fee. The concerns may include (1) whether the client is actually retaining a

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Financial Arrangements Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
		lawyer appropriate for the client's matter or whether the lawyer's involvement is based only on the agreement to divide the fees, (2) whether the lawyer dividing the fee will devote sufficient time to the client's matter in light of the fact that the lawyer is receiving a reduced fee, and (3) whether the client would prefer a different arrangement. Neither the Model Rule nor the current California rule mandates that the client be informed at the time the lawyers enter into the agreement to divide the fee. See <i>Mink v. Maccabee</i> (2004) 121 Cal.App.4th 835, 838 (the rule's requirement that the client's consent be obtained before the fee division "cannot reasonably be read to require the client's written consent prior to the lawyer's entering into a fee-splitting arrangement, or prior to the commencement of work, or at any time other than prior to the division of fees.") Both require a client's agreement to occur before the fee is divided, which could occur at the end of the case. The Commission concluded that allowing client consent to occur prior to the division and after the lawyers have agreed to divide the fee would not allow the client to assess the issues the Rule is intended address. If the agreement is entered into at the outset of the engagement and the division occurs after the matter has concluded, the client would have no meaningful opportunity to address any of the foregoing concerns. The arrangement could have an adverse effect on the lawyer-client relationship and the client would have no opportunity to avoid those consequences by refusing to consent to the arrangement. For all of these reasons, the Commission concluded that the time for client consent needed to be advanced to the time the lawyers enter into the agreement to divide the fee. A minority of the Commission dissented from the Commission's decision to revise the timing of the disclosure and consent requirement. In their opinion, the client will have a better understanding of the consequences of the agreement to divide fees when the fee is about to be divided than at the beginning of the arrangement between the lawyers, because at the time the fee will be

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Financial Arrangements Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
		divided, the amount of fees to be divided will be known instead of speculative. In the minority's view, under existing law, which allows for consent to occur prior to the division, the client can address the foregoing concerns by refusing the consent to the division and is in a better position to decide whether to consent to the division when the client knows the amount of the fee to be divided. In the minority's view, under existing law, which allows for consent to occur prior to the division, the client can address the foregoing concerns by refusing the consent to the division and is in a better position to decide whether to consent to the division when the client knows the amount of the fee to be divided. Paragraph (a)(2) also revises current Rule 2-200 by adding requirements for the disclosure to the client. Rule 2-200(A)(1) currently requires disclosure that a division will be made and the terms of the division. Paragraph (a)(2) adds a requirement that the identity of the lawyers who are parties to the division be included in the disclosure. This element is derived from concepts in the Model Rule.
(3) the total fee is reasonable.	(3) ~~the~~The total fee <u>charged by all lawyers</u> is ~~reasonable~~<u>not increased solely by reason of the agreement to divide fees.</u>	Proposed paragraph (a)(3) deviates from Model Rule paragraph (e)(3) in order to afford greater client protection. The Model Rule provides that the total fee must be reasonable. Under the Model Rule, clients can end up paying higher fees as a result of the division of fees, so long as the total fee is reasonable. Proposed paragraph (a)(3) prevents that result from occurring, so that the division of fees does not result in a higher cost to the client. The question of whether a lawyer may charge an unreasonable fee or an illegal and unconscionable fee is addressed in proposed Rule 1.5. It is unnecessary to repeat the limitation in this Rule. Proposed Comment [7] to this Rule informs lawyers that proposed Rule 1.5 also applies to the fee to be divided.

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

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

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Financial Arrangements Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.	Proposed Comment [2] replaces the balance of Model Rule Comment [7]. It explains the situations in which the proposed Rule applies.
	[3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.	Proposed Comment [3] was added in response to comments from the Office of Chief Trial Counsel ("OCTC"). OCTC requested that the Rule make clear that each lawyer who is a party to the division has the obligation to assure the client is fully informed and consents to the arrangement. OCTC was concerned that each lawyer might attempt to avoid the obligations under the rule by claiming that the other was supposed to inform the client and obtain the client's consent. Proposed Comment [3] states that the proposed Rule requires both the lawyer dividing the fee and the lawyer receiving the fee to comply with the proposed Rule's requirements.

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Financial Arrangements Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.	Proposed Comment [4] explains the rationale for requiring disclosure and client consent at the time the lawyers enter into the agreement to divide the fee. It is intended to inform lawyers about the considerations to be addressed when fully informing the client about the agreement to divide the fee.
	[5] This Rule does not apply to a division of fees pursuant to court order.	Proposed Comment [5] excludes divisions of fees pursuant to court order. The Commission concluded that the courts are in a position to protect client interests when issuing an order to divide fees. Lawyers who divide fees pursuant to the direction of a court should not be subject to discipline for complying with the order.

<u>ABA Model Rule</u> Rule 1.5(e) Fees	<u>Commission's Proposed Rule*</u> Rule 1.5.1 Financial Arrangements Among Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
	[6] This Rule does not subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).	Proposed Comment [6] addresses an issue that arose about what act constitutes the grounds for discipline. As written the Model Rule, the current California rule and the proposed Rule all state the prohibition as being the division of the fee without complying with the rules' requirements. OCTC submitted a comment stating that OCTC considers the agreement to divide the fee to be the violation rather than the division. OCTC requested the Commission clarify this point in the proposed Rule. The Commission unanimously disagreed with OCTC's construction, but agreed that the proposed Rule should make clear when a lawyer is subject to discipline. Comment [6] provides that clarification. Numerous court decisions have unanimously held that an agreement to divide a fee made in violation of existing Rule 2-200 is void. (See <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142; <i>Margolin v. Shemaria</i> (2000) 85 Cal.App.4th 891; <i>Scolinos v. Kolts</i> (1995) 37 Cal.App.4th 635.) Under the proposed Rule, that result would extend to any agreement not in writing, or about which a client has not been informed, or to which the client has not consented at the time the agreement is made. The Commission concluded that it would not be appropriate to subject lawyers to discipline for entering into a void agreement that does not result in the division of a fee.
	[7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.	Proposed Comment [7] addresses the concept contained in Model Rule 1.5(e)(3) by making clear that the fee to be divided must comply with the restrictions on illegal and unconscionable fees in proposed Rule 1.5.

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

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

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

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

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

COMMENT

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

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

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

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

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

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

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

Rule 1.5.1: Financial Arrangements Among Lawyer

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 1.5.1 is highlighted)

Arizona: Rule 1.5(b) requires lawyers to enter written fee agreements “before or within a reasonable time after commencing the representation.” Arizona adds Rule 1.5(d)(3), which provides that when a lawyer denominates a fee as “earned upon receipt” or “nonrefundable,” the client must be informed “in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).” Finally, Comment 6 says that Rule 1.5(d) allows a contingent fee “for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns” as other domestic relations matters.

Arkansas: Rule 1.5(d)(1) adds that in a domestic relations matter, “after a final order or decree is entered a lawyer may enter into a contingent fee contract for collection of payments which are due pursuant to such decree or order.”

California: Rule 4-200 forbids lawyers to “enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability is determined based on facts “existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.” The rule contains 11 factors to weigh in determining

conscionability, many of them derived from the Model Rules. In addition, see Business & Professions Code §§ 6147-6149 (governing contingency fee contracts and other fee arrangements), and Business & Professions Code §§ 6200-6206 (establishing a system and procedures for arbitrating fee disputes).

Colorado: Rule 1.5(b) requires a lawyer who has not regularly represented a client to communicate the basis or rate of the fee and expenses “in writing.” Rule 1.5(b) also provides: “Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a),” which imposes stringent requirements on business transactions with clients. Colorado Rule 1.5(c) also requires more elaborate disclosures in contingency fee cases than ABA Model Rule 1.5.

Delaware: Rule 1.5(e) does not require that the client know how lawyers in different firms are dividing a fee. Delaware adds Rule 1.5(f), which allows the lawyer to require the client to pay fees in advance, provided that the lawyer gives the client “a written statement” explaining, among other things, that “the fee is refundable if not earned.”

District of Columbia: D.C. Rule 1.5(b) requires a written fee agreement where the lawyer has not “regularly represented” the client. Rule 1.5(d) forbids contingent fees in

criminal cases but not in matrimonial cases. Rule 1.5(e) does not require that the client be told how much each lawyer is to receive when fees are divided between lawyers not in the same firm, but the client must be told "the effect of the association of lawyers outside the firm on the fee to be charged."

Florida: Rule 4-1.5(a) prohibits any fee "generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar" or that is "clearly excessive." A clearly excessive fee includes (1) a fee that exceeds a reasonable fee by so much that it constitutes "clear overreaching or an unconscionable demand," or (2) a fee sought or secured "by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee." Florida also caps the percentage amount of any contingent fee.

Regarding fee sharing between lawyers in different firms, Rule 4-1.5(f)(2) requires that each participating lawyer "shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved." Florida also tightly controls the terms on which lawyers in different firms may share fees. Rule 4-1.5(f)(4)(D) provides that "the lawyer assuming primary responsibility for the legal services" must receive "a minimum of 75% of the total fee," and "the lawyer assuming secondary responsibility" can receive "a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive." But if two or more lawyers expect to "accept substantially equal active participation in the providing of legal services," then they may seek court authorization to divide the fee however they propose "based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed."

Florida Rule 4-1.5(g) provides that if lawyers in different firms share fees on a basis not in proportion to the amount of work done, then each lawyer must not only agree to assume "joint legal responsibility for the representation" but must also agree "to be available for consultation with the client."

The Florida Supreme Court may also order any lawyer found guilty of violating the fee rules "to forfeit the fee or any part thereof," either by returning the excessive part of any fee to the client or by forfeiting all or part of an otherwise improper fee to the Florida Bar Clients' Security Fund. See Florida Supreme Court Rule 3-5.1(h).

Finally, Rule 4-1.5(i) provides that, if a retainer agreement includes a mandatory arbitration clause, the agreement must include a verbatim, bolded recitation of the notice that appears at the end of Rule 1.5(i).

Georgia adds to Rule 1.5(c) that a lawyer must include in the written statement at the conclusion of a contingent fee matter the amount of the attorney's fee and "(D) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined." Georgia also adds to Rule 1.5(e)(2) that the client must be "advised of the share that each lawyer is to receive" when lawyers in different firms share a fee.

Illinois provides that "the prohibition set forth in Rule 1.5(d)(1) shall not extend to representation in matters subsequent to final judgments in such cases." Illinois also adds the following subparagraphs:

(e) Notwithstanding Rule 1.5(c), a contingent fee agreement regarding the collection of commercial accounts or of insurance company subrogation claims may be made in accordance with the customs and practice in the locality for such legal services....

(g) A division of fees [between lawyers not in the same firm] shall be made in proportion to the services performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and

(1) the receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and

(2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer....

(i) For purposes of Rule 1.5 "economic benefit" shall include:

(1) the amount of participation in the fee received with regard to the particular matter;

(2) any other form of remuneration passing to the referring lawyer from the receiving lawyer, whether or not with regard to the particular matter; and

(3) an established practice of referrals to and from or from and to the receiving lawyer and the referring lawyer.

(j) Notwithstanding Rule 1.5(f), a payment may be made to a lawyer formerly in the firm, pursuant to a separation or retirement agreement.

Massachusetts: Rule 1.5(c) does not require a contingent fee to be in writing if it concerns "the collection of commercial accounts" or "insurance company subrogation claims," but all other contingent fee agreements must be in writing and must

contain greater detail than ABA Model Rule 1.5(c) requires. Rule 1.5(e) permits a lawyer to pay a fee to a referring lawyer even when the referring lawyer does not perform any services or take joint responsibility for the matter. Although the client must consent to such a referral fee, the client's consent need not be in writing, and a comment indicates that the lawyer does not have to disclose the size of the referral fee unless the client asks.

Michigan: Rule 1.5(d) forbids contingent fees in "a domestic relations matter" without qualification. In personal injury and wrongful death claims, Michigan Court Rule 8.121 sets a maximum contingent fee of "one-third of the amount recovered" and provides that receiving, retaining, or sharing a larger contingent fee "shall be deemed to be the charging of a 'clearly excessive fee' in violation of" Rule 1.5(a). Michigan omits ABA Model Rule 1.5(e)(1).

New Hampshire: Rule 1.5(e) permits fee sharing between lawyers in different firms if the division is made "either: (a) in reasonable proportion to the services performed or responsibility or risks assumed by each, or (b) based on an agreement with the referring lawyer," provided that in either case the lawyers obtain the client's signed written agreement to the division of fees and the total fee charged by all lawyers "is not increased by the division of fees and is reasonable."

New Jersey: Rule 1.5(b) requires a fee agreement to be in writing if the lawyer has not regularly represented the client. In addition, New Jersey has adopted various court rules that tightly control contingent fees, especially in tort cases.

New York: DR 2-106 forbids an "illegal or excessive fee" and lists eight factors to determine whether a fee satisfies the rule. New York provides heightened protection for clients in domestic relations matters, including a prohibition on nonrefundable fees.

In civil matters, New York lawyers must resolve fee disputes “by arbitration at the election of the client” pursuant to 22 N.Y.C.R.R. Part 137, which requires New York attorneys to offer fee arbitration to clients in most civil matters, and to submit to fee arbitration if a client in a civil matter requests it. Under §137.1(b), the fee arbitration program does not apply to (1) criminal matters; (2) fee disputes involving “less than \$1,000 or more than \$50,000” (unless an arbitral body and the parties all consent); (3) “claims involving substantial legal questions, including professional malpractice or misconduct”; (4) claims for relief other than adjusting a legal fee; (5) disputes over a legal fee set by a court; (6) disputes where no legal services have been rendered for more than two years; (7) disputes with out-of-state attorneys who either have no office in New York or did not render any material portion of the services in New York; and (8) disputes where the person requesting arbitration is neither the client nor the client's legal representative.

Moreover, 22 N.Y.C.R.R. Part 1215 provides as follows:

Part 1215 Written Letter of Engagement

§1215.21 Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term “client” shall mean the entity that engages the attorney. Where there is a

significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and,

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

§1215.2 Exceptions

This section shall not apply to

(a) representation of a client where the fee to be charged is expected to be less than \$3000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

North Carolina: Rule 1.5(a) forbids a “clearly excessive fee” but otherwise substantially tracks ABA Model Rule 1.5(a). North Carolina adds Rule 1.5(f), which provides as follows:

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bars program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

Ohio: Rule 1.5(b) requires fee agreements to be in writing unless the lawyer has “regularly represented” the client and is charging on the same basis or the fee is \$500 or less. Any change in the basis of a fee previously communicated must be “promptly communicated to the client in writing.” Rule 1.5(e), in permitting division of fees, does not require that the client be informed of the amount each lawyer is receiving.

Oregon: Among other variations, Rule 1.5(d) permits a division of fees between lawyers in different firms if “(1) the client gives informed consent to the fact that there will be a division of fees, and (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.”

Pennsylvania: Rule 1.5(a) prohibits an “illegal or clearly excessive fee” (rather than an “unreasonable” one) and makes

no reference to expenses. Rule 1.5(b) requires a fee agreement to be “in writing” if a lawyer has not “regularly” represented a client. Pennsylvania Rule 1.5(e) requires only that “(1) the client is advised of and does not object to the participation of an the lawyers involved, and (2) the total fee of the lawyers is not illegal or clearly excessive....”

Rhode Island: Rule 1.5(b) provides that if a lawyer has not regularly represented a client, the basis or rate of the fee “shall be communicated to the client in writing.” The same rule requires lawyers to send quarterly bills unless the client agrees to a different billing schedule or the fee is fixed or contingent.

South Carolina: Rule 1.5(d)(1) expressly permits a lawyer to charge a contingency fee “in collection of past due alimony or child support.”

Texas: Rule 1.04(a) forbids “illegal” or “unconscionable” fees and lists the same considerations as in ABA Model Rule 1.5. The Texas Rules do not forbid contingent fees in family law matters but the Comment says they are “rarely justified.” Rule 1.04(f), which governs the division of fees between lawyers in different firms, generally parallels ABA Model Rule 1.5(e) but requires client consent “in writing to the terms of the arrangement prior to the time of the association or referral proposed...”

Virginia: Rule 1.5(b) provides in part: “The lawyer’s fee shall be adequately explained to the client.” Rule 1.5(d)(1) forbids contingent fees in “a domestic relations matter, except in rare instances.” Comment 3a says that those rare instances include situations where “the parties are divorced and reconciliation is not a realistic prospect.” Rule 1.5(e) requires full disclosure to the client when lawyers are dividing a fee. The “terms of the division of the fee” must be “disclosed to the client,” the client must consent, the total fee must be reasonable, and the fee division and client consent must be

“obtained in advance of the rendering of legal services.”
However, while a writing is said to be preferable, none is required.

Wisconsin: Rule 1.5(e) permits lawyers in different firms to divide a fee only if the total fee is reasonable and the lawyers satisfy several other specific requirements.

Proposed Rule 1.7 [3-310]

“Conflicts of Interest: Current Clients”

(Draft # 13.2, 10/20/09)

Summary: Proposed Rule 1.7 states the basic conflict of interest standard for a lawyer in dealing with current clients. Provisions of the Rule are incorporated by reference in several other conflicts rules, including proposed Rule 1.9, which defines a lawyer’s duties to former clients, and proposed Rule 1.11, which concerns special conflicts of interest involving former and current government lawyers.

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

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:

Representatives of a large law firm urged the adoption of a provision concerning advance waivers of conflicts. See "Public Comment" paragraph in Introduction.

☒ Very Controversial – Explanation:

A substantial minority of the Commission favors the Model Rule approach. See Introduction.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.7* Conflict of Interest: Current Clients

October 2009

(Draft rule revised following consideration of public comment.)

INTRODUCTION:

Rule 1.7 is the basic conflicts of interest rule. It addresses conflicts of interest in the representation of current clients, and it is the point of reference for several other conflicts rules, including possible conflicts of interest that might arise because of continuing duties to former clients (Rule 1.9) and conflicts of interest affecting current and former government lawyers (Rule 1.11). The Commission generally agrees with the Model Rule's identification of situations that create potential or actual conflicts of interest for a lawyer. Nevertheless, the Commission largely has rejected the Model Rule because it believes that the format and certain of substantive elements of the Model Rule create significant gaps in, and limitations on, the protection of vital client interests. The failures of the Model Rule include the following:

First, Model Rule 1.7(a)(2) attempts to be all-encompassing by classifying as a conflict every circumstance in which “there is a significant risk that the representation of one or more clients will be materially limited” by the lawyer’s other responsibilities or the lawyer’s personal interests. The Commission agrees with the spirit of this statement, which is an admirable principle, but the Commission believes it is fundamentally flawed as a disciplinary rule. That statement of principle provides no guidance. Instead, it leaves to a lawyer attempting to comply with the Rule the unenviable task of working through 35 paragraphs of Comment to try to understand when a representation “will be materially limited”. The Commission believes that the client protection purpose of this Rule requires that it be drafted with specificity in order to maximize the likelihood that a lawyer will understand precisely which situations raise conflicts issues, and which therefore require the lawyer to make disclosures to the client and obtain the client’s consent, or which compel the lawyer to limit, or even decline, a representation. Placing in the Comment discursive materials on common conflicts situations, as has been done in Model Rule 1.7, rather than stating them specifically and in the Rule, would materially

* Proposed Rule 1.7, Draft 13.2 (10/20/08).

INTRODUCTION (Continued):

increase the likelihood that lawyers will embark on conflicted representations, with multiple possibilities of injury to the client and to the lawyer. These possibilities – which are more likely to be avoided by a more specific and more accessible rule – include: (i) a lawyer's failure to fully perform duties to a client because of the lawyer's conflicting duties, relationships, or interests; (ii) the cost, delay, and disruption of later disqualification proceedings; (iii) a client's loss of selected counsel through disqualification; and (iv) the risk that a particularly conscientious lawyer will reject representations unnecessarily, causing the client to lose its choice of counsel, delaying the client in obtaining legal representation, making the legal process more costly and less efficient, and causing the lawyer to lose an appropriate client relationship.

Second, Model Rule 1.7(b) permits a lawyer to represent a client, despite the existence of a conflict under paragraph (a), if certain conditions are met. The Commission has rejected two of these conditions as not being sufficiently client protective. One, expressed in paragraph (b)(1), is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." This requirement invites a lawyer to use his or her professional skills as a lawyer to craft a self-serving argument for why the lawyer may accept a representation – when doing so might advance the lawyer's short-term financial and professional interest but imperil the interests of the client. The Commission also has rejected Model Rule 1.7(b)(4), which provides that a lawyer may obtain the client's "informed consent, confirmed in writing". The Commission's proposal utilizes California's higher, more client protective standard of "informed written consent" in all of the more serious conflict situations. The 'informed written consent' standard protects clients by containing two requirements not found in the Model Rules. These are that California requires that the lawyer's disclosure be made in writing, and that client consent be obtained in writing and before the lawyer proceeds with the representation. These requirements have a number of protective consequences, including: (i) the lawyer is forced to analyze the situation in order to make the required written disclosure, which could lead the lawyer to reject or limit a representation a questionable representation, potentially avoiding significant future problems; (ii) the required writing emphasizes to the client the importance of the information and the client's decision; (iii) the written form of the lawyer's advice permits the client to reread and reconsider, and to take the information to others for comment; (iv) the written form of the client's consent re-emphasizes to the client the importance of the disclosure and consent; and (v) the client is freer to reject the representation if the disclosure is made

INTRODUCTION (Continued):

in advance when the lawyer more easily can be replaced. In addition, the requirements of written disclosure and written client consent provide evidence that the lawyer has fulfilled the applicable duties and could protect the lawyer against improper civil or disciplinary claims.

Third, Model Rule 1.7's indefiniteness leaves clients exposed to compromised representation, and it exposes lawyers to disciplinary proceedings that they are less able to predict or protect themselves against. Particularly in California, with a full-time, professional disciplinary staff, it is important that the grounds for professional discipline be easily ascertainable by both practicing lawyers and the disciplinary staff.

Minority. A minority of the Commission disagree with the overall approach of the proposed Rule, which rejects Model Rule 1.7's standard and analytical framework. They note that few issues face lawyers more often than conflicts of interest. Thus, public policy strongly favors having a consistent rule on conflicts that is coherent, complete and is in accord with California law and with the rules in other jurisdictions. Proposed Rule 1.7 significantly departs from the accepted standard for determining the existence of a concurrent conflict of interest. Most jurisdictions, including California, recognize that a conflict of interest exists where the particular circumstances present a significant risk that the lawyer's representation of a client will be materially and adversely affected by the lawyer's responsibilities to another client, a former client, or to a third party or by the lawyer's own interests. Restatement Third, The Law Governing Lawyers, section 121 (ALI 2000); *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal. App. 4th 275, 282. Model Rule 1.7(a) correctly reflects this standard. The standard articulated in the Model Rule has been developed through case law and is the standard adopted in the rules of most jurisdictions. The majority recommends following the Model Rule when it comes to former client conflicts. No sound reason has been given for departing so dramatically from the widely accepted rule on current client conflicts.

The minority adds that the proposed Rule has a number of flaws that will result in unnecessary confusion and inconsistent application. Paragraphs (a) and (c), for example, overlap and cover the same conflict where the representation of one client will be directly adverse

INTRODUCTION (Continued):

to another client regardless of which client's perspective is being considered. Model Rule 1.7(a)(1) is more concise and covers both situations. The Commission argues the proposed Rule is drafted with more specificity, yet it does not cover all conflict situations. While the specificity approach sounds appealing in concept, the proposed Rule misses the mark. Proposed paragraph (d)(1) is limited to a lawyer's relationships with a "party or witness" rather than duties to any third party that would materially and adversely affect the lawyer's independent judgment and loyalty to the client. Paragraph (d)(3) is limited to relationships with a third person where the third person, rather than the client, would be "affected substantially by resolution of the matter." This paragraph provides no protection where the lawyer's duties to the third person will materially limit the client's representation. Paragraph (d)(4) excludes the lawyer's personal relationship with the subject matter of the representation. Paragraphs (d)(5), (6), and (7) only apply if the lawyer "knows" of the particular relationship, while paragraphs (d)(2) and (3) apply a "knows or reasonably should know" standard. There is no explanation for these different knowledge standards.

The minority further states that the Commission overcompensates for these flaws by requiring the lawyer to obtain client consent even where the relationship is immaterial and has no plausible adverse affect on the quality of the lawyer's representation. As a result, the proposed Rule is both over and under-inclusive. If adopted, it will impose a burden on lawyers to obtain client consent to the relationships enumerated in paragraph (d) where no actual or apparent conflict of interest exists or is reasonably foreseeable. At the same time, the proposed Rule leaves out situations where the lawyer's responsibilities and own interests pose a significant risk of materially and adversely affecting the representation. Model Rule 1.7(a)(2) provides a more coherent and complete standard that requires client consent where there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. Model Rule 1.7, Comment [8]. The Model Rule employs an objective and enforceable standard by which to assess the effect on the risk of adversity and materiality on the representation. See Rest. Section 121, Comment c.; and see, e.g., *Fiandaca v. Cunningham* (1st Cir.1987) 827 F.2d 825. The minority takes the position that lawyers in California should have the same consistent and accepted standard as lawyers in other jurisdictions for determining the existence of a concurrent conflict of interest.

INTRODUCTION (Continued):

A separate minority of the Commission, which favors the overall approach of the proposed Rule, nevertheless takes issue with proposed Rule 1.7(d), which concerns conflicts arising from personal relationships and interests of a lawyer. This minority notes that Rule 1.7(d) is a continuation of current rule 3-310(B) and is intended to inform the client about a lawyer's relationships with others involved in the matter. They object to the addition of the "informed written consent" standard in paragraph (d) because it is a needless impracticality of little benefit to the client. They argue that, unlike the paragraph (a), (b) and (c) conflicts, which are true conflicts that can have vital and non-obvious consequences, the relationships disclosed under paragraph (d) often are tangential, such as when the lawyer has a casual social acquaintance with another person involved in the matter, and the possible consequences are obvious. Also unlike the paragraph (a), (b), and (c) conflicts, which generally arise before a representation begins, so the lawyer has the time and opportunity to comply with the formality of informed written consent requirement, many of the paragraph (d) conflicts will arise during representation, such as when an unexpected witness appears at trial or a new employee of a government agency becomes involved in a client's matter. Proposed paragraph (d) states that in such situations the lawyer cannot continue to represent the client unless the client has consented in writing. The minority contends that such a situation would impose a duty on the lawyer to discontinue representing the client in the midst of the representation. The minority adds that there is no information that the current written disclosure requirement in current rule 3-310(B) does not adequately protect the client.

Public Comment. The Commission received a substantial amount of public comment, much of it addressed to Comment [31], concerning advance waivers of conflicts of interest, and much of it opposing the proposed comment. The proposed comment uses Model Rule 1.7, cmt. [22] as its starting point, but has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers. The Commission carefully considered the opposing viewpoints but ultimately concluded that omitting Comment [31] would not add to lawyers' understanding of this important subject, and recommends that it be adopted.

Variations in other jurisdictions: All other jurisdictions have rules based on the Model Rule format but with a number of variations. Some of these correspond to aspects of the proposed Rule. For example, Maine's Rule requires disclosure of the lawyer's own relationships and interests along the lines of proposed paragraph (d). The District of Columbia has added paragraph (b)(4), which also

INTRODUCTION (Continued):

is along the lines of proposed paragraph (d). Alaska has defined client to exclude class members (see proposed Comment [34]). Florida and Ohio also have added a provision regarding a lawyer's relationship with another lawyer in a matter that is along the lines of California's rule 3-320 (proposed Rule 1.8.11). Idaho includes a brief reference to a lawyer's personal interests and family relationships that is a highly diluted version of proposed paragraph (d) and of proposed Rule 1.8.11. North Dakota and Ohio also add Rule references to the lawyer's personal interests, but overlook the lawyer's personal relationships.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.	~~(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:~~ ~~(1) the representation of one client will be directly adverse to another client; or~~ ~~(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.~~	The Commission has recommended the deletion of the black letter of Model Rule 1.7 in its entirety. See Introduction for an explanation of this recommendation. Paragraph (a) of Model Rule 1.7 and of the Commission's proposed Rule 1.7 state the threshold principle that a lawyer would have a conflict of interest in any representation that is directly adverse to a current client of the lawyer. The two are substantively the same, but with the Commission's proposal restated because of: (i) the Commission's rejection of Model Rule paragraphs (a)(2) and (b)(1) [see Introduction]; and (ii) the Commission's rejection of the Model Rules' "informed consent, confirmed in writing" in favor of California's more client-protective "informed written consent" [see Introduction].

* Proposed Rule 1.7, Draft 13.2 (10/20/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.	~~(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:~~ ~~(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;~~ ~~(2) the representation is not prohibited by law;~~ ~~(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and~~ ~~(4) each affected client gives informed consent, confirmed in writing.~~	See Explanation of Changes for Model Rule 1.7(a).

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.</u>	See Explanation of Changes for Model Rule 1.7(a), above.
	<u>(b) Representation of multiple clients in one matter. A lawyer shall not, without the informed written consent of each client:</u>	Paragraph (b) places in the Rule the key conflicts topic of joint representations – the representation of multiple clients in a single matter. In the Model Rule, this topic is given in Comment [8] as an example of a situation that might cause a “material limitation”. In the proposed Rule, joint representations are stated more definitively as an area of conflicts.
	<u>(1) Accept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict; or</u> <u>(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.</u>	To increase client protection, the subparagraphs (b)(1) and (2) distinguish between the potential conflict that generally exists when a lawyer accepts a joint representation and the actual conflict that sometimes arises because of developments during a joint representation, such as can happen because the lawyer receives inconsistent instructions from the clients. Subparagraph (b)(2) requires the lawyer to make a new disclosure and obtain a new informed written consent when a potential conflict becomes an actual conflict.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(c) Representation of an Adverse Party. While representing a client in a first matter, a lawyer shall not, in a second matter, accept the representation of a person or organization who is directly adverse to the lawyer's client in the first matter, without the informed written consent of each client.</u>	A lawyer's representation of a client's current adversary endangers the lawyer-client relationship by suggesting to the first client that the lawyer's loyalty to the client has been compromised. As a result, paragraph (c) identifies this as a conflict situation that requires the lawyer to make a disclosure and obtain the client's informed written consent. This topic is not identified in the Model Rule or its Comment.
	<u>(d) Personal relationships and interests. A lawyer shall not accept or continue representation of a client without the client's informed written consent where:</u> <u>(1) The lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or</u> <u>(2) The lawyer knows or reasonably should know that:</u> <u>(a) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and</u> <u>(b) the previous relationship would substantially affect the lawyer's representation; or</u> <u>(3) The lawyer has or had a legal, business,</u>	Model Rule 1.7 discusses in its Comment [10] the impact on a lawyer's representation that can be caused by the lawyer's personal interests. That discussion says that the lawyer's personal interests "... should not be permitted to have an adverse effect on representation of a client." This amounts only to a caution to the assiduous lawyer who studies the Comment, and the Model Rule does not require any notice to or consent from the client. The Model Rule entirely overlooks the possibility that a lawyer's personal relationships (as opposed to the lawyer's personal interests) might interfere with a representation. Paragraph (d) places the lawyer's personal relationships and interests in the Rule and requires the lawyer to give written disclosure to the client and obtain the client's informed written consent before the lawyer is permitted to accept or continue representation of the client. This allows the client to make an informed decision on hiring the lawyer, and if the client does so, also allows the client to supervise and monitor the lawyer with an awareness of the potential risk to the quality of the representation. Subparagraphs (d)(1) through (d)(4) are carried forward nearly verbatim from current rule 3-310(B)(1) – (4). The substance of

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; or</u> <u>(4) The lawyer has or had a legal, business, financial, or professional interest in the subject matter of the representation.</u> <u>(5) The lawyer knows that the lawyer, the lawyer's law firm, or a lawyer who is associated in that law firm is a client of another lawyer involved in the matter; or</u> <u>(6) The lawyer knows that another lawyer involved in the matter, the other lawyer's law firm, or a lawyer associated in that law firm is the lawyer's client; or</u> <u>(7) The lawyer knows that the lawyer representing another person involved in the matter has one of the following relationships with the lawyer or with another lawyer associated in the lawyer's law firm: (i) a spousal, parental, or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate personal relationship.</u>	subparagraphs (d)(5) through (d)(7) is found in current rule 3-320, Which has been revised for conciseness and clarity.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)</u> <u>[1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, a lawyer should consider all of the following: (1) the duty of undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently within the bounds of the law; and (5) the duty to make full and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer. See Rule 1.2(a) regarding the allocation of authority between lawyer and client.</u>	The proposed Comment amounts to a nearly complete rewriting of the Model Rule Comment. The Commission has done so because: (i) of its rejection of elements of the Model Rule [see Introduction and Explanation of Changes for Model Rule 1.7(a) and (b), above]; (ii) to permit more robust and focused discussion of proposed paragraphs (b), (c), and (d) [client-protective topics not included in the Model Rule – see proposed Comments [10] through [26]]; (iii) to reorder the Comment into a more logical sequence [e.g., compare Model Rule Comment [1], which discusses duties to former clients although the topic of the Rule is duties to current clients, with proposed Comment [1], which discusses general principles applicable to all conflicts of interest]; (iv) to include more detailed and organized discussion of some complex topics [e.g., compare Model Rule Comment [22] with proposed Comment [33] regarding the important question of when and how a lawyer can obtain an effective consent to a future conflict of interest]; (v) to add citations to a number of California appellate opinions that are important to understanding conflicts of interest; and (vi) to include discussion of topics not covered by the Model Rule Comment such as conflicts for insurer-appointed defense counsel – see proposed Comments [37] and [38].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[2] The first step in a lawyer's conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules.</u>	See Explanation of Changes for Comment [1].
[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).	~~[13] Loyalty and independent judgment are essential elements in the lawyer's relationship to~~<u>This rule describes</u> a client. ~~Concurrent conflicts of interest can arise from the lawyer's responsibilities~~<u>duties to another client, a former client or a third person or from the lawyer's own interests</u><u>current clients.</u> For <u>Additional</u> specific ~~Rules~~<u>rules</u> regarding ~~certain concurrent~~<u>current</u> ~~clients are set out in Rules 1.8.1 to 1.8.12.~~ For conflicts ~~of interest~~<u>duties to former clients,</u> see Rule ~~1.8.~~ For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "~~confirmed in writing~~<u>written,</u>" see Rule 1.0.1(e) and (b). <u>and see Comments [26] - [30] to this Rule.</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).	~~[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).~~	See Explanation of Changes for Comment [1].
[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1.	~~[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.	~~Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~	
[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].	~~[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].~~	See Explanation of Changes for Comment [1].
	<u>Lawyer Acting in Dual Roles</u> <u>[4] A lawyer might owe fiduciary duties in capacities other than as a lawyer that could conflict with the duties the lawyer owes to clients or former clients, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director. (See, e.g., <i>William H. Raley Co., Inc. v. Superior Court</i> (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).	~~[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~	See Explanation of Changes for Comment [1].
Identifying Conflicts of Interest: Directly Adverse [6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one	~~Identifying Conflicts of Interest~~<u>Paragraph (a): Representation Directly Adverse to Current Client</u> ~~[6] Loyalty to~~<u>A lawyer owes a duty of undivided loyalty to each current client</u>~~prohibits undertaking representation directly adverse to.~~ <u>For purposes of</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.	<u>paragraph (a), the duty of undivided loyalty means</u> that ~~client,~~ without ~~that client's~~ <u>the</u> informed <u>written</u> consent. ~~Thus, absent consent of each affected~~ <u>client,</u> a lawyer may not act as an advocate <u>or</u> <u>counselor</u> in ~~one~~ <u>a</u> matter against a person <u>or</u> <u>organization</u> the lawyer represents in ~~some other~~ <u>another</u> matter, even when the matters are wholly unrelated. The ~~client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out~~ <u>duty of</u> deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest <u>loyalty reflected</u> in retaining the current client. ~~Similarly, paragraph (a) directly adverse conflict may arise when~~ <u>applies equally in transactional and litigation matters. For example, a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require</u> <u>represent the seller of a business in negotiations when the lawyer</u>	

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>represents the buyer in another matter, even if unrelated, without the informed written consent of each client. Paragraph (a) would apply even if the ~~respective clients~~ parties to the transaction expect to, or are, working cooperatively toward a goal of common interest to them. (If a lawyer proposes to represent two or more parties concerning the same negotiation or lawsuit, the situation should be analyzed under paragraph (b), not paragraph (a). As an example, if a lawyer proposes to represent two parties concerning a transaction between them, the lawyer should consult paragraph (b).)</u>	
[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.	~~[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.~~	See Explanation of Changes for Comment [1].
	<u>[6] Paragraph (a) applies only to engagements in which the lawyer's work in a matter is <i>directly</i> adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client.</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	The word “direct” limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule.	
	[7] Generally speaking, a lawyer's work on a matter will not be directly adverse to a person if that person is not a party to the matter, even if the non-party's interests could be affected adversely by the outcome of the matter. However, in some situations, a lawyer's work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. (See <i>Hernandez v. Paicius</i> (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Identifying Conflicts of Interest: Material Limitation [8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.	~~Identifying Conflicts of Interest: Material Limitation~~ ~~[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.~~	See Explanation of Changes for Comment [1].
	[8] <u>Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, e.g., if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, e.g., if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.</u>	
Lawyer's Responsibilities to Former Clients and Other Third Persons [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.	~~Lawyer's Responsibilities to Former Clients and Other Third Persons~~ ~~[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[9] If a conflict under paragraph (a) arises during a representation, the lawyer must in all events continue to protect the confidentiality of information of each affected client and former client. Regarding former clients, see Rule 1.9(c).	See Explanation of Changes for Comment [1].
	Paragraph (b): Representation of multiple clients in a matter [10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. Examples of a transaction or common enterprise include the formation of a business organization for multiple investors, the preparation of an ante-nuptial agreement for both parties, and the preparation of a post-nuptial agreement, a trust or wills, and the resolution of an "uncontested" marital dissolution, for both spouses. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer knows or reasonably should know it is reasonably possible that the lawyer's	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>performance of the lawyer's duties to one of the joint clients will or does interfere with the lawyer's performance of the duties owed to another of the joint clients. See Comment [36] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.</u>	
	<u>[11]The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[12] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068(e)(1), Rule 1.6, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4, and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.	See Explanation of Changes for Comment [1].
	[13] If a lawyer obtains the consent of multiple clients to the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain a new, informed written consent from each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer then must obtain consent of each client in the matter under paragraph	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	(b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [31].	
	[14] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). See Rule 1.2 (c) (limiting the scope of representation).	See Explanation of Changes for Comment [1].
	[15] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	previously did so.	
	Paragraph (c): Representation of an Adverse Party. [16] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in which the lawyer's work will not be adverse to A. The purposes of paragraph (c) include (1) ensuring that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; and (2) ensuring that B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter. If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).	See Explanation of Changes for Comment [1].
	Paragraph (d): Personal Relationships and Interests [17] Paragraph (d) requires a lawyer to obtain a client's informed written consent when the lawyer has any of certain present or past relationships with others. The purpose of this requirement is to permit the client or potential client to make a more informed decision about whether and on what conditions to	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.	
Personal Interest Conflicts [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).	Personal Interest Conflicts ~~[1018] The lawyer's own interests~~ A lawyer also should not ~~be permitted~~ allow his or her own interests to have an adverse effect on the representation of a client. ~~For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A Similarly, when~~ Paragraph (d)(4) requires a lawyer ~~has discussions concerning possible employment with an opponent of the lawyer's client, or with to obtain a law firm representing the opponent, such discussions could materially limit the lawyer's representation of~~ the client's informed written consent. ~~In addition, a~~ when the lawyer ~~may not allow related business interests to affect representation, for example, by referring clients to~~ has an ~~enterprise~~ interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation in which the lawyer has an undisclosed financial interest is a shareholder; and (2) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by Paragraph (d)(4) unless the lawyer and client have agreed to take a common position, as might occur, for example, in response to a motion for discovery sanctions. See Rule ~~1.8~~1.8.1 through 1.8.12 for specificadditional rules pertaining to ~~a number of~~other personal interest conflicts, including business transactions with clients. ~~See also, and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm)~~3.7 concerning lawyer as witness.]	
[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers	~~[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
are associated. See Rule 1.10.	~~are associated. See Rule 1.10.~~	
	[19] When a lawyer owns an interest in a publicly-traded investment vehicle, such as a mutual fund, paragraph (d)(4) does not require the lawyer to investigate whether the investment vehicle owns an interest in parties to a matter. However, if the lawyer knows that a publicly-traded investment vehicle in which the lawyer owns an interest owns an interest in a party to the matter, the lawyer must disclose the interest to the client and obtain the client's informed written consent to the lawyer's continued representation of the client.	See Explanation of Changes for Comment [1].
[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).	~~[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).~~	See Explanation of Changes for Comment [1].
	[20] Paragraph (d)(4) requires a lawyer to obtain the informed written consent of the lawyer's client if the lawyer <i>has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.</i>	See Explanation of Changes for Comment [1]. The italicized language is taken verbatim from Model Rule 1.7, cmt. [10].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[21] Paragraph (d) applies only to a lawyer's own relationships and interests, except when (1) the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party or witness, or has or had an interest in the subject matter of the representation; or (2) as stated in paragraph (d)(5), (6), or (7). See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).</u>	See Explanation of Changes for Comment [1]. The italicized language is taken verbatim from Model Rule 1.7, cmt. [10].
Interest of Person Paying for a Lawyer's Service [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.	~~Interest of Person Paying for a Lawyer's Service~~ ~~[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[22] Paragraph (d) requires informed written consent only from current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.	See Explanation of Changes for Comment [1].
	[23] Paragraph (a) applies, rather than paragraph (d)(1) or (d)(3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [5] to this Rule.)	See Explanation of Changes for Comment [1].
Prohibited Representations [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.	Prohibited Representations ~~[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.~~	See Explanation of Changes for Comment [1].
	[24] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2) when the lawyer cannot make an	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068(e)(1) and Rule 1.6); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action"]; <i>Klemm v. Superior Court</i> (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857] [attorney may not represent both a closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38, and see Rule 1.14 regarding clients with diminished capacity.)	
[15]Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the	~~[15]Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).	~~circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).~~	
	[25] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied, the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c).)	See Explanation of Changes for Comment [1].
[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.	~~[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).	~~[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).~~	See Explanation of Changes for Comment [1].
Informed Consent [18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments	<u>Disclosure and</u> Informed <u>Written</u> Consent ~~[18]~~<u>[26]</u> Informed <u>written</u> consent requires ~~that the lawyer to disclose in writing to~~ each affected client ~~be aware of~~ the relevant circumstances and ~~of the material~~<u>actual</u> and reasonably foreseeable ~~ways that the conflict could have adverse effects on consequences to the interests of that client or former client.~~ See Rule 1.0<u>.1</u>(e) (informed <u>written</u> consent). The ~~information required depends~~<u>facts and explanation the lawyer must disclose will depend</u> on the nature of the <u>potential or actual</u> conflict and the nature of the risks involved <u>for the client or potential client</u>. When <u>undertaking the</u> representation of multiple clients in a single matter	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[30] and [31] (effect of common representation on confidentiality).	~~is undertaken~~, the information must include the implications of the ~~common~~<u>joint</u> representation, including possible effects on loyalty, ~~confidentiality~~ and the ~~attorney~~<u>confidentiality and lawyer</u>-client privilege ~~and the advantages and risks involved. See Comments~~<u>issues described in Comment [30]</u>~~to this Rule and [31] (effect of common representation on confidentiality).~~	
[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.	~~[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.~~	See Explanation of Changes for Comment [1].
Consent Confirmed in Writing [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed	~~Consent Confirmed in Writing~~ ~~[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.	~~executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b).~~ The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.	
Revoking Consent [21]A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a	~~Revoking Consent~~ ~~[21]A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.	~~material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.~~	
	[28] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and obtaining a new written consent.	See Explanation of Changes for Comment [1].
	[29] If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068(e)(1), Rule 1.6.) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board directors, or because of contractual or court-ordered restrictions.	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[30] In some situations, Rule 1.13(g) limits who has authority to grant consent on behalf of an organization.	See Explanation of Changes for Comment [1].
Consent to Future Conflict [22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is	Consent to Future Conflict ~~[22]~~[31] Whether a lawyer~~Whether a lawyer~~Lawyers may ~~properly request a client~~task clients to ~~waive~~give advance consent to conflicts that might arise in the future, ~~but this~~is subject to the test of paragraph ~~is subject to the test of paragraph~~usual requirement that a client's consent must be "informed" to comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [26] (informed written consent). The effectiveness of such waivers is generally determined by However, an advance consent can comply with this Rule even where the ~~extent~~lawyer cannot provide all the information and explanation ~~Comment [26] ordinarily requires. Whenever seeking an advance consent, the lawyer's disclosure to which the client reasonably understands the material risks~~should include an explanation that the waiver entails ~~lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested.~~ The ~~more comprehensive~~lawyer also should disclose to the client whether the consent	See Explanation of Changes for Comment [1]. Proposed Comment [33] shares much with the substance of Model Rule Comment [22]. However, this proposal eliminates the reference to Rule paragraph (b) because of that reference is not pertinent to the Commission's recommended Rule. Also, the proposed Comment has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).	<u>permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future representationsconflicts that might arise and of the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood thatto the client will have; (2) the requisite understanding. Thus, if the client agrees to consent to a particular typeclient's degree of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experiencedexperience as a user of the legal services involved and is reasonably informed regarding, including experience with the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., type of legal services involved; (3) whether the client is independently represented by other counsel inhas consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an</u>	

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent ~~cannot~~ will not be effective if the circumstances that materialize in compliance in the future are such as would make the conflict nonconsentable under paragraph <u>circumstances described in Comment [24] (prohibited representations). See Rule 1.0.1(g) ("informed consent").</u></u>	
Conflicts in Litigation [23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of	~~Conflicts in Litigation~~ <u>Representation of a Class</u> ~~[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.	~~the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.~~	
[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the	~~[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.	~~position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.~~	
[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.	~~[25]~~ <u>[2532] When This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of</u> a lawyer who represents or seeks to represent ~~a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule.~~ Thus, the lawyer does not ~~typically~~ need to ~~get~~<u>obtain</u> the consent of ~~such a person~~ <u>an unnamed class member</u> before representing a client ~~suing the~~<u>who is adverse to that</u> person in an unrelated matter. Similarly, a lawyer seeking to represent ~~an opponent in a party opposing~~ a class action does not ~~typically~~ need the consent of	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	~~an~~any unnamed ~~member of the~~ class ~~member~~ whom the lawyer represents in an unrelated matter <u>in order to do so. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.</u>	
Nonlitigation Conflicts [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].	Nonlitigation Conflicts ~~[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].~~	See Explanation of Changes for Comment [1].
[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is	~~[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.	~~the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.~~	
[28]Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.	~~[28]Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Special Considerations in Common Representation [29]In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.	~~Special Considerations in Common Representation~~ ~~[29]In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.	~~[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.~~	See Explanation of Changes for Comment [1].
[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the	~~[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.	~~clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.~~	
[32]When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).	~~[32]When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).~~	See Explanation of Changes for Comment [1].
[33]Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.	~~[33]Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.~~	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Organizational Clients [34]A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.	Organizational Clients [3433] A lawyer who represents ~~a corporation or other~~an organization does not, by virtue of that representation <u>alone</u>, ~~necessarily~~ represent any constituent ~~or affiliated of the~~ organization, ~~such as a parent or subsidiary~~. ~~(See Rule 1.13(a). Thus, the)~~ <u>The</u> lawyer for an organization ~~is also does not, by virtue of that representation alone, represent any affiliated organization, such as a subsidiary or organization under common ownership. The lawyer nevertheless could be~~ barred <u>under case law</u> from accepting <u>a</u> representation adverse to an affiliate ~~in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the~~ organizational client ~~that the lawyer will avoid representation adverse, even in a matter unrelated~~ to the ~~client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the~~ lawyer's representation of the ~~other~~ client, <u>under certain circumstances</u>.	See Explanation of Changes for Comment [1].
[35]A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the	[3534] A lawyer for a corporation ~~or other~~ organization who ~~is also~~ <u>is</u> a member of its board of directors <u>(or a lawyer for another type of organization who has corresponding fiduciary duties to it)</u> should determine whether <u>it is reasonably foreseeable that</u> the responsibilities of the two roles ~~may~~<u>might</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.	conflict—~~The, for example, because, as its~~ lawyer ~~may, he or she might~~ be called on to advise the corporation ~~in~~<u>on</u> matters involving actions of the directors. ~~Consideration~~ <u>The lawyer</u> should ~~be given~~ <u>to consider such things as</u> the frequency with which ~~such these~~ situations ~~may~~<u>might</u> arise, the potential ~~intensity~~<u>materiality</u> of the conflict, ~~the effect of to~~ the lawyer's ~~resignation from the board~~<u>performance of his or her duties as a lawyer</u>, and the possibility of the ~~corporation's~~<u>corporation</u> obtaining legal advice from another lawyer in ~~such these~~ situations. If there is material risk that the dual role will compromise the lawyer's ~~independence~~<u>ability to perform any</u> of ~~professional judgment~~<u>his or her duties to the client</u>, the lawyer should not serve as a director or should cease to act as the corporation's lawyer—~~when conflicts of interest arise~~. The lawyer should advise the other members of the board ~~that in some circumstances~~<u>whenever</u> matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that conflict of interest considerations might require the ~~lawyer's recusal~~<u>lawyer to withdraw</u> as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.	
	<u>Insurance Defense</u> <u>[35]In State Farm Mutual Automobile Insurance Company v. Federal Insurance Company (1999) 72</u>	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding <i>State Farm</i>, paragraphs (a) and (c) do not apply to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.	
	[36] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).	See Explanation of Changes for Comment [1].
	<u>Public Service</u> [37][For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see	See Explanation of Changes for Comment [1].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Rule 6.5.]	

Rule 1.7: Conflict Of Interest: Current Clients
(Commission's Proposed Rule – Clean Version)

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

- (7) The lawyer knows that the lawyer representing another person involved in the matter has one of the following relationships with the lawyer or with another lawyer associated in the lawyer's law firm: (i) a spousal, parental, or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate personal relationship.

COMMENT

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

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

considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules.

- [3] This rule describes a lawyer's duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1 to [1.8.9]. For conflicts duties to former clients, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "written," see Rule 1.0.1(e) and (b). See also Comments [26] – [30] to this Rule.

Lawyer Acting in Dual Roles

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

Paragraph (a): Representation Directly Adverse to Current Client

- [5] A lawyer owes a duty of undivided loyalty to each current client. For purposes of paragraph (a), the duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person

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

- [6] Paragraph (a) applies only to engagements in which the lawyer's work in a matter is *directly* adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule.
- [7] Generally speaking, a lawyer's work on a matter will not be directly adverse to a person if that person is not a party to the matter, even if the non-party's interests could be affected adversely by the outcome of

the matter. However, in some situations, a lawyer's work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)

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

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

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

- [10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or common enterprise. Examples of a transaction or common enterprise include the formation of a business organization for multiple investors, the preparation of an ante-nuptial agreement for both parties, and the preparation of a post-nuptial agreement, a trust or wills, and the resolution of an “uncontested” marital dissolution, for both spouses. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer knows or reasonably should know it is reasonably possible that the lawyer’s performance of the lawyer’s duties to one of the joint clients will or does interfere with the lawyer’s performance of the duties owed to another of the joint clients. See Comment [36] with respect to the application of paragraph (b) to an insurer’s appointment of counsel to defend an insured.
- [11] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client’s instructions without violating another client’s instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible

for the lawyer to advance one client’s interests or objectives without detrimentally affecting another client’s interests or objectives; (3) the clients have antagonistic positions and the lawyer’s duty requires the lawyer to advise each client about how to advance that client’s position relative to the other’s position, because the lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer’s independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.

- [12] A lawyer’s representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client’s informed written consent under paragraph (b). First, although each client’s communications with the lawyer are protected as to third persons by the lawyer’s duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068(e)(1), Rule 1.6, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4, and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.
- [13] If a lawyer obtains the consent of multiple clients to the lawyer’s representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain a new,

informed written consent from each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer then must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [31].

- [14] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). See Rule 1.2 (c) (limiting the scope of representation).
- [15] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or previously did so.

Paragraph (c): Representation of an Adverse Party.

- [16] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in which the lawyer's work will not be adverse to A. The purposes of paragraph (c) include (1) ensuring that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; and (2) ensuring that B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter. If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).

Paragraph (d): Personal Relationships and Interests

- [17] Paragraph (d) requires a lawyer to obtain a client's informed written consent when the lawyer has any of certain present or past relationships with others. The purpose of this requirement is to permit the client or potential client to make a more informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.
- [18] A lawyer also should not allow his or her own interests to have an adverse effect on the representation of a client. Paragraph (d)(4) requires a lawyer to obtain the client's informed written consent when the lawyer has an interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (2) the lawyer represents a landlord in lease

negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by paragraph (d)(4) unless the lawyer and client have agreed to take a common position, as might occur, for example, in response to a motion for discovery sanctions. See Rules 1.8.1 through 1.8.9 for additional rules pertaining to other personal interest conflicts, including business transactions with clients, and Rule 3.7 concerning lawyer as witness.

- [19] When a lawyer owns an interest in a publicly-traded investment vehicle, such as a mutual fund, paragraph (d)(4) does not require the lawyer to investigate whether the investment vehicle owns an interest in parties to a matter. However, if the lawyer knows that a publicly-traded investment vehicle in which the lawyer owns an interest owns an interest in a party to the matter, the lawyer must disclose the interest to the client and obtain the client's informed written consent to the lawyer's continued representation of the client.
- [20] Paragraph (d)(4) requires a lawyer to obtain the informed written consent of the lawyer's client if the lawyer has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.
- [21] Paragraph (d) applies only to a lawyer's own relationships and interests, except: (1) when the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party or witness, or has or had an interest in the subject matter of the representation; or (2) as stated in paragraph (d)(5), (6), or (7). See also

Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

- [22] Paragraph (d) requires informed written consent only from current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.
- [23] Paragraph (a) applies, rather than paragraph (d)(1) or (d)(3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [5] to this Rule.)

Prohibited Representations

- [24] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068(e)(1) and Rule 1.6); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action"]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857] [attorney may not represent both a closely-held corporation and directors/shareholders who are accused

of wrongdoing or whose interests are otherwise adverse to the corporation)); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.)

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

Disclosure and Informed Written Consent

- [26] Informed written consent requires the lawyer to disclose in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client. See Rule 1.0.1(e) (informed written consent). The facts and explanation the lawyer must disclose will depend on the nature of the potential or actual conflict and the nature of the risks involved for the client or potential client. When undertaking the representation of multiple clients in a single matter, the information must include the implications of the joint representation, including possible effects on loyalty, and the confidentiality and lawyer-client privilege issues described in Comment [12] to this Rule.
- [27] The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives

and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

- [28] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and obtaining a new written consent.

- [29] If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068(e)(1), Rule 1.6.) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board of directors, or because of contractual or court-ordered restrictions.

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

Consent to Future Conflict

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

complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [26] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comment [26] ordinarily requires. Whenever seeking an advance consent, the lawyer's disclosure to the client should include an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also should disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular

type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent will not be in compliance in the circumstances described in Comment [24] (prohibited representations). See Rule 1.0.1(g) ("informed consent").

Representation of a Class

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

Organizational Clients

- [33] A lawyer who represents an organization does not, by virtue of that representation alone, represent any constituent of the organization. (See Rule 1.13(a).) The lawyer for an organization also does not, by

virtue of that representation alone, represent any affiliated organization, such as a subsidiary or organization under common ownership. The lawyer nevertheless could be barred under case law from accepting a representation adverse to an affiliate of an organizational client, even in a matter unrelated to the lawyer's representation of the client, under certain circumstances.

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

Insurance Defense

- [35] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraphs (a) and (c) do not apply to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.
- [36] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

Public Service

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

Rule 1.7: Conflicts and Interests: Current Clients

STATE VARIATIONS

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

California: Rule 3-310 (Avoiding the Representation of Adverse Interests) requires written informed consent to the conflicts it describes. This rule incorporates in one place principles spread across several rules in the ABA Model Rules, including current and former client conflicts and conflicts arising from the payment of a fee by a nonclient.

Section 2860 of the California Civil Code, adopted after the important decision in *San Diego Credit Union v. Cumis*, 208 Cal. Rptr. 494 (1984), seeks to reconcile the multiple interests at stake when an insurance company has a duty to defend an insured whose interests might not be congruent with those of the insurer. The first paragraph of §2860 provides as follows:

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

District of Columbia: Rule 1.7 differs significantly from the ABA Model Rule in its language but addresses the same current client conflicts. A unique provision is Rule 1.7(d), which in certain (but not all) instances allows a lawyer to continue with a conflicted representation when the conflict arises after the lawyer has begun work on a matter, but only if the conflict was “not reasonably foreseeable at the outset of a representation.”

Florida adds Rule 1.7(d) (identical to the 1983 version of ABA Model Rule 1.8(i), now Comment 11 to ABA Model Rule 1.7), which provides:

A lawyer related to another lawyer as parent, child, sibling, or spouse 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.

Florida also adds Rule 1.7(e), which requires a lawyer representing “an insured client at the expense of the insurer ... to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation.”

Georgia has a unique version of Rule 1.7 that draws heavily on the Restatement of the Law Governing Lawyers. Georgia Rule 1.7 provides, in full, as follows:

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:

(1) consultation with the lawyer,

(2) having received in writing reasonable and adequate information about the material risks of the representation, and

(3) having been given the opportunity to consult with independent counsel.

(c) Client consent is not permissible if the representation:

(1) is prohibited by law or these rules;

(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or

(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Maine: Rule 3.4(a)(1) provides as follows:

Disclosure of Interest. Before commencing any professional representation, a lawyer shall disclose to the prospective client any relationship or interest of the lawyer or of any partner, associate or affiliated lawyer that might reasonably give rise to a conflict of interest under these rules. A lawyer has a continuing duty to disclose to the client any information that, in light of circumstances arising after the commencement of representation, might reasonably give rise to such a conflict of interest.

Massachusetts retains the original 1983 version of ABA Model Rule 1.7, and the Comment to Massachusetts Rule 1.7 differs substantially from the Comment to ABA Model Rule 1.7. Among other things, the Massachusetts Comment addresses the situation of the lawyer who represents one member of a corporate family while opposing another member of the family, the issue of confidentiality and privilege in multiple representation, and the responsibilities of lawyers who represent classes. Comment 6 states that "a lawyer should not accept referrals from a referral source... if the lawyer's desire to continue to receive referrals from that source or the lawyer's relationship to that source would or would reasonably be viewed as discouraging the lawyer from representing the client zealously."

New Jersey: Rule 1.7(b)(1), the counterpart to ABA Model Rule 1.7(b)(4), contains a proviso to the effect "that a public entity cannot consent to any such representation." In addition, New Jersey adds a sentence from the original 1983 version of ABA Model Rule 1.7 requiring the lawyer, when representing multiple clients in a single matter, to explain "the advantages and risks involved" in common representation.

With respect to mortgage transactions, New Jersey has an unusual conflict of interest statute, N.J.S.A. §46:10A-6(b), which provides as follows:

If a lender makes a written offer to a borrower to make a loan secured by real property located in this State, the lender shall disclose, in writing, prominently and in bold type, to the borrower before the acceptance of the offer by the borrower, that the interests of the borrower and lender are or may be different and may conflict, and that the lender's attorney represents only the lender and not the borrower and the borrower is, therefore, advised to employ an attorney of the borrower's choice licensed to practice law in this State to represent the interests of the borrower.

New York retains DR 5-101 and DR 5-105 of the ABA Model Code of Professional Responsibility. In addition, DR 5-105(E) imposes a duty on a "law firm" to keep adequate records to enable lawyers to check for conflicts. It provides:

E. A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(D).

Pennsylvania: Rule 1.7 tracks ABA Model Rule 1.7, except that Pennsylvania Rule 1.7(b)(4) does not require that client consent be "confirmed in writing."

Texas: Rule 1.06 provides as follows:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or becomes adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such

parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

The Texas rule thus allows a lawyer to oppose a current client in a matter not "substantially related" to matters being handled for that client. However, in *In re Dresser Industries, Inc.*, 972 F.2d 540 (5th Cir. 1992), the Fifth Circuit refused to apply Texas Rule 1.06, stating, that conflicts of interest in federal litigation are governed by "national standards," including ABA Model Rule 1.7 and the Restatement of the Law Governing Lawyers.

Washington: For consent to a conflict to be valid. Rule 1.7(b)(4) requires that each affected client gives Informed consent, confirmed in writing "(following authorization from the other client to make any required disclosures)."

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

[*NOTE: The above vote records the position of the Commission on the version of Rule 1.8.1 submitted to the Board of Governors for consideration at its January 7–9, 2010 meeting. The version of Rule 1.8.1 submitted by the Commission was modified by the Board at that meeting to implement conforming changes arising from the Board's adoption of a Commission minority position on the issue of modification of fee agreements. Refer to the Introduction to Rule 1.8.1 and to Rule 1.5.]

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 for the 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

February 2010

(Draft rule revised following consideration of public comment and conformed to Board action.)

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) responsibility for the disclosure requirements of the Rule when the client is actually represented by independent counsel; and (2) applicability of the Rule to fee agreement modifications. As explained below, on the latter issue, the Board of Governors adopted a recommendation of a minority of the Commission that: limited the applicability of Rule 1.8.1 to modifications that confer on a lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client; and added a new paragraph (f) to Rule 1.5 (Fees for Legal Services) which prohibits a lawyer from making a material modification that is adverse to a client's interests unless: (i) the client is represented by an independent lawyer regarding the modification; or (ii) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so.

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

Modifications to Agreements by which the Lawyer is Retained by a Client. 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 concluded that modifications to lawyer-client engagement agreements occur in many lawyer-client relationships and are frequently beneficial to the client. The majority believed that imposing the Rule 1.8.1 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. The majority view was considered by the Board of Governors at its January 7 – 9, 2010 meeting, together with an alternate approach developed by a minority of the Commission. The minority approach limited the applicability of Rule 1.8.1 to modifications that confer on a lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client; but also added a new paragraph (f) to Rule 1.5 (Fees for Legal Services) which prohibits a lawyer from making a material modification that is adverse to a client's interests unless: (1) the client is represented by an independent lawyer regarding the modification; or (2) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. Following discussion at its January 2010 meeting, the Board adopted the minority approach on the issue of fee modifications.

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 reasonable opportunity to do so is generally viewed as the most effective means of protecting a client in business dealings with the client's lawyer – new paragraph (f) to Rule 1.5 was adopted by the Board:

(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 applies 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 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. Placing the provision in Rule 1.5 is believed to be the logical place that lawyers will look for guidance on all things concerning fees, including fee modifications. The explanatory comments 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.

As the Board agreed with the Commission minority, the Commission majority position on the treatment of fee agreement modifications is not implemented in proposed Rule 1.8.1 or Rule 1.5. For a full discussion of the Commission majority view on this subject, a memorandum from Commission members Robert Kehr and Ellen Peck is provided at the end of these materials.

The Disclosure Requirement under Rule 1.8.1. 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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	<u>Explanation of Changes to the ABA Model Rule</u>
(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 <u>each of the following requirements has been satisfied</u>:	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)~~ ~~the~~ <u>The</u> transaction <u>or acquisition</u> and <u>its</u> terms ~~on which the lawyer acquires the interest~~ are fair and reasonable to the client and are fully disclosed and transmitted in writing <u>to the client</u> in a manner that <u>reasonably</u> can be ~~reasonably~~ understood by the client; <u>and</u>	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 15 (12/14/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	<u>Explanation of Changes to the ABA Model Rule</u>
(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	(2b) ~~the~~The client <u>either is represented in the transaction or acquisition by an independent lawyer of the client's choice or</u> is advised in writing <u>by the lawyer to seek the advice of an independent lawyer</u> of the ~~desirability of seeking~~<u>client's choice</u> and is given a reasonable opportunity to seek ~~the~~<u>that</u> 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 when 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

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	<u>Explanation of Changes to the ABA Model Rule</u>
		must encourage the client to seek such advice and cannot imply that such advice is unnecessary. (<i>Rose v. State Bar</i> (1989) 49 Cal.3d 646, 663; <i>Rodgers v. State Bar</i> (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 <i>Matter of Silverton II</i> (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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	<u>Explanation of Changes to the ABA Model Rule</u>
		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.	(3c) ~~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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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...]	~~<i>Business Transactions Between Client and Lawyer</i>~~ <u>Scope of Rule</u> [1] A lawyer's legal ~~skill and training~~ <u>and skill, together with</u> the relationship of trust and confidence <u>that arises</u> between a lawyer and client, create the possibility ~~of overreaching~~ <u>that a lawyer, even unintentionally, will overreach or exploit client information</u> when the lawyer ~~participates in~~ <u>enters into</u> a business, ~~property or financial~~ transaction with ~~the~~ client, ~~for example, a loan~~ or ~~sales~~ <u>acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or a lawyer investment on behalf</u> <u>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</u> 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 overreaching 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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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).	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] <i>Business Transactions Between Client and Lawyer</i> [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.	<i>Business Transactions ~~Between Client and Lawyer~~ With Clients</i> ~~[1] 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 to~~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 titles~~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 business of selling goods and services related to the practice of

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[CONTINUED...]	investment products or services to ~~existing clients of the lawyer's legal practice. See Rule 5.7a~~ a client.	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.	~~[14] It also applies to lawyers purchasing property from estates they represent. 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	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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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 ~~restrictions in paragraph~~ (lawyer's client makes the same investment on the same terms. When a) ~~are unnecessary~~ lawyer and impracticable</u> 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.	
	<u>[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].</u>	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 also 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 reference was added because the Discussion in the current

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		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 among the Commission members. It was observed 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. As explained in the Introduction, the Board of Governors adopted a recommendation of a minority of the Commission that: limited the applicability of Rule 1.8.1 to modifications that confer on a lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client; and added a new paragraph (f) to Rule 1.5 (Fees for Legal Services) which prohibits a lawyer from making a material modification that is adverse to a client's interests unless: (i) the client is represented by an independent lawyer regarding the modification; or (ii) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. Comment [5] appropriately refers to Rule 1.5 as a rule that governs fee modifications that are adverse to a client's interests.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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.	Comment [6] has no counterpart in the Model Rule and is new with Draft 15 of the Rule, which was revised as a result of public comments and comments from Board members at its November 2009 meeting. The first 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. The second sentence is new. It refers lawyer's to Rule 1.5, where the Commission recommends that obligations and guidance with respect to fee agreement modifications be placed. See proposed Rule 1.5 & comments [3] – [3C] thereto. The third sentence provides a specific reference to proposed Rule 1.5, Comment [3B], which is intended to provide guidance, by reference to case law and specific rules and statutes, to lawyers on fiduciary duties that might govern fee agreements even when neither this Rule nor Rule 1.5 applies.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Adverse Pecuniary Interests</u> <u>[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. <i>Hawk v. State Bar</i> (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 <i>Fletcher v. Davis</i> (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 <i>Rodgers v. State Bar</i> (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; <i>Kapelus v. State Bar</i> (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].)</u>	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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Full Disclosure to the Client</u> <u>[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.</u>	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	<u>[29] Full disclosure under Paragraph (a)(1) 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 (21987) 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.</u> 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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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~~<i>Rodgers v. State Bar</i> (~~e~~1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; <i>Clancy v. State Bar</i> (~~definition of informed consent~~1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; <i>Brockway v. State Bar</i> (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. <i>Felton v. Le Breton</i> (1891) 92 Cal. 457, 469 [28 P. 490, 494].	

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.	[310] The risk to a client is ~~greatest~~<u>heightened</u> 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~~<u>acquisition itself</u>. Under ~~that~~<u>this</u> Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction <u>or acquisition</u>, such as the risk that the lawyer will structure the transaction <u>or acquisition</u> or give legal advice in a way that favors the lawyer's interests at the expense of the client. ~~Moreover~~<u>Because the lawyer has an interest in the transaction or acquisition</u>, the lawyer must ~~obtain the client's informed consent~~<u>also comply with Rule 1.7(d)</u>. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from ~~seeking~~<u>representing</u> the ~~client's consent to~~<u>client in</u> the transaction <u>or acquisition</u>.	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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[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.</u>	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.

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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.
	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,	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

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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.</u>	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.	~~[4] If a lawyer is not required to advise the client is independently represented into 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 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 <u>or acquisition</u> is relevant in determining whether the ~~agreement was~~ <u>terms of the transaction or acquisition are</u> fair and reasonable to the client as paragraph (a)(1) ~~further~~ requires.	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 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

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		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 from 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 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

<u>ABA Model Rule</u> Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		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.
* * * <i>Imputation of Prohibitions</i> [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.	~~* * *~~ ~~<i>Imputation of Prohibitions</i>~~ ~~[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 1.8.11.

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

(Rule adopted by the Board of Governors based upon a Commission minority recommendation.)

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.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

Our original November 29, 2009 Memo:

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.
 - o 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.
 - o 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].

Applying Rule 1.8.1 to all fee agreement modifications would alter current California law:

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. **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.** (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 turpitude¹].

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

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).

Proposed Rule 1.8.3 [4-400]

“Gifts from Client”

(Draft # 5.1, 10/18/09)

Summary: Rule 1.8.3, which is based on Model Rule 1.8(c), addresses a lawyer’s duties with respect to gifts from a client. See Introduction for details as to how proposed Rule 1.8.3 differs substantively from Model Rule 1.8(c).

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 4-400

Statute

Probate Code § 21350(b).

Case law

McGee v State Bar (1962) 58 Cal.2nd 423.

☐ 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 12
Opposed Rule as Recommended for Adoption 0
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:

Public commenters took issue with the Commission's proposed substitution of "induce" for the Model Rule's "solicit". Other commenters criticized broadening the Rule to include "attempts to induce". See Public Comment Chart, comments from San Diego County Bar Association and Ross Simmons. The Commission has replaced the "attempt to induce" standard with the Model Rule's "solicit" and believes that change may assuage the commenters' concerns.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.3* Gifts from Clients

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.8.3 is based on Model Rule 1.8(c), and is intended to replace current California rule 4-400. Proposed Rule 1.8.3 reorganizes ABA 1.8(c), and includes several changes that improve client protection and conform the rule to California law. First, the Rule retains the current California rule prohibition against “inducing” a gift, which provides broader protection than the Model Rule, in addition to the Model Rule standard, which prohibits “solicitation” of gifts. Second, rather than restate in the rule the scope of related persons excluded from the gift prohibition, reference instead is made to Probate Code § 21350(b), which defines “a person who is related by blood or marriage.” See proposed paragraph (b). Third, to conform to California law, the Commission has included a requirement in Comment [2] that an unrelated client have independent legal representation before an attorney may draft an instrument giving a substantial gift to the lawyer. Model Rule 1.8(c), cmt. [7] merely states that the client “should” have such advice.

Variations in Other Jurisdictions. Nearly every jurisdiction has adopted Model Rule 1.8(c), some with minor variations. See State Variations chart, below.

A Note on Rule Numbering. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

* Proposed Rule 1.8.3, Draft #5,1 (10/18/09).

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.3 Gifts from Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.	(a) <u>A lawyer shall not:</u> (c) ~~A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.~~	Proposed Rule 1.8.3 is based on Model Rule 1.8(c), but has been reorganized into three subparts to improve its readability.
	(1) <u>induce or solicit a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or</u>	The Commission has retained the prohibition in current California rule 4-400, which prohibits “inducing” a client gift, and has also added the Model Rule’s “solicit” standard. Together, they provide broader client protection than the Model Rule, which simply prohibits “solicitation” of a gift. In response to public comment, the Commission has removed the “attempting to induce” standard proposed in the public comment draft because it is too vague a standard for a disciplinary rule.

* Proposed Rule 1.8.3, Draft 5.1 (10/18/09).

BLUE UNDERLINE indicates that language has been added to the ABA Model Rule.

~~REDLINE STRIKEOUT~~ shows text that has been deleted from the ABA Model Rule.

~~Green STRIKEOUT~~ indicates that text from the ABA Model Rule has been moved and

Green UNDERLINE shows the new location where that language has been placed in the proposed Rule.

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.3 Gifts from Clients	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,</u>	Subparagraph (2) is taken verbatim from Model Rule 1.8(c).
	<u>unless the lawyer or other recipient of the gift is related to the client.</u>	The closing clause of paragraph (a) is taken verbatim from Model Rule 1.8(c).
	<u>(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).</u>	Rather than restate in the Rule a description of people excluded from the Rule's coverage, as does Model Rule 1.8(c), the Commission recommends including a reference to Probate Code § 21350, which includes a statutory definition of "a person who is related by blood or marriage."

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.3 Gifts from Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Gifts to Lawyers [6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).	~~Gifts to Lawyers~~ ~~[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).~~	See Explanation of Changes for Comment [1], below.
	<u>[1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. (See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)</u>	Comment [1] is based on Model Rule 1.8(c), cmt. [6], but has been substantially revised to make it more concise and provide greater clarity. In particular, the Commission has changed the example to better illustrate the point of the Comment. Reference to Supreme Court authority confirming imposition of discipline where a lawyer induces a substantial gift has been included.

<u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.3 Gifts from Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.	~~[7]~~ If ~~effectuation—of~~effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client ~~should~~<u>must</u> have ~~the detached advice that~~<u>independent representation by another lawyer can provide</u><u>in accordance with Probate Code, sections 21350 et seq.</u> The sole exception ~~to this Rule~~ is where the client is a relative of the donee.	Comment [2] is based on Model Rule 1.8, cmt. [7]. Other than changing the text of the Model Rule comment for clarity, the Commission has retained the California requirement that an unrelated client actually have independent legal representation before an attorney may draft an instrument giving a substantial gift to the lawyer. Model Rule Comment [7] merely states that the client “should” have such advice. Thus, the proposed Comment provides greater client protection.
[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.	~~[8]~~ This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest ~~provision~~<u>provisions</u> in Rule 1.7 ~~(d)—when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary.~~ In ~~obtaining the client's informed consent to~~<u>disclosing</u> the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.	Comment [3] largely tracks the language in Model Rule 1.8, cmt. [8], except it deletes an explanation of what the referenced rule 1.7 states. The Commission has not recommended the adoption of the “materially limit” standard in Model Rule 1.7, so including the description would be inaccurate. <i>Minority.</i> A minority of the Commission believes this explanation for deleting most of the second sentence from Model Rule, cmt. [2], illustrates the lack of public protection under proposed Rule 1.7(d) for conflicts described in this Comment that can materially affect a lawyer's duty of loyalty and professional judgment. Contrary to the rule in virtually every other jurisdiction, proposed Rule 1.7(d) imposes no obligation to obtain the client's consent where the lawyer seeks to have himself named or have a partner or associate in the firm named as executor, trustee or to another “potentially lucrative fiduciary position” no matter how significant the risk that the recommendation, or the appointment, will materially limit the lawyer's professional judgment. See Minority Report to proposed Rule 1.7.

Rule 1.8.3 Gifts From Client
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not:
- (1) induce or solicit a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or
 - (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client.
- (b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).
- [3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d). In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

COMMENT

- [1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal market value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)
- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent representation by another lawyer in accordance with Probate Code, sections 21350 et seq. The sole exception is where the client is a relative of the donee.

Rule 1.8.3: Gifts from Client

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.3 is highlighted.)

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

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

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

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

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

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

And Rule 4-210 provides in part as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Rule 1.8.5 [4-210]

“Payment of Personal or Business Expenses Incurred by or for a Client”

(Draft # 8, 10/6/09)

Summary: Although proposed Rule 1.8.5 addresses the same concept as Model Rule 1.8(e), i.e., placing restrictions on a lawyer paying the personal or business expenses of a client, the proposed Rule provides a more detailed statement in order to afford better client protection and protect the integrity of the legal system. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
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- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 4-210.

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

(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 _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

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:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.5* Payment of Personal or Business Expenses Incurred by or for a Client

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Although proposed Rule 1.8.5 addresses the same concept as Model Rule 1.8(e), i.e., placing restrictions on a lawyer paying the personal or business expenses of a client, the proposed Rule provide a fuller and more detailed statement in order to afford better client protection and protect the integrity of the legal system. The proposed Rule also clarifies points that are alluded to only in general terms by the Model Rule, or not at all. These include expanding the reach of the Rule to include promises made in advance and not just the lawyer's actual advancement of funds, adding a definition of "costs", limiting a lawyer's right to advance costs to those that are "reasonable", and clarifying that a lawyer may loan money to a client with certain limitation including compliance with the business transactions Rule. The proposed Rule operates to limit the risk of a conflict of interest between a lawyer and client that can result from the lawyer's heightened interest in the outcome of matter when the lawyer has advanced the costs and expenses of litigation. See Explanation of Changes for paragraph (a). The Rule also prohibits a lawyer from "purchasing" a client's loyalty by the lawyer promising loans or other remuneration to ensure that the client retains the lawyer by making clear that such promises or guarantees are prohibited, (see Explanation of Changes to paragraph (a)), and prohibiting the making of loans until after the lawyer has been retained. (See Explanation of Changes for subparagraph (a)(2).)

Variation in Other Jurisdictions. Every state has adopted a rule that places restrictions on a lawyer making loans or advancing costs and expenses to a client. Mississippi permits a lawyer to advance "reasonable and necessary medical expenses associated with the treatment of an injury giving rise to the litigation" and "reasonable and necessary living expenses." See State Variations, below.

* Proposed Rule 1.8.5, Draft #8 (10/6/08).

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	<u>Explanation of Changes to the ABA Model Rule</u>
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:	~~(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:~~	Model Rule 1.8(e) is intended to avoid several risks. First, a lawyer's promise to provide financial assistance to a client could amount to bidding for clients, which traditionally has been deemed unacceptable. Also, the lawyer's resulting financial stake could create a conflict of interest for the lawyer and interfere with the lawyer's exercise of independent professional judgment on behalf of the client. The Commission agrees with these goals, but it has rejected the Model Rule in favor of a substantially more detailed version.
	<u>(a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except that a lawyer may:</u>	Model Rule 1.8(e) prohibits a lawyer from providing financial assistance, but by its terms it is not limited to financial assistance to a client. The Commission does not believe that the risks addressed by the Rule arise when a lawyer provides financial assistance to a non-client. Paragraph (a) excludes a lawyer's assistance to non-clients. Paragraph (a) also moves the prohibition forward in time, recognizing that it is the promise to provide financial assistance and not the financial assistance itself that triggers the client solicitation concerns of the Rule. Paragraph (a) also expands the prohibition to assistance by the lawyer law firm.
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and	~~(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and~~	Model Rule subparagraph (e)(1) addresses a lawyer's advancement of court costs and of litigation expenses. The Commission has moved this topic to subparagraph (3) where it is stated more fully.

* Proposed Rule 1.8.5, Draft 8 (10/6/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	<u>Explanation of Changes to the ABA Model Rule</u>
	(1) <u>pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;</u>	There is no Model Rule counterpart to subparagraph (a)(1). It recognizes that a lawyer might be asked to use client funds, which might come under the lawyer's control in the future, to pay the client's personal or business expenses. This could happen, for example, if a lawyer agrees to pay a client's medical provider out of the recovery. Because the risks addressed by this Rule are not involved when a lawyer does so, subparagraph (a)(1) expressly permits this arrangement.
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.	(2) <u>after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the lawyer complies with Rule 1.8.1 before making the loan or agreeing to do so;</u>	There is no Model Rule counterpart to subparagraph (a)(2). The Model Rule implicitly permits a lawyer to loan money to a client. Subparagraph (a)(2) makes this explicit, and by doing so it permits reference to the business transactions Rule in order to provide guidance to lawyers in how to fulfill their duties.
	(3) <u>advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and</u>	Subparagraph (a)(3) is consistent with Model Rule 1.8(e)(1) but is stated more fully. It adds a definition of "costs" and, to eliminate a potential loophole in the Model Rule, limits costs to those that are reasonable.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	<u>Explanation of Changes to the ABA Model Rule</u>
	(24) ~~a lawyer representing an indigent client may~~ pay court costs and <u>reasonable</u> expenses of litigation on behalf of <u>an indigent or pro bono client in a matter in which the lawyer represents</u> the client.	Subparagraph (a)(4) is based on Model Rule 1.8(e)(2). As the Commission did in subparagraph (3), it limits costs to those that are reasonable. Also, it expands the provision to include pro bono clients as well as indigent clients. Lawyers should be encouraged to support pro bono clients as well as indigent clients.
	(b) <u>A lawyer does not violate this rule by offering or giving a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.</u>	The Model Rule has no counterpart to paragraph (b). Paragraph (b) is intended to avoid having a lawyer's gift to a client come within the scope of the Rule, so long as the gift was not bargained for.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Financial Assistance [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.	Financial Assistance ~~[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.~~	To provide for a more complete explanation of the Rule, and to accommodate the Commission's changes in the Model Rule, the Commission has restated the Model Rule's single Comment paragraph as three paragraphs. The proposed Rule's comment generally is consistent with the Model Rule Comment except where the proposed Rule differs in substance, as described above.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.	See above. Comment [1] is taken from Restatement (3d), Law Governing Lawyers § 33.
	[2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rule 1.8.1 and make a disclosure under Rule 1.7(d)(4) concerning the effect the proposed agreement might have on the lawyer's representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12.	See above. Comment [2] adds a reference to Rule 1.7(d)(4), which addresses a lawyer's potential conflict because of the lawyer's financial or other interest in the subject of the representation.

<u>ABA Model Rule</u> Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.	See above. Comment [3] clarifies the meaning of "costs" in order to avoid any suggestion that it is limited to taxable costs.

Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client
(Commission's Proposed Rule – Clean Version)

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

Comment

- [1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.
- [2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rule 1.8.1 and make a disclosure under Rule 1.7(d)(4) concerning the effect the proposed agreement might have on the lawyer's representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.
- [3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.

Rule 1.8.5: Payment of Personal or Business Expenses Incurred by or for a 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 1.8.5 is highlighted.)

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

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

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

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

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

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

And Rule 4-210 provides in part as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Rule 1.8.6 [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 rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

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- ☐ 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).

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

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

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

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		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)~~<u>(b)</u> there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	No change in the Model Rule language is proposed for this paragraph.
(3) information relating to representation of a client is protected as required by Rule 1.6.	~~(3)~~<u>(c)</u> information relating to representation of a client is protected as required by Rule 1.6 <u>and by Business and Professions Code section 6068(e)</u>.	<u>Revision Identifying California's Unique Confidentiality Statute.</u> Paragraph (c) identifies the duty of confidentiality as a special concern. The proposed version broadens the Model Rule's reference to Rule 1.6 to include California's unique and vital statutory duty of confidentiality.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Payments Not From Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Person Paying for a Lawyer's Services [11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).	Person Paying for a Lawyer's Services ~~[11] Lawyers are frequently~~<u>A lawyer might be asked to represent a client under circumstances in which a third</u>~~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~~<u>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</u>~~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.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Payments Not From Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (~~prohibiting concerning~~ interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).	
	[2] 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 (1) public agencies that provide legal services to other public agencies or the public, or (2) 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.

<u>ABA Model Rule</u> Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule</u> Rule 1.8.6 Payments Not From Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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 <i>San Diego Navy Federal Credit Union v. Cumis Insurance Society</i> (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under 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: 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

RRC - 3-310 1-8-7 - Compare - Introduction - DFT4 (12-14-09)KEM-ML

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

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.7 Aggregate Settlements	<u>Explanation of Changes to the ABA Model Rule</u>
		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."

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

* Redline/strikeout showing changes to the ABA Model Rule

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

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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).	

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.

<u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Rule 1.8.8 [RPC 3-400]
“Limiting Liability to Client”
(Draft #6, 10/10/09)

Summary: Proposed Rule 1.8.8 carries forward the substance of current rule 3-400 and rejects the approach in Model Rule 1.8(h)(1) that permits a lawyer to obtain a client's waiver of the lawyer's prospective malpractice liability if the client is represented by independent counsel. Otherwise, the Rule largely tracks the remainder of 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

Rule

RPC 3-400

Statute

Business and Professions 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

(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 10
Opposed Rule as Recommended for Adoption 1
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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.8* Limiting Liability to Client

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.8.8 is based on Model Rule 1.8(h), but incorporates the principles of current California Rule 3-400 on limiting liability to a client. The major difference between the proposed Rule and Model Rule 1.8(h) is found in paragraph (a) in that the proposed Rule does not have an exception for limiting prospective liability for malpractice if the client is represented by independent counsel. Paragraph (a) is more client-protective by not permitting lawyers in any circumstances to obtain prospective waivers of future malpractice claims. Paragraph (b) of the proposed Rule is substantially similar to the equivalent Model Rule paragraph. The Comments to the proposed Rule have been substantially shortened to eliminate excess verbiage that adds little to comprehension of the Rule.

The Commission concluded that its proposed Rule offers substantially more public protection than does the Model Rule and has clearer and more easily understood language. See Explanation of Changes for paragraph (a).

Variations in other Jurisdictions. Most jurisdictions have adopted Model Rule 1.8(h) without substantial change. Two states have added provisions relating to the reporting of complaints to the appropriate disciplinary authorities, a prohibition that is covered by statute in California (Business and Professions Code § 6090.5). A reference to that code section has been added to the Comment pursuant to a suggestion by the Los Angeles County Bar Association.

A Note on Rule Numbering. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 to its own separate rule number.

* Proposed Rule 1.8.8, Draft 6 (10/10/09).

<u>ABA Model Rule</u> Rule 1.8(h)	<u>Commission's Proposed Rule*</u> Rule 1.8.8	<u>Explanation of Changes to the ABA Model Rule</u>
(h) A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or	~~h)~~A lawyer shall not: <del>(1)a</del>~~make an agreement~~<u>Contract with a client</u> prospectively limiting the lawyer's liability to ~~a client for malpractice unless the client is independently represented in making for the agreement,~~<u>lawyer's professional malpractice</u>; or	Proposed paragraph (a) rejects the advance waiver of a client's possible future malpractice claim. As explained in Restatement § 54, Comment b: "Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement." In addition, a lawyer who recognizes some particular risk in a proposed representation should direct his or her efforts to explaining that to the client, not to obtaining a limitation on the lawyer's liability.
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.	~~(b)~~ <u>Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:</u> <u>(1) represented by independent counsel concerning the settlement; or</u> (2) ~~settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is~~ advised in writing ~~that~~<u>by the lawyer to seek the advice of an [independent lawyer] of the desirability of seeking</u>~~client's choice regarding the settlement~~ and is given a reasonable opportunity to seek ~~the~~<u>that</u> ~~advice of independent legal counsel in connection herewith.~~	The proposed language of paragraph (b) is substantially similar to that of the Model Rule but offers more client protection by mandating that the lawyer advise the client to seek independent counsel rather than advise of the desirability of doing so. Paragraph (b)(1) has been added in recognition that, if the client is already represented by independent counsel, the lawyer should have no duty to advise the client to seek independent counsel.

* Proposed Rule 1.8.8, Draft 6 (10/10/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(h) Comment	<u>Commission's Proposed Rule</u> Rule 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
Limiting Liability and Settling Malpractice Claims [15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.	~~[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.~~ <u>[1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling a claim or potential claim for malpractice.</u>	The Commission decided to eliminate a large amount of verbiage that added little to comprehension of the Rule.

<u>ABA Model Rule</u> Rule 1.8(h) Comment	<u>Commission's Proposed Rule</u> Rule 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
Limiting Liability and Settling Malpractice Claims [14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.	~~[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph~~<u>Rule</u><del> does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement</del><u>e.g., Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; Lawrence v. Walzer & Gabrielson (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6].</u><del> Nor does this paragraph</del><u>Rule</u><del> limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.</del>	The Commission decided to eliminate a large amount of verbiage that added little to comprehension of the Rule. The Commission added a pointer on the permissibility of entering into an agreement with the client to arbitrate a legal malpractice claim, citing cases.

<u>ABA Model Rule</u> Rule 1.8(h) Comment	<u>Commission's Proposed Rule</u> Rule 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
	[3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code § 6090.5.	This Comment was added to make certain that lawyers are aware of the statutory prohibition on agreements that purport to preclude the reporting of complaints to the State Bar.
	[4] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. (See Rule 1.2.)	This paragraph clarifies the meaning of the Rule by describing important limitations on its scope, and by reminding that Rule 1.2 allows a lawyer to limit the scope of a representation.

Rule 1.8.8 [3-400] Limiting Liability to Client
(Commission's Proposed Rule – Clean Version)

A lawyer shall not:

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

- [3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code § 6090.5.
- [4] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. (See Rule 1.2.)

COMMENT

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

Rule 1.8.8: Limiting Liability to 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 1.8.8 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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client

sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

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

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

connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

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

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

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

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

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

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

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

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(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 ...

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

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

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and

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

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

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

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

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

relations with a client.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

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

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

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

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

causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

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

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

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

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

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

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

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

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

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

Proposed Rule 1.8.9 [4-300]

“Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review”

(Draft #3, 2/09/10)

Summary: Proposed Rule 1.8.9, for which there is no Model Rule counterpart, carries forward current rule 4-300’s prohibition on lawyers’ (i) purchasing property at various legally required sales such as foreclosure, execution, receiver’s and similar sales, or (ii) representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer. Unlike the current rule, however, the proposed Rule does not regulate probate sales. 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 4-300

Statute

Probate Code §§ 9880-9885.

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 3

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 Commission's decision to remove probate sales from the scope of the current rule, under which participation in such sales is prohibited, might be viewed as lessening client protection because the Probate Code permits lawyer's participation in such sales under certain conditions.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.9* Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.8.9 prohibits lawyers' either purchasing property at various sales under legal process, such as foreclosure, execution, receiver's and similar sales, or representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer.

There is no equivalent Model Rule, but the Commission believes that such a rule is a necessary public protection device, as it has been for many years.

There is only one substantive change to the current rule that the Commission proposes. The current rule applies to probate sales as well as to other types of sales; but Probate Code sections 9880-9885 specifically allow such transactions under specified and detailed provisions including disclosure and court approval. This conflict between statute and rule has existed for a number of years. Consequently, the Commission proposes that the statute provides sufficient public protection and that therefore the Rule need not address probate sales. However, a cross reference to the pertinent Probate Code sections is provided so as to identify the issue and the statute controls for any interested parties.

Minority. This proposal will change current Rule 4-300 to permit a lawyer in a probate case to buy assets out of the estate. As set forth in more detail in the dissent to this proposal, it thereby abrogates decades of clear decisional law, will allow lawyers to take advantage of vulnerable members of the public, will promote conflicts of interest for lawyers in probate cases, and will deprive the

* Proposed Rule 1.8.9, Draft #3 (2/09/10).

INTRODUCTION (Continued):

judiciary of objective advocacy in an essential aspect of the probate process. Proposed Rule 1.7 does not cure the defects in this new proposed rule because it does not require a lawyer to obtain the informed written consent of the client or of the heirs, beneficiaries, or creditors of the probate estate, nor to assure that they obtain independent representation, before the lawyer or the lawyer's relation may purchase an asset of the estate. Thus, the proposed rules will not protect the public but will encourage harm to those interested in probate estates

A Note on the Rule Number. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each such concept its own separate rule number.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review	<u>Explanation of Changes to the California Rule 4-300</u>
	(Aa) A ~~member~~lawyer shall not directly or indirectly purchase property at a ~~probate,~~ foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member~~lawyer or any lawyer affiliated ~~by reason of personal, business, or professional relationship~~ with that ~~member or with that member's~~lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.	Since there is no comparable ABA Model Rule, this Explanation will only address changes to the existing California Rule, 4-300. The Commission believes that this Rule protects the public against self-dealing by lawyers who are performing professional functions in connection with various forms of property sales under legal processes, such as receiver's, trustee's, or judicial sales, and should be continued. The Commission is not aware of any reasons why the ABA has not addressed this subject; but it believes that the possibility for self-dealing or abuse in these situations is apparent wherever a lawyer performs professional functions concerning a public or semi-public sale under legal process. Thus, proposed Rule 1.8.9 retains virtually all of current California rule 4-300, with one significant exception. Lawyers' roles in probate sales have been regulated both by rule 4-300 and by statute (Probate Code §§ 9880-9885). The current rule completely prohibits lawyers' self-dealing (directly or indirectly through family members etc.) in such transactions; but the Probate Code allows such transactions upon court order, given after notice to all interested parties as specified in the Code. After extensive consideration whether to continue the current rule's total prohibition of that which the legislature has decided to allow with specified conditions, the Commission decided that the statutory provision afforded adequate public protection in probate sales transactions, and has deleted that part of current rule 4-300 from the proposed Rule.

* Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule</u>* Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review	<u>Explanation of Changes to the California Rule 4-300</u>
		The only other changes to part (a) are that the qualification which describes the nature of the "affiliation" which precludes participation in such a sale was eliminated as unnecessary and perhaps too limiting, and that "lawyer" was substituted for "member."
	(B) A ~~member~~<u>lawyer</u> shall not represent the seller at a ~~probate~~, foreclosure, ~~receiver~~<u>receiver's</u>, ~~trustee~~<u>trustee's</u>, or judicial sale ~~in an action or proceeding~~ in which the purchaser is a spouse ~~or~~ relative <u>or other close associate</u> of the ~~member~~<u>lawyer</u> or of another lawyer in the ~~member's lawyer's~~ law firm ~~or is an employee of the member or the member's law firm.~~ (Amended by order of Supreme Court, operative September 14, 1992.)	See Explanation of Changes for paragraph (a).
	(c) <u>This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].</u>	New paragraph (c) excepts probate sales from the Rule and cross-references the specific provision of the Probate Code. See Explanation to part (a) of this proposed rule. Paragraph (c) also adds the caveat that although probate sales might be regulated under the statute, a lawyer's participation in such transactions is still subject to other rules.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review Comment	<u>Explanation of Changes to the California Rule 4-300</u>
	[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.	Comment [1] has been added to caution lawyers that failure to comply with the conditions of the Probate Code as to probate sales is a violation of this Rule.

Proposed Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

Rules Revision Commission — Minority Dissent

This proposal will change current Rule 4-300 to permit a lawyer in a probate case to buy assets out of the estate. It thereby abrogates decades of clear decisional law, will allow lawyers to take advantage of vulnerable members of the public, will promote conflicts of interest for lawyers in probate cases, and will deprive the judiciary of objective advocacy in an essential aspect of the probate process. Proposed Rule 1.7 does not cure the defects in this new proposed rule because it does not require a lawyer to obtain the informed written consent of the client or of the heirs, beneficiaries, or creditors of the probate estate, nor to assure that they obtain independent representation, before the lawyer or the lawyer's relation may purchase an asset of the estate. Thus, the proposed rules will not protect the public but will encourage harm to those interested in probate estates.

California has always strictly prohibited an attorney from purchasing assets at a probate or other judicial sale if the attorney represents a party to the matter. This prophylactic rule is intended to remove any temptation for a lawyer to deal unfairly and is intended to protect the reputation of the legal profession. In *Eschwig v. State Bar* (1969) 1 Cal. 3d 8, 16, the Court disbarred an attorney for purchasing property that was an asset of an estate in which he was an attorney for the executrix. The Court emphasized the conflicts of interest inherent in this situation:

An attorney representing the representative of an estate is under an obligation to seek the highest possible price

on the sale of an estate asset. As a purchaser, however, he would be inclined to seek the lowest possible price. The resulting conflict of interest where the attorney becomes the purchaser is apparent. Because of the conflict of interest inherent in the situation, [former] Rule 8 is applicable even where an attorney is acting in good faith and even where there is competitive bidding. A conflict of interest exists, and is inherently more dangerous, in a sale during probate such as occurred here, because it was not public, was unknown to the court, did not involve competitive bidding, and allowed petitioner to overreach or exercise undue influence upon his client.

Id., 1 Cal. 3d at 15. Attorneys should not be allowed to purchase, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See, e.g., *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 [attorney's wife bought at judicial sale. Held act of moral turpitude and breach of fiduciary duty.]; *Sodikoff v. State Bar* (1975) 14 Cal. 3d 422 [attorney bought asset through his corporate alter ego: six months suspension].

It is astounding that the majority of the Commission recommends continuing the absolute prohibition as to foreclosure, receiver's, trustee's, or judicial sales but would permit lawyers to purchase in probate sales. In probate, the executor, executrix, administrator, heir, or beneficiary is often less able to protect herself or himself than in the other types of sales. A widow, widower,

orphan, or surviving parent may have no experience in sales of business, real property, or other assets. Often, they are unsophisticated. Particularly when a close relative, spouse, or lover has died, a normal reaction of the survivors is one of shock and pain. Often, the full emotional impact of the death is more than the survivor or survivors can tolerate, and they become dependent on their attorney to guide them through the transition. Even if the survivors would normally have the ability to exercise independent judgment, after the death of a loved one they often do not. The author of this dissent has met with surviving spouses and parents, and months later they admit that they were in such shock that they did not even remember that we met, let alone what we discussed. Nevertheless, the majority of the Commission who voted to change this rule would deprive vulnerable people of the protections of existing law but continue those protections for commercial receivership sales, foreclosure sales and the like.

Permitting attorneys in probate cases to loot estates would be inexcusable. An attorney who has the opportunity to recommend a sale of an asset and to guide the survivors in how to sell, to whom to sell, under what circumstances, and at what price, may perform a valuable service. However, an attorney who has a direct interest in the sale because he or she is a buyer is more likely to perform a huge disservice. The attorney's own financial, business, property, and personal interests will conflict with the interests of the client and with the interests of the heirs, beneficiaries, and creditors of the probate estate. The attorney may find it very difficult to set his or her personal interests aside, and those

interested in the estate will not receive advice based upon independent professional judgment. This will occur precisely when they are most vulnerable.

Particularly in probate cases, the courts are uniquely dependent upon the integrity of counsel. Many matters are unopposed, so no advocate urges that a petition for authority to sell is not in the best interests of the estate or those interested in it. Often, the personal representative has no idea what the consequences of a sale at a given price may be and is dependent on the attorney to ascertain what is in the personal representative's or the heirs' best interests. Permitting lawyers to buy assets from probate estates will impair the ability of clients to obtain independent advice and representation and will cut the courts off from advocacy by someone without a personal stake in the outcome.

The heirs, beneficiaries, and creditors of the probate estate will not adequately be protected by court procedures. For example, because the executrix trusts the attorney, she and the beneficiaries or heirs consent to the petition for approval of the sale without obtaining any independent advice. The petition comes on for an unopposed hearing before a judge who may not have time to examine the merits, let alone give attention to the lawyer's conflicts of interest.¹ Now, when a lawyer alleges in a petition that a sale is in the best interests of the estate and those beneficially interested in the estate, the probate judge can assume that the lawyer is

¹ On October 7, 2009, the San Francisco probate department heard 55 matters on its 9:00 calendar. At three minutes a case, only contested matters can receive much attention.

advocating for the executrix, heirs, and creditors and not from self interest. In the future, if proposed rule 1.8.9 is adopted, no one will be advocating for them who does not have an inherent conflict of interest. This rule will create a very substantial risk that parties to probate proceedings will be represented in the courts by attorneys who cannot give them objective advice and who cannot objectively represent them in court. When an attorney for a personal representative appears on the petition for authority to sell property, he or she will be advocating that the property should be sold to the attorney or to the attorney's relative or partner, but not to a bona fide purchaser. The attorney will be advocating what is in his or her own interest when, instead, the lawyer should be advocating what is in the best interests of the estate and those beneficially interested in it. The administration of justice will have been corrupted.

The type of transaction that would be promoted by the proposed new rule is inherently abhorrent. It will victimize clients and other members of the public who are inherently vulnerable.

Deviating from established norms of our profession is not justified by the lobbying that the probate bar did to induce the Legislature to permit lawyers to buy at a probate sale. The fact that the Legislature included permission for lawyers to buy at probate sales does not make that wrongful practice right. Probate Code section 9881 does not serve as a substitute for rules of ethics or of discipline and does not absolve the lawyer of the duty to address the significant conflicts of interest when buying from a probate estate.

The Supreme Court has inherent jurisdiction to control conduct of lawyers in probate cases. See Bus. & Prof. Code §§ 6077 & 6103. The Supreme Court can require attorneys to adhere to stricter standards than the Legislature may require. Legislative standards are only minimal standards that must be applied for discipline, and the Supreme Court retains inherent power to make its rules more strict than the Legislature requires. See, e.g., *Stratmore v. State Bar* (1975) 14 Cal. 3d 887, 889-90.

In 1990, Commission for the Revision of the Rules recommended adoption of current Rule 4-300. In its report, the Commission expressly pointed out to the Board of Governors and to the Supreme Court the conflict between that rule and then new Probate Code sections 9880 through 9885. The Commission recommended that the Supreme Court adopt Rule 4-300 because it affords clients protection from predatory lawyers in situations where clients, for emotional or other reasons, will likely have difficulty exercising independent or objective judgment. The Board of Governors and the Supreme Court agreed. That was the ethical and correct position, and it would be the ethical and correct position to take today.

The Commission should be embarrassed by proposing to enrich lawyers by blessing inherent conflicts of interest that jeopardize the public. The Board of Governors should reject this new rule.

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
(Commission's Proposed Rule – Clean Version)

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

COMMENT

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

Proposed Rule 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 rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ 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.

* 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 Rule 1.8(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 Rule 1.8(j). Comments such as “the attorney-client relationship is almost always unequal,” and that “it is unlikely a client can provide informed consent due to the ‘client’s own emotional involvement,’” appear to some 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).

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule</u>* Rule 1.8.10 Sexual Relations With Client	<u>Explanation of Changes to the ABA Model Rule</u>
(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.	(j)a A lawyer shall not ~~have~~<u>engage in</u> sexual relations with a client unless a consensual sexual relationship existed between them when the ~~client~~<u>lawyer-client</u> 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).

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule</u>* Rule 1.8.10 Sexual Relations With Client	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(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.</u>	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).

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	<u>Commission's Proposed Rule</u> Rule 1.8.10 Sexual Relations With Client Comments	<u>Explanation of Changes to the ABA Model Rule</u>
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].

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	<u>Commission's Proposed Rule</u> Rule 1.8.10 Sexual Relations With Client Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	[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., <i>Greenbaum v. State Bar</i> (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; <i>Alkow v. State Bar</i> (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; <i>Cutler v. State Bar</i> (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; <i>Clancy v. State Bar</i> (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., <i>Giovanazzi v. State Bar</i> (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; <i>Benson v. State Bar</i> (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; <i>Lee v. State Bar</i> (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; <i>Clancy v. State Bar</i> (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., <i>Magee v. State Bar</i> (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; <i>Lantz v. State Bar</i> (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.

<u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments	<u>Commission's Proposed Rule</u> Rule 1.8.10 Sexual Relations With Client Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	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).	~~[182] Sexual relationships that~~ This Rule is not applicable to ongoing consensual sexual relations which predate the client-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(ad) (2) (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.	~~[193] 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 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

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

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

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

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

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

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

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

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

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

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

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

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

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of

the client cause the lawyer to render incompetent representation.

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

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

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains

ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Rule 2.4 [n/a] “Lawyer as Third-Party Neutral”

(Draft #7, 9/13/07)

Summary: Proposed Rule 2.4, which closely tracks Model Rule 2.4, applies to lawyers when they serve as third party neutrals.

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

Statute

Case law

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

☒ Other Primary Factor(s)

Judicial Council Standards for Mediators in Court Connected Mediation Programs; Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total)

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/Not Voting 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:

ADR Services, Inc., Alternative Resolution Centers, California Dispute Resolution Council, California Judges Association, JAMS, Judicate West, NASD, NYSE, State Bar Committee on Alternative Dispute Resolution, State Bar of California

☒ Very Controversial – Explanation:

Stakeholders maintain that the services they provide are not the practice of law and therefore, the State Bar should not regulate third party neutral lawyers. See Introduction, ¶¶. 2 & 3. See also Comment [4] to proposed Rule & Explanation of Changes to Comment [4].

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.4* Lawyer as Third-Party Neutral

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 2.4 substantially follows ABA Model Rule 2.4, except that the Rule has been modified to emphasize that it applies to “neutral” arbitrators but not to “party” arbitrators, whose duties are different. See Explanation of Changes for paragraph (a). In addition, a few changes have been made to conform the Rule to current California law, and to reference the State Bar Act, where appropriate.

A minority of the Commission believes that Rule 2.4 should go further in providing a means by which the State Bar can discipline lawyers who engage in misconduct while acting as a third party neutral, whether through appointment by a court or by agreement of the parties. In light of the reality that many lawyers in California now provide services as third party neutrals, either in supplement to or in place of their traditional services, the public comment version of the Rule tracked Model Rule 2.4 but also incorporated by reference selected provisions of the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Thus, under the public comment version of the proposed rule, a lawyer serving as a third party neutral would have been subject to discipline for violating any of the selected standards incorporated in the rule. The Judicial Council standards selected by the Commission included provisions addressing conflicts of interest, confidentiality, ex parte communication and other standards that the Commission believed were relevant to the particular context of a lawyer, as opposed to a non-lawyer, serving as a third party neutral. The Commission's regulatory strategy of setting a lawyer disciplinary standard by incorporating by reference provisions found outside of the Rules of Professional Conduct was based on current California rules 1-700 and 1-710, both of which both incorporate by reference selected provisions of the Code of Judicial Ethics.

* Proposed Rule, Draft 7 (9/13/07)

INTRODUCTION (Continued):

Nearly all of the public comment received opposed the Commission's approach of incorporating Judicial Council standards as disciplinary rules. Following consideration of the public comment and presentations at Commission meetings made by several of the commentators, the Commission voted to delete those portions of the proposed rule that would incorporate the Judicial Council standards as disciplinary rules. In taking this action, the Commission considered alternate approaches of: (1) "codifying" in the rule itself, the language of the selected standards; and (2) restructuring the rule, along the lines of California's current trust accounting rule 4-100, to include an enabling provision authorizing the Board to adopt standards for regulating lawyer conduct when acting as a third-party neutral. Neither option garnered the support of a majority of the Commission members. In addition, concerns about the practical obstacle of statutory mediation confidentiality would have persisted even under these alternatives to formulating a broader rule.

Minority. A minority of the Commission believes that incorporating by reference the Judicial Council standards, as was done in earlier drafts of proposed Rule 2.4, is the appropriate approach to regulating conduct of lawyers serving as neutrals, and that it would provide better public protection. The minority also points out that virtually all of the public comment that opposed the original version of the rule came from individuals or entities offering commercial ADR services, or from professional organizations which represent the interests of such individuals or entities.

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral	<u>Commission's Proposed Rule*</u> Rule 2.4 Lawyer as Third-Party Neutral	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.	(a) A lawyer serves as a third-party neutral when the lawyer ~~assists~~<u>is engaged to assist impartially</u> two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as ~~an~~<u>a neutral</u> arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.	This section is nearly identical to the corresponding Model Rule 2.4(a). Changes have been made to clarify that this Rule is applicable only when the lawyer is acting as a <i>neutral</i> arbitrator. Party arbitrators owe different duties to the parties that have retained them and should not necessarily be subject to the same standards as neutral arbitrators.
(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.	(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.	This section is identical to ABA Model Rule 2.4(b).

* Proposed Rule 4.2, Draft 7 (9/13/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.	[1] Alternative dispute resolution has become a substantial part of the civil justice system. <u>Aside</u> from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. <u>A</u> third-party neutral is a person, such as a mediator, <u>neutral</u> arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. <u>Whether</u> a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.	Comment [1] is nearly identical to comment [1] to Model Rule 2.4. The word "neutral" has been added to emphasize that the Rule applies when a lawyer is acting as an <i>impartial</i> neutral. See Explanation of Changes for paragraph (a).
[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.	[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. <u>In</u> performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the ~~Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.~~ <u>Judicial Council</u>	Comment [2] is identical to Model Rule 2.4, cmt. [2], except that the standards applicable to lawyers acting as third party neutrals in California have been substituted in place of the corresponding ABA standards.

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.</u>	
[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.	[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.	Comment [3] is identical to Model Rule 2.4, cmt. [3].

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. <i>In re Scott</i> (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is intended to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.	Comment [4] has no counterpart in Model Rule 2.4. It has been added to emphasize the California Supreme Court's authority to regulate lawyers when acting as third party neutrals, regardless of whether such conduct constitutes the practice of law.
[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.	~~[4][5] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. <i>Cho v. Superior Court</i> (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)~~	~~The second sentence of Model Rule 2.4, cmt. [4], has been deleted and replaced with a reference to California case law relating to when a former third party neutral is precluded from accepting a later representation of one of the parties because of a conflict of interest. Comment [5] is identical to Model Rule 2.4, cmt. [4].~~

<u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment	<u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.	~~[5]~~^[6] Lawyers who represent clients in alternative dispute-resolution processes are governed by ~~the~~^{these} ~~Rules of Professional Conduct and the State Bar Act. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.~~	Comment [6] is identical to Model Rule 2.4, cmt. [5], except that it references the Rules of Professional Conduct and the State Bar Act generally, rather than Model Rules 1.0(m) and 3.3.
	^[7] <u>Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.</u>	Comment [7] has no counterpart in Model Rule 2.4. This Comment has been added in recognition that the conduct of lawyers who serve as third party neutrals may also be subject to other regulation.
	^[8] <u>This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.</u>	Comment [8] has no counterpart in Model Rule 2.4. The comment has been included to reference proposed Rule 2.4.1 and clarify that when lawyers act as temporary judges, referees, or court-appointed arbitrators, Rule 2.4.1, and not this Rule, applies.

Rule 2.4 Lawyer as Third-Party Neutral

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

- [1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, neutral arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.
- [2] The role of a third-party neutral is not unique to lawyers, although, in some court connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the

lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

- [3] Unlike non lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.
- [4] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. *In re Scott* (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is

not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is intended to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.

- [5] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.
- [6] Lawyers who represent clients in alternative dispute resolution processes are governed by these Rules and the State Bar Act.
- [7] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.
- [8] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4: Lawyer as Third-Party Neutral

STATE VARIATIONS

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

New York has no counterpart to ABA Model Rule 2.4 in its Disciplinary Rules, but New York's EC 5-20 provides as follows:

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity after disclosing such present or former relationships. A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.

South Carolina: Rule 2.4 adds a new subparagraph (c) that permits a lawyer to serve as a neutral only if the lawyer or law firm does not represent (and has not previously represented) any party in the matter.

Tennessee: Rule 2.4 defines the circumstances under which a lawyer may act as a "dispute resolution neutral," the limitations on a lawyer who assumes that position, the circumstances under which the lawyer must withdraw from the position, and the lawyer's responsibilities following withdrawal. The rule and its comment are much more extensive than Model Rule 2.4.

Virginia: Long before the ABA adopted Model Rule 2.4 in 2002, Virginia adopted its (own Rule 2.10 (Third Party Neutral) and Rule 2.11 (Mediator), which provide as follows:

Virginia Rule 2.10 Third Party Neutral

(a) A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.

(b) A lawyer who serves as a third party neutral

(1) shall inform the parties of the difference between the lawyer's role as third party neutral and the lawyer's role as one who represents a client;

(2) shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and

(3) may encourage and assist the parties in reaching a resolution of their dispute; but

(4) may not compel or coerce the parties to make an agreement.

(c) A lawyer may serve as a third party neutral only if the lawyer has not previously represented and is not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding....

(g) A lawyer who serves as a third party neutral shall not charge a fee contingent on the outcome of the resolution proceeding.

(h) This Rule does not apply to joint representation, which is covered by Rule 1.7.

Virginia Rule 2.11 Mediator

(a) A lawyer-mediator is a third party neutral (see Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

(b) Prior to agreeing to mediate and throughout the mediation process a lawyer-mediator should reasonably determine that:

(1) mediation is an appropriate process for the parties;

(2) each party is able to participate effectively within the context of the mediation process; and

(3) each party is willing to enter and participate in the process in good faith.

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by

legal counsel about the importance of reviewing the lawyer-mediator's legal information with legal counsel.

(d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties....

Proposed Rule 2.4.1 [RPC 1-710] “Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator”

(Draft #5, 6/23/07)

Summary: Proposed Rule 2.4.1 carries forward current California Rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics, when they act as temporary judges, etc.

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 1-710.

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)

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 0

Abstain/Not Voting 1

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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.4.1* Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 2.4.1 has no ABA Model Rule counterpart. This Rule currently exists as California Rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics when they act as temporary judges, referees, or court-appointed neutrals. The Rule also requires compliance with Canon 6D, and provides a disciplinary path for lawyers who violate the Canon.

Current Rule 1-710 originated from a Supreme Court request sent to the State Bar in 1996, following the Supreme Court's consideration of a report and recommendation of the Supreme Court Advisory Committee on Judicial Ethics, the body which drafted the CA Code of Judicial Ethics that became effective on January 15, 1996. In drafting that Code, the Advisory Committee determined that while standards could be imposed on lawyers serving as temporary judges, the Commission on Judicial Performance lacked disciplinary jurisdiction over the conduct of lawyers. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline lawyers who violate Canon 6D while acting in a judicial capacity. In response to the Supreme Court's request, Rule 1-710 was developed and adopted by the Board of Governors and subsequently approved by the Supreme Court.

* Proposed Rule 2.4.1, Draft 5 (6/23/07).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-710)	<u>Commission's Proposed Rule*</u> Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator	<u>Explanation of Changes to the California Rule of Professional Conduct</u>
A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.	A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.	There is no ABA Model Rule counterpart to proposed Rule 2.4.1. This Rule currently appears as California Rule 1-710, and the Commission recommends that it be carried over into the new rules. The Commission recommends only a few changes be made to current rule 1-710 to conform to California rule drafting style.

* Redline/strikeout showing changes to the ABA Model Rule

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-710)	<u>Commission's Proposed Rule*</u> Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator Comment	<u>Explanation of Changes to the California Rule of Professional Conduct</u>
This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.	[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.	Comment [1] is based on paragraph 1 of the Discussion to current rule 1-710. The only substantive change recommended is the expansion of the comment to make clear the rule covers lawyers acting in "quasi-judicial" capacities as well as acting as temporary judges.
Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative March 18, 1999.)	[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.	Comment [2] is based on paragraph 2 of the Discussion to current rule 1-710. The Commission recommends that it be carried over into the new rule. No substantive changes are recommended to comment [2].
	[3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.	Comment [3] is a new comment, and has been included to cross-reference new Rule 2.4 relating to lawyers who are acting as third party neutrals.

* Redline/strikeout showing changes to the ABA Model Rule

Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator (Commission's Proposed Rule – Clean Version)

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

COMMENT

- [1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court.
- [2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.
- [3] This Rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See Rule 2.4.

Proposed Rule 3.1 [3-200]

“Meritorious Claims and Contentions”

(Draft #5, 10/3/09)

Summary: Proposed Rule 3.1 imposes discipline on a lawyer for bringing or continuing frivolous claims, etc. It is nearly identical to Model Rule 3.1 but makes minor wording changes to insure a broader coverage for the Rule, and for clarity.

Comparison with ABA Counterpart

Rule

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 3-200.

Statute

Case law

Zamos v. Stroud, (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54].

- ☐ 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 _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

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:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.1* Meritorious Claims and Contentions

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 3.1 Proposed Rule 3.1 imposes discipline on a lawyer for bringing or continuing frivolous claims, etc. It is nearly identical to Model Rule 3.1 but makes minor wording changes to insure a broader coverage for the Rule and for clarity. See Explanation of Changes for the Rule.

Variation in Other Jurisdictions. See Explanation of Changes for the Rule.

* Proposed Rule, Draft 5 (10/3/09).

<u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions	<u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.	(a) A lawyer shall not bring, <u>continue</u> or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. (b) A lawyer for the defendant in a criminal proceeding, or <u>for</u> the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.	Proposed Rule 3.1 is based on Model Rule 3.1, with only minor changes to broaden the rule's scope and to provide clarity. The addition of the word "continue" in paragraph (a) is intended to ensure broad coverage in the public interest. See also <i>Zamos v. Stroud</i> (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54]. The division of the Rule into two paragraphs and the addition of the word "for" in paragraph (b) is for clarity. <u>Variation in other Jurisdictions:</u> Most states follow the Model Rule verbatim. A number of other jurisdictions have divided the Model Rule into two paragraphs as the Commission recommends. E.g., Montana, Wisconsin, and Wyoming. One state has taken the opposite tack and reduced the two sentences of the Model Rule to a single sentence. See Oregon Rule 3.1. Wyoming adds a third paragraph that parallels the substance of FRCP 11(b), concerning the legal effect of a lawyer's signing a pleading, motion or other court document. The Commission is not aware of any other jurisdiction that has added "continue" to its rule. New Jersey has not adopted the second sentence of MR 3.1. Several states elaborate on the word "incarceration," adding or substituting such phrases as "or commitment" (North Dakota), "involuntary institutionalization" (D.C.), or "deprivation of liberty" (Wisconsin).

* Proposed Rule, Draft 5 (10/3/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.	[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.	Comment [1] is identical to Model Rule 3.1, cmt. [1].
[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith	[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith	Comment [2] is based on Model Rule 3.1, cmt. [3]. The added language clarifies that the Proposed Rule is consistent with the provisions of the State Bar Act and other law.

* Proposed Rule, Draft 5 (10/3/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions Comment	<u>Explanation of Changes to the ABA Model Rule</u>
argument for an extension, modification or reversal of existing law.	argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Code of Civil Procedure section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.	
[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.	[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.	Comment [3] is identical to Model Rule 3.1, cmt. [1].
	[4] This Rule is intended to apply to proceedings of all kinds, including appellate and writ proceedings.	Comment [4] has no counterpart in the Model Rule. It reinforces the intended broad scope of this Rule.

Rule 3.1 Meritorious Claims and Contentions (Commission's Proposed Rule – Clean Version)

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

Comment

- [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
- [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital

evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Civil Procedure Code section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

- [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.
- [4] This Rule applies to proceedings of all kinds, including appellate and writ proceedings.

Rule 3.1 Meritorious Claims and Contentions

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 generally tracks ABA Model Rule 3.1, but the “unless” clause in the first sentence applies if there is a “good faith” basis in law and fact, which “may include” a good faith “and nonfrivolous” argument for an extension, modification, or reversal of existing law.

California: Rule 3-200 provides:

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Also, California Business & Professions Code §6068(c) states that an attorney has a duty to “counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.” In addition, California Civil

Code §§ 128.5, 128.6, and 128.7 provide sanctions for bad faith lawsuits and for frivolous litigation tactics.

Colorado: Rule 1.2(c) permits a lawyer to “provide limited representation to pro se parties...,” but Rule 11(b) of the Colorado Rules of Civil Procedure provides as follows:

Limited Representation

... Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number.... The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts....

Merely “helping to draft the pleading or paper filed by the pro se party” constitutes a certification by the attorney that the pro se client's document is “(1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney... and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

District of Columbia: The second sentence of Rule 3.1 provides that a lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in “involuntary institutionalization, shall, if the client elects to go to trial or to a contested factfinding hearing, nevertheless so defend the proceeding as to require that the government carry its burden of proof.”

Georgia rejects ABA Model Rule 3.1 and instead retains the language of DR 7-102(A)(1) and (A)(2) from the ABA Model Code of Professional Responsibility.

Montana: Rule 3.1 forbids a lawyer from asserting a claim or defense unless the lawyer has first determined “through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated.” Also, a lawyer may not make a claim or defense “for the purpose of harassment, advancement of a non-meritorious claim, or solely to gain leverage.”

New Jersey adds “the lawyer knows or reasonably believes” after “unless” in the first sentence and adds “or the establishment of new law” at the end of the first sentence.

New York: DR 7-102(A) provides that in representing a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except... if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

North Dakota: The second sentence of Rule 3.1 applies to a proceeding that could result in incarceration “or commitment.”

Texas: Rule 3.01 ends after the word “frivolous” in the first sentence.

Wyoming divides ABA Model Rule 3.1 into paragraphs (a) and (b), and adds the following new paragraph (c):

The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase, in the cost of litigation.

Proposed Rule 3.10 [5-100]

“Threatening Criminal, Administrative, or Disciplinary Charges”

(Draft #4, 8/12/08)

Summary: This Rule will repeat the substance of existing California Rule of Professional Conduct 5-100. There is no model rule counterpart. The Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. It reflects California disciplinary decisions that preceded the adoption of the 1975 Rules of Professional Conduct and has also been applied in civil cases. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
☐ ABA Model Rule substantially adopted ☐ ABA Model Rule substantially rejected ☐ Some material additions to ABA Model Rule ☐ Some material deletions from ABA Model Rule ☒ No ABA Model Rule counterpart	☐ ABA Model Rule substantially adopted ☐ ABA Model Rule substantially rejected ☐ Some material additions to ABA Model Rule ☐ Some material deletions from ABA Model Rule ☒ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rules

RPC 5-100

Statute

Case law

See, e.g., Lindenbaum v. State Bar (1945) 26 Cal. 2d 565; *Libarian v. State Bar* (1952) 3 Cal. 2d 328; and *Arden v. State Bar* (1959) 52 Cal. 2d 310; *Bluestein v. State Bar* (1974) 13 Cal. 3d 162; *Kinnamon v. Staitmen & Snyder* (1977) 66 Cal. App. 893; *Crane v. State Bar* (1981) 30 Cal. 3d 117; *In the Matter of Rodriguez* (Rev. Dept. 1993) 2 State Bar Ct. Rptr. 480.

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

☒ Other Primary Factor(s)

Threats to present criminal, administrative, or disciplinary complaints in order to gain an advantage in a civil dispute have long been prohibited by decisional law in this State. A Rule of Professional Conduct should memorialize the substance of those decisions so that lawyers have clear notice that such conduct is prohibited. Repealing the existing rule would incorrectly suggest that such conduct would be permissible in the future.

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 10
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:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.10* Threatening Criminal, Administrative, or Disciplinary Charges*

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 3.10 is based on current California Rule 5-100, which makes a lawyer subject to discipline and civil liability for threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. That rule is based on 1975 California Rule of Professional Conduct 7-104. That, in turn, was based on American Bar Association Disciplinary Rule 5-105(a). Both the current and proposed Rule reflect California disciplinary decisions that preceded the adoption of the 1975 Rules of Professional Conduct. See, e.g., *Lindenbaum v. State Bar* (1945) 26 Cal. 2d 565; *Libarian v. State Bar* (1952) 3 Cal. 2d 328; *Arden v. State Bar* (1959) 52 Cal. 2d 310. The current rule and predecessors have also been applied in civil cases. See, e.g., *Kinnamon v. Staitmen & Snyder* (1977) 66 Cal. App. 893. The current American Bar Association Model Rules contain no counterpart to this rule. The Commission decided to retain the substance of the existing California Rule and to expand the Comment to describe its scope.

The current California Rule applies regardless of whether there is a civil action pending. A threat made before a formal civil action has been commenced also comes within the rule.

The Commission published for public comment a proposed expansion of Comment [2] that would have outlined the application of the Rule to proposed release-dismissal agreements in which prosecutors might agree to drop criminal charges in exchange for a defendant's agreement not to pursue a civil complaint against arresting officers or a government entity. The comments and criticisms regarding that proposed expansion were to the effect that it would give too much authority to prosecutors. The Commission rescinded most of that proposal in light of the comments.

* Proposed Rule 3.10, Draft 4 (8/12/08).

INTRODUCTION (Continued):

The Commission's conclusion was that the applicability of the rule to that process should play out on a case by case basis in light of the facts. As a result of the deletion of most of the proposed language, the only expansion of proposed Comment [2] exempts from the rule an offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78, and the comments on this subject became moot.

Variation in Other Jurisdictions. Most states do not have a rule similar to existing California Rule 5-100. Colorado, South Carolina, Virginia, the District of Columbia, Louisiana, and Maine have similar rules. Hawaii, Idaho, Connecticut, Georgia, New Jersey, and Tennessee limit their rules to threats of criminal charges and do not include threats of criminal or disciplinary charges.

Minority. A minority of the Commission recommends against adoption of proposed Rule 3.10 for the reasons the ABA omitted such a rule from the Model Rules in 1983. The drafters of the Model Rules viewed a similar prohibition in former ABA Model Code DR 7-105(A) (1969), on which California Rule 5-100 is based, as overly broad and unnecessary. Threats of criminal prosecution or administrative charges that amount to extortionate conduct under the law are adequately covered under proposed Rule 8.4(b) which expands on Model Rule 8.4(b). Proposed Rule 3.10 is considerably broader than the rule in the few states that retain the earlier ABA Model Code rule which is limited to threats of criminal prosecution. What constitutes a "threat" under the proposed rule is incapable of adequate definition to inform lawyers in advance what conduct is prohibited. As drafted, the proposed Rule would unreasonably impede legitimate negotiation tactics in criminal and civil matters. There is no showing of a need to depart from the Model Rules by having a separate rule that prohibits extortionate conduct in addition to proposed Rule 8.4, which regulates lawyer misconduct.

<u>California Rule 5-100</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges	<u>Explanation of Changes to Current California Rule 5-100</u>
(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.	(Aa) A ~~member~~lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.	Because there is no Model Rule similar to existing California Rule of Professional Conduct 5-100, the comparisons in this table are to the existing California rule. The Commission changed “member” to “lawyer” to track the Model Rule’s convention of referring to lawyers rather than to members.
(B) As used in paragraph (A) of this rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.	(Bb) As used in paragraph (Aa) of this ~~rule~~Rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.	Proposed paragraph (b) is identical to current rule 5-100(B), except that the reference to paragraph (a) is now lower case, and the word “rule” has been capitalized.

* Proposed Rule 3.10, Draft 4 (8/12/08). Redline/strikeout showing changes to the current California Rule (no ABA Model Rule counterpart)

<u>California Rule 5-100</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges	<u>Explanation of Changes to Current California Rule 5-100</u>
(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.	(C) As used in ~~paragraph (A) of this rule~~Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.	Proposed paragraph (c) is substantially the same as existing California Rule 5-100(C). The definition of "civil dispute" will now apply to all parts of the proposed new Rule.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges Comment	<u>Explanation of Changes to the California Rule 1-710</u>
	<u>[1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. (See, e.g., <i>Crane v. State Bar</i> (1981) 30 Cal.3d 117 [177 Cal.Rptr 670].) A statement that the lawyer will pursue "all available legal remedies," or words of similar import, by itself does not violate this Rule.</u>	Comment [1] is new and does not appear in current California rule 5-100. The Commission added this comment in order to describe the scope of the proposed Rule and to make clear that whether a lawyer's statement violates the Rule depends on the facts and circumstances in which the statement is made. The limitations on the scope of the Rule stated in the proposed Comment are consistent with existing California law. For example, current California rule 5-100 only prohibits threatening criminal or similar charges to gain an advantage in a civil dispute. Actually filing such charges is not prohibited, even if doing so is for the purpose of gaining an advantage in a civil dispute. See, e.g., Los Angeles County Bar Association Formal Opinion 469 (1993).

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges Comment	<u>Explanation of Changes to the California Rule 1-710</u>
Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.	[2] <u>This Rule 5-100 is does not intended to apply to (i) a member's threatening threat to initiate contempt proceedings against a party for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78.</u>	This Comment, which is based on the first Discussion paragraph to current rule 5-100, has been reworded to make it active voice and to clarify that the Rule do not apply in two situations. The first exception is substantially the same as in current rule 5-100. The second exception is to make clear that, if a person has been injured by an act constituting a misdemeanor, and that person has a remedy by a civil action, a prosecutor may offer to compromise the misdemeanor action in accordance with Penal Code sections 1377-78 without fear of violating this Rule. The version of this Rule circulated for public comment contained a more lengthy description of circumstances in which release-dismissal agreements in criminal cases might or might not violate this Rule. However, the Commission deleted most of those sentences in light of adverse public comment.
Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.	[3] Paragraph (B) ~~is intended to exempt~~ <u>exempts</u> the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.	Comment [3] is substantially the same as the second paragraph of the Discussion in current rule 5-100. The Comment now affirmatively states the exemption instead of couching it in terms of the intent of the drafters.
For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.	~~For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.~~	The Commission recommends deleting the last Discussion paragraph of current rule 5-100 as unnecessary. Proposed paragraph (c) of the Rule expressly refers to a "potential controversy," thereby obviating this paragraph.

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges (Commission's Proposed Rule – Clean Version)

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

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

- [2] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78.
- [3] Paragraph (b) exempts the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

Comment

- [1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil

STATE VARIATIONS – CA RULE, NO ABA COUNTERPART

California Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

Jurisdictions with provisions similar to California:

Colorado

[Rule 4.5\(a\)](#) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

South Carolina

[Rule 4.5](#) A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.

Virginia

[Rule 3.4\(i\)](#) [A lawyer shall not] Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

District of Columbia

[Rule 8.4\(g\)](#) [It is professional misconduct for a lawyer to] Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Louisiana

Rule of Professional Conduct 8.4(g) [It is professional misconduct for a lawyer to] Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

Maine*

Rule 3. Code of Professional Responsibility. 3.6 Conduct During Representation. (C) Threatening Prosecution. A lawyer shall not present, or threaten to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter.

*This rule is no longer effective. The Maine Rules of Professional Conduct (which follow the ABA numbering system and do not include a specific provision on threatening to present charges) became effective on 8/1/2009.

Jurisdictions with provisions relating only to threats of criminal charges:

Hawaii – [Rule 3.4\(i\)](#)

Idaho - [Rule 4.4\(a\)\(4\)](#)

Connecticut – [Rule 3.4\(7\)](#)

Georgia – [Rule 3.4\(h\)](#)

New Jersey – [Rule 3.4\(g\)](#)

Tennessee – [Rule 4.4\(b\)](#)

Other Resources:

ABA Article, [Making Threats](#), (October 2008), discussing history of prohibition against threats and state bar rules and ethics opinions on the subject. Note: some rule citations no longer effective and/or amended.

[ABA Formal Opinion 92-363](#) *Use of Threats of Prosecution in Connection with a Civil Matter* (1992).

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 rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ 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 does 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.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;	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., <i>Batt v. City and County of San Francisco</i>, 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. <u>Minority</u>. 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, <i>Schaefer v. State Bar</i>, 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

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
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, <u>unless disclosure is prohibited by Business and Professions Code section 6068(e)</u>. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false; <u>or</u>	
	<u>(4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.</u>	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~~ <u>extent permitted by Business and Professions Code section 6068(e)</u>.	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 <u>or the representation, whichever comes first</u>	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)

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
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). <u>Minority.</u> 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.

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

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule ~~1.0~~<u>1.0.1</u>(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~~ <u>However</u>, 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~~<u>make</u> false statements of law or fact or <u>present</u> evidence that the lawyer knows to be false.	The first two sentences in Comment [2] are identical to the Model Rule counterpart. The third sentence in Model Rule Comment [2] is deleted because the lawyer's duty of confidentiality under Business and Professions Code § 6068(e) is not qualified by the lawyer's duty of candor to the tribunal. The final sentence is the same as the ABA counterpart, except for several grammatical changes and to clarify that the lawyer's obligation is to not make false statements of law or fact or present evidence the lawyer knows to be false rather than ensuring that the tribunal will not be misled.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Representations by a Lawyer [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).	Representations by a Lawyer [3] ~~An advocate~~A lawyer is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of ~~matters~~the facts asserted therein, ~~for because~~ litigation documents ordinarily present assertions of fact by the client, or ~~by someone on the client's behalf~~a witness, and not ~~assertions~~ by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. (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 clearer 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.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Legal Argument [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.	Legal Argument [4] ~~Legal argument based on 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~~<u>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</u> a ~~duty~~lawyer to disclose directly adverse <u>and legal</u> authority in the controlling jurisdiction <u>that is known to the lawyer and</u> that has not been disclosed by the opposing party. ~~The underlying concept is that legal argument is a discussion seeking to determine~~ <u>Legal authority in the controlling jurisdiction may include legal premises properly applicable</u> 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.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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</u>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 Commission recommends deletion of the second sentence of Comment [5], which simply explains the rationale underlying all the rules in the third chapter but does not provide guidance as to this specific Rules application. The rationale underlying the entire chapter should not be relegated to a comment in a single rule. 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	[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. <u>With respect to criminal defendants, see comment [7].</u> If only a portion of a	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 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

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.	witness's testimony will be false, the lawyer may call the witness to testify but may not elicit ~~or otherwise permit the witness to present~~ the testimony that the lawyer knows is false <u>or base arguments to the trier of fact on evidence known to be false.</u>	lawyer may not base arguments to the trier of fact on the evidence known to be false. Second, the clause, "or 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. <i>Minority.</i> 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 a witness or to give a narrative statement if criminal defendant insists on testifying, and the accused so desires, even if counsel~~<u>lawyer</u> knows that the testimony ~~or statement~~ will be false. ~~The obligation of the advocate under~~<u>lawyer may offer</u> the ~~Rules~~<u>testimony in a narrative form if the lawyer made</u>	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.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>reasonable efforts to dissuade the client from the unlawful course of ~~Professional Conduct is~~conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. (Business and Professions Code section 6068(d); <i>People v. Guzman</i> (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467]; <i>People v. Johnson</i> (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; <i>People v. Jennings</i> (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; <i>People v. Brown</i> (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to ~~such requirements. See also Comment [9]~~applicable constitutional provisions.</u>	The third sentence adds a reference to the State Bar Act, which also regulates a lawyer's conduct before tribunals. The reference to Comment [9] has been deleted because the Commission recommends deletion of Model Rule 3.3, cmt. [9].
[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	~~[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~~	Model Rule Comment [9] has been deleted because it does not provide useful guidance and is not consistent with current California law.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].	~~false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~	
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	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~~ <u>The lawyer's</u> proper course is to remonstrate with the client confidentially, advise the client of the <u>consequences of providing perjured testimony and of the</u> lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements	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

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

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(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).</u>	Comment [10] has no Model Rule counterpart and is intended to provide guidance on what constitutes "reasonable remedial measures" under paragraphs (a)(3) and (b).
	<u>[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.</u>	Comment [11] has no Model Rule counterpart and is intended to clarify that the obligation to take "reasonable remedial measures" under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question and that the duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to investigate or represent a person concerning that person's conduct in the prior proceeding.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Preserving Integrity of Adjudicative Process [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Preserving Integrity of Adjudicative Process [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence <u>relating to the proceeding</u> or failing to disclose information to the tribunal when required by law to do so. <u>See Rule 3.4.</u> Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, ~~including disclosure if necessary,~~ whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Comment [12] is identical to its Model Rule counterpart, except that it clarifies that "other evidence" referred to in the comment is evidence relating to the proceeding. It adds a cross-reference to Rule 3.4. The Comment deletes the phrase "including disclosure if necessary" for the reasons explained in the changes to paragraphs (a)(3) and (b).
Duration of Obligation [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.	Duration of Obligation [13] ~~A~~<u>Paragraph (c) establishes a</u> practical time limit on the obligation to rectify false evidence or false statements of law and fact ~~has to be established. The~~ <u>Either the conclusion of the proceeding is or of the representation provides</u> a reasonably definite point for the termination of the ~~obligation~~<u>mandatory obligations under this Rule.</u> A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time	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.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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 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.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward The Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	<u>remedial measures</u>. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in ~~such an extreme~~ deterioration of the client-lawyer relationship <u>such</u> that the lawyer can no longer competently <u>and diligently</u> represent the client, <u>or where continued employment will result in a violation of these Rules</u>. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. ~~In connection~~ <u>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</u> 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

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)

California. In presenting a matter to a tribunal, a member:

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

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

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

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

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

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

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

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

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

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

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

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

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

Florida: Rule 3.3 provides that a lawyer shall not

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Knowingly use perjured testimony or false evidence.

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

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

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

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

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

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

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

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

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

Ohio: Rule 3.B(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 of 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)

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

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact

is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

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

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

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

Proposed Rule 3.4 [5-200(E)][5-220][5-310(A)] “Fairness to Opposing Party and Counsel”

(Draft #6, 09/19/09)

Summary: Proposed Rule 3.4 describes litigation abuses that threaten the goal of the fair administration of justice that is intended to provide a level playing field. The proposed Rule generally tracks Model Rule 3.4, supplemented by provisions from current California rules 5-200, 5-220, and 5-310.

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

Rules 5-220, 5-310

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 11

Opposed Rule as Recommended for Adoption 0

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:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.4* Fairness To Opposing Party And Counsel

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 3.4 describes litigation abuses that threaten the goals of the fair administration of justice that is intended to provide a level playing field. The proposed rule generally tracks ABA Model Rule 3.4, supplemented by provisions in current California rules 5-200, 5-220, and 5-310.

Proposed Rule 3.4 omits all or part of Model Rule 3.4(d), (e) and (f), as well as the comment paragraphs associated with those provisions. The Commission believes that adoption of those provisions would chill legitimate advocacy and be inconsistent with legislative policy regarding discovery.

Variations in Other Jurisdictions. Twelve states have revised the substance of ABA Model Rule 3.4. (See State Variation Chart.)

* Proposed Rule 3.4, Draft 6 (9/19/09).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;	A lawyer shall not: (a) unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;	Paragraph (a) is identical to Model Rule 3.4(a).
	(b) <u>suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;</u>	Paragraph (b) carries forward current rule 5-220; it does not have a counterpart in the Model Rule. Retaining the concept of rule 5-220 adds a layer of public protection by prohibiting suppression of evidence. Paragraph (b) makes specific what might be implied by paragraph (a), thus eliminating the possibility of confusion. See also paragraph (d), below.¹
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;	(b) falsify evidence, <u>or</u> counsel or assist a witness to testify falsely, ~~or offer an inducement to a witness that is prohibited by law;~~	Paragraph (c) tracks Model Rule 3.4(b), except the concept of offering an unlawful inducement to a witness has been moved to another paragraph dealing with conduct toward witnesses. (See paragraph (e) below.)

* Proposed Rule 3.4, Draft 6 (9/19/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
	(d) <u>advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;</u>	Paragraph (d) carries forward current rule 5-310(A); it does not have a Model Rule counterpart. Retaining the concept of rule 5-310(A) adds a layer of public protection by prohibiting a lawyer from advising or causing a person to be unavailable, which is a subset of evidence obstruction and suppression. Paragraph (d) makes specific what might be implied by paragraph (a), thus eliminating the possibility of confusion. See also paragraphs (a) and (b), above.²
	(e) <u>offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:</u>	Paragraph (e) melds ABA Model Rule 3.4(b)'s concept of "offer[ing] an inducement to a witness that is prohibited by law. . ." with current rule 5-310(B)'s prohibitions concerning witness compensation that are not found in the Model Rule.
	(1) <u>expenses reasonably incurred by a witness in attending or testifying;</u>	Subparagraph (e)(1) carries forward current rule 5-310(B)(1), which the Commission believes is good public policy that facilitates presentation of witness testimony by compensating for reasonable expenses.

² RM: SHOULD SAY A MORE "SPECIFIC" LAYER BECAUSE (d) IS REALLY A SUBSET OF (a)—OBSTRUCTING ACCESS TO EVIDENCE

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
	(2) reasonable compensation to a witness for loss of time in attending or testifying; or	Subparagraph (e)(2) carries forward current rule 5-310(B)(2), which the Commission believes is good public policy that facilitates presentation of witness testimony by compensating witnesses who provide testimony for earnings lost by reason of their appearance in litigation proceedings.
	(3) a reasonable fee for the professional services of an expert witness.	Subparagraph (e)(3) carries forward current rule 5-310(B)(3), which the Commission believes essential to the ability of litigants to prove cases where expert witnesses are necessary or desirable.
(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;	(~~e~~f) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists; or	Paragraph (f) is identical to Model Rule 3.4(c).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;	~~(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;~~	Model Rule 3.4(d) has been rejected because it conflicts with California legislative policy, which provides for: (1) a comprehensive system of discovery remedies (e.g., C.C.P., § 2019 – 2036.050); (2) Court supervision of discovery misconduct and abuse through a variety of means, including sanctions and contempt(e.g., C.C.P., § 1992, 2019.030, 2020.240, 2023.010, 2023.020); and (3) no reporting of attorney sanctions for discovery matters (Bus. & Prof. C., §6068(o)(3)) The Commission believes that this public policy is sound because: (1) the tribunal before which a matter is pending is better equipped to control discovery delay or frivolous requests; (2) discovery misconduct is not necessarily indicative of unfitness to practice law; and (3) more serious discovery abuses can subject a lawyer to discipline through other standards (e.g., Bus. & Prof. C., §6103 – failure to comply with court order; §6068(b) --failure to maintain respect for the courts; or other parts of this Rule).
	<u>(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.</u>	Paragraph (g) is based in part on Model Rule 3.4(e), and in part on current rule 5-200(E).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel	<u>Explanation of Changes to the ABA Model Rule</u>
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or	~~(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or~~	Except for what has been proposed as paragraph (g), the Commission recommends rejecting Model Rule 3.4(e) because it is overbroad, ambiguous and is likely to chill legitimate advocacy. Abuses can best be controlled by the trial judge through proper objections by the opponent.
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.	~~(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:~~ ~~(1) the person is a relative or an employee or other agent of a client; and~~ ~~(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.~~	Commenters objected to Model Rule 3.4(f) arguing that it is ambiguous, overly broad and duplicative, and in conflict with paragraph (a). On reconsideration, the Commission agreed.

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Commission's Proposed Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.	[1] The procedures^s of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.	Comment [1] adopts Model Rule 3.4, comment [1], only making "procedure" plural.
[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting	[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. ~~Applicable law in many jurisdictions makes it an~~ <u>It is a criminal</u> offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. <u>(See, e.g., Penal Code section 135; 18 United States Code section 1501-1520.)</u> Falsifying evidence is also generally a criminal offense. <u>(See, e.g., Penal Code section 132; 18 United States Code section 1519.)</u> Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or	Comment [2] largely tracks Model Rule 3.4, deleting only the reference to law in other jurisdictions and adding California citations to support the principles stated in the Comment.

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Commission's Proposed Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Explanation of Changes to the ABA Model Rule</u>
authority, depending on the circumstances.	destroy material characteristics of the evidence. ~~In such a case, applicable~~ <u>Applicable</u> law may require ~~the a~~ lawyer to turn ~~the~~ evidence over to the police or other prosecuting ~~authority~~<u>authorities</u>, depending on the circumstances. <u>(See <i>People v. Lee</i> (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; <i>People v. Meredith</i> (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)</u>	
[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.	~~[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.~~	The Commission recommends that Comment [3] to Model Rule 3.4 be rejected because (1) the first sentence is too general to provide definition of the rule or guidance; and (2) the second sentence is unnecessary because it refers to common law in other jurisdictions, which is irrelevant to the common law of California and therefore can provide little guidance. Moreover, the topic is more comprehensively addressed in proposed paragraph (e).
	<u>[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. This Rule does not establish a standard that governs civil or criminal discovery disputes.</u>	Proposed comment [3] has no counterpart in the Model Rule; it clarifies the scope of the Rule. In that regard, the Comment is intended to prevent abuse of the Rule by parties who might attempt to claim that a discovery violation under the rules regulating discovery is equivalent to a breach of professional obligations under this Rule.
[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.	~~[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.~~	The Commission recommends that Comment [4] to Model Rule 3.4, which clarifies Model Rule 3.4(f) be rejected because the Commission's has proposed deleting of paragraph (f).

<u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Commission's Proposed Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.	Comment [4] has no counterpart in the Model Rule. It attempts to provide guidance regarding application of this Rule. (See e.g., California State Bar Formal Opn. No. 1997-149.)

Rule 3.4 Fairness to Opposing Party and Counsel
(Commission's Proposed Rule – Clean Version)

A lawyer shall not:

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

Comment

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

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

this Rule. This Rule does not establish a standard that governs civil or criminal discovery disputes.

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

Rule 3.4: Fairness to Opposing Party and Counsel

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 adds two exceptions that allow a lawyer to ask a non-client not to give information to another party if: “(2) the person may be required by law to refrain from disclosing the information; or (3) the information pertains to covert law enforcement investigations in process, such as the use of undercover law enforcement agents.”

California: Compare Rule 5-200 (reprinted in the Selected State Variations following ABA Model Rule 3.3 above) and Rule 5-220, which provides that a lawyer “shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.” Also, Rule 5-310 provides that a member shall not:

(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

In addition, California Penal Code §135, which was enacted in 1872, provides as follows:

Destroying evidence. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

Connecticut: Rule 3.4(7), which retains language from DR 7-105 of the old ABA Model Code of Professional Responsibility, forbids a lawyer to “present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

District of Columbia: Rule 3.4 provides that a lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence, is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6;...

(g) Peremptorily strike jurors for any reason prohibited by law.

Florida: Rule 3.4(a) replaces the ABA phrase "having potential evidentiary value" with the phrase "that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding..." Rule 3.4(b) provides that a lawyer shall not "fabricate" evidence, and provides that a lawyer shall not

offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

Florida Rule 3.4(d) deletes the phrase "to make a reasonably diligent effort," instead providing that a lawyer shall not "intentionally" fail to comply with a legally proper discovery request by an opposing party. Florida Rules 3.4(g)

and (h) expand upon DR 7-105 of the ABA Model Code of Professional Responsibility by providing that a lawyer must not present, participate in presenting, or threaten to present either criminal charges or "disciplinary charges under these rules" solely to obtain an advantage in a civil matter.

Georgia: Rule 3.4(b) borrows language from DR 7-109(C) of the ABA Model Code of Professional Responsibility. Georgia omits ABA Model Rules 3.4 (c), (d), and (e) entirely. Georgia Rule 3.4(f) adds that a lawyer may request a person not to volunteer information to another party "if the information is subject to the assertion of a privilege by the client."

Georgia also adds a new Rule 3.4(g), based on ABA Model Rule 4.4, which provides that a lawyer shall not "use methods of obtaining evidence that violate the legal rights of the opposing party or counsel," and a new Rule 3.4(h), taken verbatim from DR 7-105 of the ABA Model Code, which provides that a lawyer shall not "present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Illinois has adopted ABA Model Rule 3.3(a), (b), and (f) verbatim, but omits Rule 3.4(c) and (d). Illinois also moves some of the topics in ABA Model Rule 3.4 to Illinois Rule 3.3. Specifically, expanding on ABA Model Rule 3.4(b)'s command not to "offer an inducement to a witness that is prohibited by law," Illinois Rule 3.3(a)(15) provides that a lawyer appearing in a professional capacity before a tribunal shall not "pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case, but a lawyer may advance, guarantee, or acquiesce in the payment of expenses reasonably incurred in attending or testifying, and a reasonable fee for the professional services of an expert witness." In addition, Illinois moves the

language in Rule 3.4(e) to Illinois Rule 3.3(a)(10), but adds that “a lawyer may argue, on analysis of evidence, for any position or conclusion with respect to the matter stated herein.”

New Jersey adds Rule 3.4(g), which provides, based on DR 7-105 of the ABA Model Code of Professional Responsibility that a lawyer shall not “present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.”

New York: Regarding Rule 3.4(a), DR 7-102(A)(3) provides that a lawyer representing a client shall not “[c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal,” and DR 7-109(A) provides that a lawyer shall not “suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.” Regarding Rule 3.4(b), DR 7-102(A)(6) provides that a lawyer representing a client shall not “[p]articipate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false,” and DR 7-109(C) provides:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

1. Expenses reasonably incurred by a witness in attending or testifying.
2. Reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel.
3. A reasonable fee for the professional services of an expert witness.

Regarding Rule 3.4(c), DR 7-106(A) provides that a lawyer shall not “disregard or advise a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.” New York has no counterpart to Rule 3.4(d). Regarding Rule 3.4(e), DR 7-106(C) provides that in appearing as a lawyer before a tribunal, a lawyer shall not:

- (1) State or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
- (2) Ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
- (3) Assert personal knowledge of the facts in issue, except when testifying as a witness.
- (4) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
- (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply.
- (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
- (7) Intentionally or habitually violate any established rule of procedure or of evidence.

Regarding Rule 3.4(f), New York's DR 7-104(A)(2) provides that a lawyer shall not "[g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyers client," and DR 7-109(B) provides that a lawyer "shall not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

North Carolina: Rule 3.4(b) adds that a lawyer shall not "counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness." Rule 3.4(c) provides that a lawyer shall not "advise a client to disobey" an obligation under the rules of a tribunal, except that "a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation." Rule 3.4(f)(1) limits the "employee" exception to a "managerial employee."

Ohio: The exception clause in Ohio Rule 3.4(c) applies to an open refusal based on a "good faith" assertion that no valid obligation exists. Rule 3.4(d) provides that a lawyer engaged in pretrial procedure shall not "intentionally or habitually" make a frivolous "motion or" discovery request. Ohio omits Rule 3.4(f) because it is inconsistent with a lawyer's obligations under Ohio law, and Ohio adds a new Rule 3.4(g) that provides that a lawyer shall not "advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness."

Oklahoma omits the clause "other than the testimony of a defendant in a criminal matter" in the last sentence of Rule 3.4(a)(3). In addition, Oklahoma adds a new Rule 3.4(a)(4), which 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."

Oregon: Rules 3.4(b) and (g) provide that a lawyer shall not:

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Pennsylvania: Rule 3.4(b) deletes the ABA phrase "or offer an inducement to a witness that is prohibited by law" and substitutes language nearly identical to DR 7-109(C) of the ABA Model Code of Professional Responsibility. Pennsylvania deletes ABA Model Rule 3.4(c) and substitutes the language of DR 7-106(C)(4). Pennsylvania deletes subparagraphs (d) and (e) of ABA Model Rule 3.4, and adds "and such conduct is not prohibited by Rule 4.2" at the end of Pennsylvania Rule 3.4(d), which is equivalent to ABA Model Rule 3.4(f).

Texas: Rule 3.04(a)'s prohibition on unlawfully altering, destroying, or concealing evidence applies "in anticipation of a dispute." (Regarding "unlawfully," Texas Penal Law §37.09 makes it a felony if a person "knowing that an investigation or official proceeding is pending or in progress... alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence," but §37.09 does not apply to items that are "privileged" or "work product.") Texas Rule 3.04(b) retains the substance of DR 7-109(C) of the ABA Model Code of Professional Responsibility. Rule 3.04(c) retains language from DR 7-106(C), and Rule 3.04(c)(5) provides that a lawyer shall not "engage in conduct intended to disrupt the proceedings." Rule 3.04(d) provides that a lawyer shall not knowingly disobey "or advise the client to disobey" an obligation under the tribunal's "standing rules" or under a "ruling" by the tribunal, except for an open refusal based either on an assertion that no valid obligation exists "or on the client's willingness to accept any sanctions arising from such disobedience."

Virginia eliminates the word "unlawfully" from Rule 3.4(a), and provides that a lawyer shall not alter, destroy or conceal material having potential evidentiary value "for the purpose of obstructing a party's access to evidence." Rule 3.4 (b) and (c) incorporates language from DR 7-109(B) and (C) of the ABA Model Code of Professional Responsibility. Rule 3.4(i), which expands on DR 7-105 of the Model Code, provides that a lawyer shall not present or threaten to present criminal "or disciplinary" charges solely to obtain an advantage in a civil matter, and Rule 3.4(j) is taken verbatim from DR 7-102(A)(1) of the Model Code but adds "or initiate criminal charges" to the list of forbidden conduct.

Washington omits ABA Model Rule 3.4(f) (which sets forth circumstances in which a lawyer may ask a person other than a client to refrain from voluntarily giving

information to another party). A Comment explains that the Model Rule is "inconsistent with Washington law," and that "[a]dvising or requesting that a person other than a client refrain from voluntarily giving information to another party may violate other Rules," such as Rule 8.4(d).

Proposed Rule 3.5 [5-300][5-320] “Impartiality and Decorum of the Tribunal”

(Draft # 5, 10/7/09)

Summary: Proposed Rule 3.5 concerns the same general subject matter as Model Rule 3.5 but carries forward the specificity of current California Rules 5-300 [Contact with Officials] and 5-320 [Contact with Jurors]. By including specific guidance in the proposed Rule on conduct is prohibited in interacting with the tribunal and jurors, proposed Rule 3.5 better serves these Rules’ purpose of protecting the integrity of the legal system and promoting the administration of justice.

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 5-300, 5-320.

Statute

Cal. Code Civ. Proc. § 206 (Communications with Jurors).

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 11

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:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.5* : Impartiality and Decorum of the Tribunal

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 3.5 concerns the same general subject matter as Model Rule 3.5 but carries forward the specificity of current California Rules 5-300 [Contact with Officials] and 5-320 [Contact with Jurors]. Rule 3.5(a)-(c) continue policies of prohibiting (1) the giving or loaning anything of value to a judge, judicial officer, or judicial employee and (2) *ex parte* communications concerning the merits of a matter pending before a tribunal with judges, judicial officers and other judicial personnel, with noted exceptions. Proposed Rule 3.5(d) – (l) continue policies of prohibiting certain communications with jurors, members of jury venires and their families, as well as regulating communications with discharged jurors. The Commission decided not to recommend adoption of Model Rule 3.5 due to its overbreadth and lack of specificity. The Commission believes that proposed Rule 3.5 better serves these Rules’ purpose of protecting the integrity of the legal system and promoting the administration of justice by specifying the conduct that is prohibited.

The policies underlying proposed Rule 3.5 and Model Rule 3.5 are substantially similar.

- a. Model Rule 3.5(a) prohibits lawyers from seeking to influence judges, officials and jurors by means prohibited by law. Proposed Rule 3.5(a) prohibits lawyers from giving or lending anything of value to a judge, judicial officer, or employee. By prohibiting acts that historically have resulted in influence peddling, the proposed Rule (1) clarifies, by creating a “bright line” stating precisely what “seeking to influence” means; and (2) clearly defines what is not prohibited. Proposed Rule 5.3(d) – (l) prevents lawyers from unduly influencing jurors by prohibiting outright certain communications and contacts, while regulating others.

* Proposed Rule 3.5, Draft 5 (10/7/09).

INTRODUCTION (Continued):

- b. Model Rule 3.5(b) prohibits all *ex parte* contact with judges, officials and jurors during a proceeding unless authorized to do so by law or court order. Proposed Rule 3.5 specifies the circumstances when *ex parte* communications with judges, judicial officers and personnel, and jurors are prohibited; when any communications with jurors are prohibited; and when certain communications are permitted in order to create a brighter line for compliance with the law and for establishing proof in disciplinary and regulatory proceedings.

Defining what conduct is acceptable and what is not better aids judicial personnel, lawyers and jurors from engaging in conduct that may be well meaning, but which reflects adversely upon the fairness of the judicial process, thereby ultimately providing better public protection.

State Variations: Many jurisdictions have revised ABA Model Rule 3.5 to add specificity; some, like California, have opted to retain more specific language similar to current rules 5-300 and 5-320. (See State Variations Chart.)

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;	~~A lawyer shall not:~~ ~~(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;~~	See Explanation of Changes for proposed paragraph (a), below.
	<u>(a) Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.</u>	See Introduction. Paragraph (a) carries forward nearly verbatim the provisions of current rule 5-300(A) ("lawyer" has been substituted for "member"). The Commission determined that carrying forward the specificity of the provision in current California rules 5-300 and 5-320 would avoid challenges of overbreadth and vagueness and better serve these Rules' purpose of protecting the integrity of the legal system and promoting the administration of justice by specifying the conduct that is prohibited.
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;	~~(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;~~	See Explanation of Changes for paragraph (a).

* Proposed Rule 3.5, Draft 5 (10/7/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(b) Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:</u> <u>(1) in open court;</u> <u>(2) with the consent of all other counsel in the matter;</u> <u>(3) in the presence of all other counsel in the matter;</u> <u>(4) in writing with a copy thereof furnished promptly to all other counsel; or</u> <u>(5) in ex parte matters as permitted by law.</u>	See Explanation of Changes for paragraph (a). Paragraph (b) carries forward the substance of current rule 5-300(B). The clause, "Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order," has been added to track the "unless authorized by to do so by law or court order" in Model Rule 3.5(b).

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(c) As used in this Rule, “judge” and “judicial officer” shall include law clerks, research attorneys, other court personnel who participate in the decisionmaking process, and neutral arbitrators.</u>	See Explanation of Changes for paragraph (a). Paragraph (c) carries forward the substance of current rule 5-300(C). Paragraph (c) clarifies that the prohibitions in paragraphs (a) and (b) extend to any court personnel who participate in decisionmaking and might affect the outcome. The phrase, “and neutral arbitrators” has been added so the Rule will also apply in an arbitration setting. This added phrase recognizes that much of the work of the judicial system now takes place before court-appointed and other third-party neutrals.
	<u>(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.</u>	See Explanation of Changes for paragraph (a). Paragraph (d) carries forward the substance of current rule 5-320(A) nearly verbatim, with only “lawyer” substituted for “member.”
	<u>(e) During a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.</u>	See Explanation of Changes for paragraph (a). Paragraph (e) carries forward the substance of current rule 5-320(B) nearly verbatim, with only “lawyer” substituted for “member.”
	<u>(f) During a trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.</u>	See Explanation of Changes for paragraph (a). Paragraph (f) carries forward the substance of current rule 5-320(C) nearly verbatim, with only “lawyer” substituted for “member.”

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
(c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment; or	(eg) <u>A lawyer shall not</u> communicate <u>directly or indirectly</u> with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate;~~or~~ (3) the communication involves misrepresentation, coercion, duress or harassment; or (4) the communication is intended to influence the juror's actions in future jury service.	Paragraph (g) is nearly identical to Model Rule 3.5(c), except communicate is modified by the phrase "directly or indirectly" to conform with the prohibitions in paragraphs (d), (e) and (f). The addition of that language is intended to prevent lawyers from communicating through a third party to avoid the prohibitions of the Rule.
(d) engage in conduct intended to disrupt a tribunal.	~~(d) engage in conduct intended to disrupt a tribunal.~~	The Commission recommends that Model Rule 3.5(d) not be adopted because it is vague and subject to overbreadth challenges. See Introduction.
	<u>(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.</u>	See Explanation of Changes for paragraph (a). Paragraph (h) carries forward the substance of current rule 5-320(E) nearly verbatim, with only "lawyer" substituted for "member." Paragraph (h) supplements proposed paragraph (g)(4).

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
	(i) <u>All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.</u>	See Explanation of Changes for paragraph (a). Paragraph (i) carries forward the substance of current rule 5-320(F) nearly verbatim, with only “lawyer” substituted for “member.” The addition of that language is intended to prevent lawyers from influencing jurors through communications with, or investigations of, family members of jurors or potential jurors.
	(j) <u>A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.</u>	See Explanation of Changes for paragraph (a). Paragraph (j) carries forward the substance of current rule 5-320(G) nearly verbatim, with only “lawyer” substituted for “member.”
	(k) <u>This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.</u>	See Explanation of Changes for paragraph (a). Paragraph (k) carries forward the substance of current rule 5-320(H) nearly verbatim, with only “lawyer” substituted for “member.”
	(l) <u>For the purposes of this Rule, “juror” means any empaneled, discharged, removed, or excused juror.</u>	See Explanation of Changes for paragraph (a). Paragraph (l) carries forward the substance of current rule 5-320(I) nearly verbatim. In addition to substituting “lawyer” for “member,” proposed paragraph (l) includes “removed” juror within the definition of “juror.”

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.	[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ~~ABA Model~~ Code of Judicial ~~Conduct~~ Ethics and Code Civ. P. section 170.9, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.	Comment [1] is identical to Model Rule 3.5, cmt. [1], except that it references the California Code of Judicial Ethics, the governing judicial code in California, and to Code Civ. P. section 170.9. Section 170.9 is a public official gift statute that overlaps with Canon 4D(5) of the Code of Judicial Ethics in restricting judges' acceptance of gifts.
[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.	[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, <u>but a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may do so in the performance of that service. "Promptly" as used in paragraph (b)(4) of this Rule means that a copy of a communication to a judge should be sent to opposing counsel by means likely to result in receipt of the copy of the communication substantially simultaneously to its receipt by the judge.</u>	Comment [2] is based on Model Rule 3.5, cmt. [2]. The last clause of the Comment has been added to provide guidance to lawyers acting as temporary judges pursuant to proposed Rule 2.4.1 (which in is based on current rule 1-710), a rule that has no counterpart in the Model Rules. The last sentence of this Comment has been added to address concerns over possible gamesmanship in which a lawyer uses a slow method to deliver to opposing counsel a communication the lawyer has delivered quickly to a court, thus potentially interfering with opposing counsel's ability to participate.
	[3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also Code of Civil Procedure, section 206.	Comment [3] provides a cross-reference to California statutory law for specific guidance on permissible communications with jurors or prospective jurors.

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.	~~[34]~~-A <u>It is improper for a</u> lawyer ~~may on occasion want to communicate with a juror who has been removed, discharged, or prospective juror after excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged. The lawyer may do so from further service or unless the communication is prohibited by law or a court order but must respect the desire~~part of the juror not to talk with official proceedings of the lawyer. The lawyer may not engage in improper conduct during the communication<u>case</u>.	The subject matter of proposed Comment [4] is the same as that of Model Rule 3.5, cmt. [3]: communication with jurors or prospective jurors. However, the tenor of the Model Rule Comment has been recast to stress what is prohibited under the Rule rather than what is permitted. The former approach better reflects the primary function of these Rules as disciplinary rules.
[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.	~~[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.~~	The Commission recommends that Model Rule 3.5, cmt. [4], which relates to Model Rule 3.5(d), not be adopted as the Commission also recommends that Model Rule 3.5(d) not be adopted.

<u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).	~~[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).~~	The Commission recommends that Model Rule 3.5, cmt. [5], which relates to Model Rule 3.5(d), not be adopted as the Commission also recommends that Model Rule 3.5(d) not be adopted.

Rule 3.5 Impartiality and Decorum of the Tribunal
(Commission's Proposed Rule – Clean Version)

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

- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (l) For the purposes of this Rule, “juror” means any empaneled, discharged, removed, or excused juror.

COMMENT

- [1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Ethics and Code Civ. P. section 170.9, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
- [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, but a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may do so in the performance of that service. “Promptly” as used in paragraph (b)(4) of this Rule means that a copy of a communication to a judge should be

sent to opposing counsel by means likely to result in receipt of the copy of the communication substantially simultaneously to its receipt by the judge.

- [3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also Code of Civil Procedure, section 206.
- [4] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.5: Impartiality and Decorum of the Tribunal

STATE VARIATIONS

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

Arizona clarifies that Rule 3.5(a) applies only to an official “of a tribunal,” and substitutes “likely” for “intended” in Rule 3.5(d).

California: Rule 5-300 provides as follows:

(A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

(1) In open court; or

(2) With the consent of all other counsel in such matter; or

(3) In the presence of all other counsel in such matter; or

(4) In writing with a copy thereof furnished to such other counsel; or

(5) In ex parte matters.

(C) As used in this rule, “judge” and “judicial officer” shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process.

Florida: Rule 3.5(a) provides that a lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker “except as permitted by law or the rules of court” Rule 3.5(d), governing communications with jurors, former jurors, and prospective jurors, generally tracks DR 7-108 of the ABA Model Code of Professional Responsibility, but adds that a lawyer shall not:

(4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless

the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview....

Georgia: Rule 3.5 adopts most of the pre-2002 version of ABA Model Rule 3.5 verbatim, but alters the introductory phrase to make clear that the prohibitions apply “without regard to whether the lawyer represents a client in the matter.”

Illinois: Rule 3.5 tracks DR 7-108 of the ABA Model Code of Professional Responsibility almost verbatim, but adds the following paragraph (h) prompted by the bribery and “loan” scandals uncovered in Chicago courts during Operation Greyford in the 1980s:

(h) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans which a judge or a member of the judge’s family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, and except that a lawyer may make a gift, bequest, loan or campaign contribution to a judge that the judge is permitted to accept under the Code of Judicial Conduct, provided that no campaign contribution to a judge or candidate for judicial office may be made other than by means of a check, draft, or other instrument payable to or to the order of an entity which the lawyer reasonably believes to be a political committee supporting such judge or candidate, provided further, however, that the provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this Rule.

Illinois Rule 3.5 also adds a new subparagraph (i) that tracks language from DR 7-110.

Maryland: Rule 3.5 includes several sui generis provisions, including a prohibition against discussing employment of a judge before whom the lawyer’s firm has a matter, a limitation on contacts with discharged jurors, and a requirement to report knowledge of improper contacts with jurors or prospective jurors.

Massachusetts: Rule 3.5(d) restricts the ability of lawyers connected to a case to initiate a communication with a member of the jury after discharge without leave of the court.

Michigan: Rule 3.5(c) retains the language of DR 7-106(C)(6) of the ABA Model Code of Professional Responsibility.

Minnesota adds language to Rule 3.5 drawing on DR 7-108 of the ABA Model Code of Professional Responsibility.

Mississippi omits ABA Model Rule 3.5(c)(3).

Nevada: Rule 3.5(c) adds that, subject to limitations imposed by Rule 3.5 or by the law, “it is a lawyer’s right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge” -- but the “scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror or to influence his or her action in any subsequent jury service.” Nevada also adds the following new Rule 3.5(e):

(e) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided that a lawyer or the lawyer’s employees or independent contractors may not,

at any time before the commencement of the trial, conduct or authorize any investigation of the prospective jurors, through any means which are calculated or likely to lead to communication with prospective jurors of any allegations or factual circumstances relating to the case at issue. Conduct prohibited by this Rule includes, but is not limited to, any direct or indirect communication with a prospective juror, a member of the juror's family, any employer, or any other person that may lead to direct or indirect communication with a prospective juror.

New Jersey: Rule 3.5(b) provides only that a lawyer shall not communicate ex parte with anyone specified in subparagraph (a) "except as permitted by law," and New Jersey Rule 3.5(c) says only that a lawyer shall not "engage in conduct intended to disrupt a tribunal." New Jersey deletes ABA Model Rules 3.5(c)(1)-(3) and Rule 3.5(d).

New York: Regarding ABA Model Rule 3.5(a), New York's DR 9-101(C) provides that a lawyer "shall not state or imply that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." Regarding Rule 3.5(b), DR 7-110(B) provides:

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to an adverse party who is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to an adverse party who is not represented by a lawyer.

(4) As otherwise authorized by law, or by the Code of Judicial Conduct.

Regarding Rule 3.5(b) and (c), New York's DR 7-108 provides:

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108 (a) and (b) do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings.

Regarding Rule 3.5(d), DR 7-106(C)(6) provides that a lawyer appearing before a tribunal shall not "[e]ngage in undignified or discourteous conduct which is degrading to a tribunal."

North Carolina: Rule 3.5 adds language from DR 7-106(C)(5)-(7), DR 7-108(D), (F), and (G), and DR 7-110(B) of the ABA Model Code of Professional Responsibility.

North Dakota: Rule 3.5(b) provides that a lawyer shall not communicate ex parte with “a judge, impaneled juror, prospective juror or other official concerning a pending or impending proceeding” unless authorized to do so by law or court order.

Ohio replaces the term “judge” with the term “judicial officer” throughout Rule 3.5. Ohio adds Rule 3.5(a)(2), which provides that a lawyer shall not “lend anything of value or give anything of more than *de minimis* value to a judicial officer, official, or employee of a tribunal.” Ohio Rule 3.5(a)(3) provides that a lawyer shall not communicate ex parte with “(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order” or “(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.” Ohio also adds a new Rule 3.5(b), which provides that a lawyer “shall reveal promptly to the tribunal improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has knowledge.”

Texas: Rule 3.05 is substantially the same as DR 7-110(B) of the ABA Model Code of Professional Responsibility. Rule 3.06 borrows heavily from DR 7-108, but rearranges the order somewhat, adds references to an “alternate juror,” and provides in Rule 3.06(A)(2) that a lawyer shall not “seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.”

Utah: Rule 3.5(b) provides that a lawyer shall not communicate ex parte “in an adversary proceeding as to the merits of the case with a judge, juror, prospective juror or court official during the proceeding, prior to full discharge of

that person’s duties in the proceeding,” unless authorized to do so by law or court order.

Virginia: Rule 3.5(a)(2) generally tracks DR 7-108(D) of the ABA Model Code of Professional Responsibility but adds that a lawyer shall not “after discharge of the jury from further consideration of a case: (i) ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service.” A new Rule 3.5(e) adds exceptions to the rule against ex parte communications with a judge.

Wyoming: Rule 3.5(b) provides that a lawyer shall not communicate ex parte “with an official acting in an adjudicative capacity concerning any substantive or procedural issue before him, or which is likely to be before him,” unless authorized to do so by law or court order.

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 rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

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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).

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

* Redline/strikeout showing changes to the ABA Model Rule

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

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

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

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	~~safety and measures aimed at assuring its security. It also has a legitimate interest~~<u>lawyers who are, or who have been involved</u> in the ~~conduct~~<u>investigation or litigation</u> of ~~judicial proceedings~~<u>a case</u>, 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~~<u>their associates</u>.	
[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]

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).	Comment [2] adopts Model Rule Comment [4].
	[3] <u>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.</u>	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.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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 [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;~~	

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
(3) the 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]~~ 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].

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	[75] ~~Finally~~<u>Under paragraph (c)</u>, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may ~~have the salutary effect of lessening~~<u>lessen</u> any resulting adverse impact on the adjudicative proceeding. Such responsive statements ~~should~~<u>must</u> be limited to ~~contain only such~~ information ~~as is~~ necessary to mitigate undue prejudice created by ~~the~~ statements ~~made by~~ 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.	[86] 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] <u>Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with</u>	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.

<u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment	<u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>such rules.</u>	
	<u>[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.</u>	This Comment is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.

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.
 - (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.
- (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):
 - (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

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, Rule 3.8(a) provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR 7-107(B) then provides that a statement "ordinarily is likely to prejudice materially an adjudicative proceeding" when it relates to any of the six enumerated items set forth in Comment 5 to ABA Model Rule 3.6, which DR 7-107(B)(1)-(6) tracks verbatim.

DR 7-107 (C) provides that if a statement complies with DR 7-107 (A), a lawyer "involved with the investigation or litigation of a matter" may state "without elaboration" the items enumerated in ABA Model Rule 3.6(b), which New York tracks verbatim, except that DR 7-107(C)(1) refers only to "the general nature of the claim or defense" DR 7-107(C)(7)(a) adds the word "age," and DR 7-107(C)(7)(c) permits a lawyer to state not only the "fact, time and place of arrest" but also "resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission, or statement." New York omits Rule 3.6(d).

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

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

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

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

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

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

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

Texas Rule 3.07(b) provides that a lawyer "ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent," by making an extrajudicial statement described in Rule 3.07 (a) if the statement refers to five specified categories of information, which track verbatim the items listed in Comment 5 to ABA Model Rule 3.6-except that Texas omits from this list 14(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.

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.

* Proposed Rule 3.7, Draft 7 (12/12/09).

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:	(a) A lawyer shall not act as <u>an</u> advocate ~~at~~<u>before</u> a ~~trial~~<u>jury</u> in which the lawyer is likely to be a necessary witness unless:	The Commission recommends retaining the approach in current California rule 5-210, whose application is limited to jury trials. The Commission notes that any threat 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. <i>Minority.</i> A minority of the Commission believes that the Rule should also apply to bench trials, as in every other jurisdiction in the country. See complete Dissent, below.
(1) the testimony relates to an uncontested issue;	(1) the testimony relates to an uncontested issue <u>or matter</u>;	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

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

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness	<u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness	<u>Explanation of Changes to the ABA Model Rule</u>
		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.

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

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.

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

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

<u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2] This Rule is not applicable in 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.

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.

[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)].

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.

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 and Roy D. Simon. The text relevant to proposed Rule 1.8 is highlighted)

California. Rule 5-210 provides as follows:

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

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

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

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

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

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

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

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

New York: DR 5-102 provides as follows.

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

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

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

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

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

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

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

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

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

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

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

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

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

Virginia: In Rule 3.7(a), Virginia substitutes "adversarial proceeding" for "trial." In Rule 3.7(b), Virginia incorporates language from DR 5R 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."

Proposed Rule 4.2 [2-100]
“Communication with a Represented Person”
(Draft #18, 10/19/09)

Summary: Proposed Rule 4.2(a), which regulates a lawyer’s communications with persons – regardless of whether they are parties or witnesses in a matter, tracks the language of Model Rule 4.2. However, similar to current rule 2-100, it provides detailed guidance as to how the rule is intended to apply in certain contexts. Further, it should be noted that representatives from the California Attorney General, Public Defenders and District Attorneys have criticized the Commission’s recommendation to follow the Model Rule and nearly every other jurisdiction in expressly applying the Rule to a lawyer’s communications with “persons,” not just “parties,” See Introduction and Public Comment Chart.

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 2-100.

Statute

Case law

Matter of Dale (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.

☐ 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 8
Opposed Rule as Recommended for Adoption 2
Abstain 1

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:

California Attorney General, California Public Defenders Assoc., CA Attorneys for Criminal Justice, Los Angeles Co. Pub. Defender, Orange Co. Pub. Defender, Nat. Assoc. of Criminal Defense Lawyers, SD Criminal Defense Bar Assoc., and various District Attorney offices in California. See Public Comment Chart for complete list.

☒ Very Controversial – Explanation:

Prosecutors and defense attorneys complain that the change from “party” to “person” will inhibit ability to investigate cases and contact witnesses. Others complain that the prohibition against contacting public officials is too broad.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.2* – “Communication with a Represented Person”

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 4.2(a) follows the basic “no-contact” rule in Model Rule 4.2, except that the proposed Rule makes clear that a lawyer is prohibited from communicating indirectly as well as directly with a person known to be represented in the matter. In addition, the proposed Rule goes beyond its Model Rule counterpart by providing more detailed guidance as to how the Rule is intended to apply in certain contexts. For example, while the Model Rule expresses the general prohibition against communications with persons represented by counsel, it does not attempt to resolve the difficult challenges that the Rule has engendered historically and in practice. Unlike the Model Rule, the proposed Rule defines which individuals within an organization qualify as a “person” when the communication is with an agent or employee of the organizational entity. The Rule also sets forth exceptions for communications with public officials, and government boards and committees, as well as communications from a person involved in the matter who is seeking independent legal advice. In keeping with California’s traditional policy of protecting a client’s confidential information and the attorney-client relationship, the proposed Rule also provides that even where a communication is permitted under the Rule, a lawyer may not seek to obtain privileged or confidential information. Additionally, the Rule provides that a lawyer representing an organizational client may not falsely represent that he or she represents all employees or constituents of the organization.

Public Comment: “Person”. Notwithstanding the fact that the overwhelming majority of jurisdictions have adopted rules governing communications with a represented “person” rather than a represented “party,” and the fact that lawyers who practice in the lawyer discipline area in California have interpreted “party” in current rule 2-100 to encompass any represented person in a matter, the Commission received a substantial amount of input from the public on using “person” in the proposed Rule. During the Commission’s deliberations, as well as the

* Proposed Rule 4.2, Draft 18 (10/19/09).

INTRODUCTION (Continued):

official public comment period, representatives of the California Attorney General; Public Defender and District Attorney offices in California, and their representative organizations; and representative organizations of the California criminal defense bar raised concerns over the substitution of “person” in the proposed Rule for “party” in current rule 2-100. The Commission carefully considered the concerns that these commenters expressed at meetings and in writing, but ultimately retained “person” in the Rule. The Commission drafted several comments to accommodate these concerns, but the interested parties ultimately rejected them. Nevertheless, the Commission believes that the comments it drafted are a reasonable compromise between protecting attorney-client relationships of *all* persons involved in a matter and permitting law enforcement agencies and the criminal defense bar to conduct their investigations. See Explanation of Changes for paragraph (c)(3) and Comments [18]-[21].

Public Comment: “Public Official”. During the Commission’s deliberations, the Commission received a substantial amount of input from representatives of County and City Attorneys in California, as well as from several law firms with extensive land use practices, concerning the exception for communications with a “public official” stated in paragraph (c)(1). The Commission carefully considered the concerns that these commenters expressed at meetings and in writing. The Commission believes that the rule provision and comment it drafted are a reasonable compromise between the interests of the government and lawyers representing persons who are petitioning the government. See Explanation of Changes for paragraph (c)(1) and Comment [16].

Variations in Other Jurisdictions. Every other jurisdiction has adopted a rule that governs communications with a represented “person” rather than a represented “party.” The Commission is aware of only four jurisdictions that still retain “party” in the black letter of its Model Rule 4.2 counterpart: Alabama, Arizona, Connecticut and Mississippi. In each instance, however, the jurisdictions use “Person” in the title of the rule and include a comment that provides: “This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” Within the last year and a half, both Illinois, Kentucky, Maine and West Virginia have each rejected rules that formerly prohibited contact only with a “party” in favor of a more expansive rule that prohibits communications with a “person known by the lawyer to be represented.” Other states have rules similar to proposed California Rule 4.2 and current rule 2-100 that expressly address communications with members or constituents of organizations (e.g., District of Columbia, Louisiana, Maryland, New Jersey, New Mexico, and Texas). Also similar to the proposed California Rule, several states also address communications with the government (e.g., District of Columbia, Maryland, and North Carolina). Two other states, Maine and Utah, have rules that expressly address the conduct of prosecutors under the Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.	(a) In representing a client, a lawyer shall not communicate <u>directly or indirectly</u> about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer ~~or is authorized to do so by law or a court order.~~	Paragraph (a) tracks the language of the single paragraph Model Rule 4.2, but adds the words “directly or indirectly” to make clear that the Rule applies to communications through an intermediary such as an investigator. The exception for communications authorized by law or court order have been moved to paragraph (c).
	(b) <u>For purposes of this Rule, a “person” includes:</u> (1) <u>A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or</u>	The Model Rule does not define “person” in an organizational or corporate setting. Therefore, the Commission recommends paragraph (b), which describes the types of organization constituents who fall within the proscription of the Rule. The Model Rule by contrast makes no attempt to define which constituents of a corporation or other association are subject to the protections afforded by the Rule. As result, the proposed changes provide greater guidance to lawyers seeking to communicate with a represented organization.

* Proposed Rule 4.2, Draft 18 (10/19/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.</u>	Paragraph (b)(2) clarifies that the proposed Rule applies to certain other constituents of an organization not within the organization's "control group," and provides greater guidance and specificity than the Model Rule.
	<u>(c) This Rule shall not prohibit:</u> <u>(1) Communications with a public official, board, committee or body; or</u>	Subparagraph (c)(1) expresses an exception to the Rule that communications with public officers, board committees, and other similarly situated government employees and entities are permitted under the First Amendment and the right to petition government. This concept is found in a comment to the Model Rule. Paragraph (c) places the exception in the black letter of the Rule for greater clarity.
	<u>(2) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or</u>	Subparagraph (c)(2) carries forward an exception found in current Rule 2-100.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	(3) <u>Communications authorized by law or a court order.</u>	This exception stated in subparagraph (c)(3) is identical to the exception found in the Model Rule. It has been placed with the other express exceptions to the proposed Rule for clarity.
	(d) <u>When communicating on behalf of a client with any person as permitted by this Rule, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.</u>	Paragraph (d) adds an important public protection not found in the Model Rule. It is designed to prevent misleading a person with whom communication is permitted.
	(e) <u>In any communication permitted by this Rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.</u>	Paragraph (e) adds protections not found in the Model Rule against unwarranted intrusions into the attorney-client or other privilege. Thus, even where a communication is permitted by the Rule, the lawyer may not seek to obtain privileged or confidential information that the lawyer is not entitled to receive.
	(f) <u>A lawyer for a corporation, partnership, association or other organization shall not represent that he or she represents all employees, members, agents or other constituents of the organization unless such representation is true.</u>	Paragraph (f) is intended to prevent an attorney for an organization from thwarting legitimate inquiries and investigations by falsely representing that he or she represents all of the employees or other constituents of the organization. As such, it adds more public protection by preventing misuse of the Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel	<u>Commission's Proposed Rule*</u> Rule 4.2 Communication with a Represented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	(g) <u>As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).</u>	Paragraph (g) defines the term "public official" as used in paragraph (c)(1). The Model Rule recognizes that lawyers are authorized by law to communicate with government on behalf of clients who are exercising their constitutional rights. However, this exception is found in a comment to the Model Rule, whereas the proposed Rule includes the exception in the black letter for greater clarity, specificity, and guidance.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.	<u>Overview and Purpose</u> [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the ~~uncounselled~~<u>uncounseled</u> disclosure of information relating to the representation.	Comment [1] is identical to Model Rule 4.2, cmt. [1], except for the spelling of "uncounseled."
[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.	[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.	Comment [2] is identical to Model Rule 4.2, cmt. [2].
[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.	[3] ~~The~~<u>This</u> Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.	Comment [3] is identical to Model Rule 4.2, cmt. [3], except for the substitution of "This" for "The".

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.</u>	Comment [4] explains use of the terms "person" and "matter" as used in the Rule. The proposed Rule uses the term "person" rather than "party" as in present Rule 2-100 to clarify that the Rule is not limited to litigation contexts and does not refer only to parties to litigation. (Cf. <i>Matter of Dale</i> (Rev.Dept. 2005) 4 Cal. State Bar Ct.Rptr. 798, 804-807.)
	<u>[5] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.</u>	Comment [5] clarifies the use of the words "directly or indirectly" in Paragraph (a).
[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule	~~[4]~~ This Rule does not prohibit ~~communication~~ <u>communications</u> with a represented person, or an employee ~~or member~~ agent, <u>or other constituent</u> of ~~such a person~~ <u>represented organization</u>, concerning matters outside the representation. For example, the existence of a controversy, <u>investigation or other matter</u> between ~~at the government agency~~ and a private ~~party~~ <u>person</u>, or between two organizations, does not prohibit a lawyer for either from communicating with <u>the other</u>, <u>or with</u> nonlawyer representatives of the other, regarding a separate matter. ~~Nor does this Rule preclude communication with a represented person~~	Comment [6] is based on Model Rule 4.2, cmt. [4], which has been modified to conform to the terminology used in paragraph (b). That paragraph defines "person" in an organizational context. The revisions also clarify the language of the Model Rule comment. The last four sentences of the comment have not been adopted because they do not materially add to an understanding of the Rule, are covered by other comments or are self-evident from a reading of the black letter of the Rule itself. The point stated in the stricken sentence--that parties to a matter may communicate directly with each other -- is addressed in Comment [7] below.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.	~~who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.~~	
[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.	<u>Communications Between Represented Persons</u> ~~[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.~~	The concepts contained in Model Rule 4.2, cmt. [5] are covered in more detail in Comments [16] and [19], and so the Model Rule comment has been stricken.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer's client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e).	The gist of Comment [4] – that represented persons may communicate with each other – is found in Model Rule, cmt. [4]. The second sentence of this comment, which states that a lawyer may advise a client on what to say or not to say to the represented person, is designed to address the issue of whether giving a client instructions or directions on what to say to the represented person amounts to an “indirect communication” with the represented person. (Cf. COPRAC Opn. 1993-131.) This comment thus seeks to clarify that a lawyer can advise or edit a client's communications with the represented party without the communication being deemed an indirect communication. The Model Rule does not address the concept of indirect communications with represented persons; hence the need to add this comment.
	[8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.	Comment [8] has no counterpart in the Model Rule. As noted in Comment [7], represented persons in a matter may communicate directly with each other. Comment [8] clarifies that the Rule does not preclude a lawyer who is a party from communicating with the represented person. The second sentence provides cautionary advice on how a represented person may avoid abuses.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Knowledge of Representation and Limited Scope Representation</u> <u>[9] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. However, knowledge may be inferred from the circumstances. (See Rule 1.0.1(f).)</u>	The substance of Comment [9] is in Model Rule 4.2, cmt. [8].
	<u>[10]When a lawyer knows that a person is represented by another lawyer on a limited basis, the lawyer may communicate with that person with respect to matters outside the scope of the limited representation. (See Comment [6].) In addition, this Rule does not prevent a lawyer from communicating with a person who is represented by another lawyer on a limited basis where the lawyer who seeks to communicate does not know about the other lawyer's limited representation because that representation has not been disclosed. In either event, a lawyer seeking to communicate with such person must comply with paragraphs (d) and (e) or with Rule 4.3.</u>	Comment [10] has no counterpart in the Model Rule. California authorizes limited scope representation in civil cases and family law cases. (California Rules of Court, Rules 3.35-3.37; 5.70 & 5.71) Limited scope representation occurs where a lawyer may be hired to represent a person only for limited tasks, which renders the person to be contacted, at the same time, both represented and unrepresented. Model Rule 1.2 recognizes that a lawyer may limited the scope of representation, but neither that Rule nor Model Rule 4.2 provide guidance on how to handle communications with partially represented persons. Comment [10] is intended to fill this void.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Represented Organizations and Constituents of Organizations</u> <u>[11]"Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.</u>	Comments [11] to [15] explain paragraph (b), a provision not found in Model Rule 4.2. Model Rule 4.2 proscribes communications with a represented "person," but does not attempt to define in an organizational context which agents or employees of the organization may be contacted when the organization is represented by counsel.
	<u>[12]As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.</u>	See Explanation of Changes for Comment [11].
	<u>[13]Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code section 1222.)</u>	See Explanation of Changes for Comment [11].

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[14]If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.	See Explanation of Changes for Comment [11].
	[15]This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.	See Explanation of Changes for Comment [11].
	<u>Represented Governmental Organizations</u> [16]Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization	Comment [16] explains paragraph (c)(1), which has no counterpart in the Model Rule. (See discussion above regarding Paragraph (c)(1).) This Comment also provides parameters on permissible communications.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.	
	<u>Represented Person Seeking Second Opinion</u> [17] Paragraph (c)(2) permits a lawyer who is not already representing another person in the matter to communicate with a person seeking to hire new counsel or to obtain a second opinion where the communication is initiated by that person. A lawyer contacted by such a person continues to be bound by other Rules of Professional Conduct. (See, e.g., Rules 7.3 and 1.7.)	Comment [17] explains paragraph (c)(2), which has no counterpart in the Model Rule.
	<u>Communications Authorized by Law or Court Order</u> [18] This Rule is intended to control communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These	This comment explains what is meant by the “authorized by law exception.” It expands on Comment [5] of the Model Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.	
	[19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the "authorized by law" exception in these circumstances may run counter to the broader policy that underlies this Rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.	Comment [19] recognizes that law enforcement agencies, as permitted by the "authorized by law" exception in Paragraph c(3), may engage in investigative activities which involve communications with persons represented by counsel and which are necessary to promote legitimate law enforcement functions. The comment provides additional guidance not found in Model Rule 4.2, cmt. [5].

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[20] Former Rule 2-100 prohibited communications with a "party" represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a "person" represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.	Comment [20] explains that the change from "party" in Rule 2-100 to "person" in the proposed Rule is not intended to alter existing investigative communication exceptions that were recognized under current rule 2-100. The comment has no Model Rule counterpart since ABA Rule 4.2 does not use the word "party."
[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.	~~[6]~~^[21] A lawyer who is uncertain whether a communication with a represented person is permissible ~~may~~might be able to seek a court order. A lawyer ~~may~~ also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.	Comment [21] addresses the "authorized by court order" exception in paragraph (c)(3). Except for minor changes, this comment is identical to Comment [6] to the Model Rule.

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.	~~[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.~~	The subject matter of Model Rule 4.2, cmt. [7], is addressed more fully in paragraph (b) and Comments [11] to [15] of the proposed Rule. See Explanation of Changes, above.
[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.	<u>Prohibited Objectives of Communications Permitted Under This Rule</u> ~~[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.~~	Model Rule 4.2, cmt. [8], although stricken, is found in the black letter and in Comment [9] of the proposed Rule (see above).

<u>ABA Model Rule</u> Rule 4.2 Communication With Person Represented By Counsel Comment	<u>Commission's Proposed Rule</u> Rule 4.2 Communication with a Represented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).	Comment [22] serves as a reminder that even if a communication is permitted by this Rule, a lawyer must not abuse the privilege by disregarding the lawyer's obligations under paragraphs (d) and (e). There is no counterpart to paragraphs (d) and (e) in the ABA Rule.
	[23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See [Rule 4.4.] Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d).	Comment [23] clarifies the scope and application of paragraphs (d) and (e), which are not found in the ABA rule. References to Rule 4.4 are in brackets pending the Commission's final consideration of that Rule.
[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.	[924] ~~In the event the person~~ When a lawyer's communications with ~~whom~~ a person are not subject to this Rule because the lawyer ~~communicates~~ does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not ~~known to be~~ represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.	Comment [24] is based on Model Rule 4.2, cmt. [9], but corrects an error in it. Rule 4.3 applies when a lawyer is communicating with a person the lawyer knows to be unrepresented by counsel, and it also applies when the lawyer doesn't know if the person is unrepresented. Both Model Rule 4.2 and proposed Rule 4.2 apply when the lawyer is communicating with a person the lawyer knows to be represented by counsel.

Rule 4.2: Communication with a Represented Person
(Commission's Proposed Rule – Clean Version)

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

COMMENT

Overview and Purpose

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- [4] As used in paragraph (a), “the subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.
- [5] The prohibition against “indirect” communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator.

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

Communications Between Represented Persons

- [7] This Rule does not prohibit represented persons from communicating directly with one another, and a lawyer is not prohibited from advising the lawyer’s client that such communication may be made. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client’s communications with a represented person, subject to paragraph (e).
- [8] This Rule does not prevent a lawyer who is a party to a matter from communicating directly or indirectly with a person who is represented in the matter. To avoid possible abuse in such situations, the lawyer for the represented person may advise his or her client (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Knowledge of Representation and Limited Scope Representation

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

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

Represented Organizations and Constituents of Organizations

- [11] "Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.
- [12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.
- [13] Paragraph (b)(2) applies to current employees, members, agents, and constituents of the organization, who, whether because of their rank or implicit or explicit conferred authority, are authorized to speak on behalf of the organization in connection with the subject matter of the representation, with the result that their statements may constitute an

admission on the part of the organization under the applicable California laws of agency or evidence. (See Evidence Code section 1222.)

- [14] If an employee, member, agent, or other constituent of an organization is represented in the matter by his or her own counsel, the consent by that counsel is sufficient for purposes of this Rule.
- [15] This Rule generally does not apply to communications with an organization's in-house lawyer who is acting as a legal representative of the organization where the organization is also represented by outside legal counsel in the matter that is the subject of the communication. However, this Rule does apply when the in-house lawyer is a "person" under paragraph (b)(2) with whom communications are prohibited by the Rule.

Represented Governmental Organizations

- [16] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization special considerations exist as a result of the rights conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. A "public official" as defined in paragraph (g) means government officials with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1). Therefore, a lawyer seeking to communicate on behalf of a client with a governmental organization constituent who is not a public official must comply with paragraph (b)(2) when the lawyer knows the governmental organization is represented in the matter. In addition, the lawyer must also comply with paragraphs (d) and (e) when the lawyer knows the governmental organization is represented

in the matter that is the subject of the communication, and otherwise must comply with Rule 4.3.

Represented Person Seeking Second Opinion

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

Communications Authorized by Law or Court Order

- [18] This Rule controls communications between a lawyer and persons the lawyer knows to be represented by counsel unless a statutory scheme, court rule, case law, or court order overrides the Rule. There are a number of express statutory schemes which authorize communications that would otherwise be subject to this Rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity.
- [19] Paragraph (c)(3) recognizes that prosecutors or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, or in juvenile delinquency proceedings, as authorized by relevant federal and state, constitutional, decisional and statutory law, may engage in legitimate investigative activities, either directly or through investigative agents and informants. Although the “authorized by law” exception in these circumstances may run counter to the broader policy that underlies this Rule,

nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person’s right to counsel under the 5th and 6th Amendments of the U.S. Constitution, and parallel provisions of the California Constitution (Cal. Const., Art. I, §15), that are beyond the scope of this Comment. In addition, certain investigative activities might be improper on grounds extraneous to this Rule or in circumstances where a government lawyer engages in misconduct or unlawful conduct.

- [20] Former Rule 2-100 prohibited communications with a “party” represented by another lawyer, while paragraph (a) of this Rule prohibits communications with a “person” represented by another lawyer. This change is not intended to preclude legitimate communications by or on behalf of prosecutors, or other lawyers representing governmental entities in civil, criminal, or administrative law enforcement investigations, that were recognized by the former Rule as authorized by law, or to expand or limit existing law that permits or prohibits communications under paragraph (c)(3). This change also is not intended to preclude the development of the law with respect to which criminal and civil law enforcement communications are authorized by law.
- [21] A lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order. A lawyer also might be able to seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Prohibited Objectives of Communications Permitted Under This Rule

- [22] A lawyer who is permitted to communicate with a represented person under this Rule must comply with paragraphs (d) and (e).
- [23] In communicating with a current employee, member, agent, or other constituent of an organization as permitted under paragraph (b)(2), including a public official or employee of a governmental organization, a lawyer must comply with paragraphs (d) and (e). A lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. (See [Rule 4.4].) Obtaining information from a current or former employee, member, agent, or other constituent of an organization that the lawyer knows or reasonably should know is legally protected from disclosure may also violate Rules [4.4], 8.4(c) and 8.4(d).
- [24] When a lawyer's communications with a person are not subject to this Rule because the lawyer does not know the person is represented by counsel in the matter, or because the lawyer knows the person is not represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.2: Communication with a Person Represented by Counsel

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 4.2 restricts communication with a “party” rather than a “person” and omits the phrase “or a court order.”

California: Rule 2-100 (Communication with a Represented Party), provides as follows:

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a “party” includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or

(3) Communications otherwise authorized by law.

Colorado: Rule 1.2(c) permits “limited representation of a pro se party” as provided by specified Colorado Rules of Civil Procedure. Rule 5 of the Colorado Rules of Civil Procedure provides that such limited representation of a pro se party “shall not constitute an entry of appearance by the attorney... and does not authorize or require the service of papers upon the attorney.”

District of Columbia adds the following three paragraphs to Rule 4.2:

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization’s lawyer. If the organization is an adverse

party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

(c) For purposes of this rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.

(d) This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

Florida: Rule 4.2 deletes the phrase "or is authorized to do so by law or a court order" and substitutes the following new language:

[A]n attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute, court rule, or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

In addition, Florida adds a new paragraph (b) stating as follows:

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating the Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of; or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(Florida's version of Rule 1.2(c) provides, in part, that "a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation.")

Georgia replaces the phrase "authorized to do so by law" with the phrase "authorized to do so by constitutional law or statute." Georgia also adds a new paragraph (b) that provides: "Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State."

Illinois provides that a lawyer shall not communicate "or cause another to communicate" with a represented "party."

Louisiana adds a new paragraph (b) that prohibits communication with:

(b) a person the lawyer knows is presently a director, officer, employee, member, shareholder, or other constituent of a represented organization and

(1) Who supervises, directs or regularly consults with the organization's lawyer concerning the matter;

(2) Who has the authority to obligate the organization with respect to the matter; or

(3) Whose act or omission in connection with the matter may be imputed to the organization for purpose of civil or criminal liability.

Maryland adds the following paragraphs to Rule 4.2 and limits the reach of paragraph (a), which is the same as ABA Model Rule 4.2, by reference to paragraph (c):

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer's client and the lawyer first makes the disclosures specified in paragraph (b).

Michigan currently retains the pre-2002 version of ABA Model Rule 4.2 (which lacks an express "court order" exception).

New Jersey: Rule 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Rule 4.2 must be read in conjunction with New Jersey's Rule 1.13, which defines the phrase "litigation control group" as follows:

For the purposes of RPC 4.2 and 4.3... the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organizations legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be

represented in the matter by the organization's lawyer but may at any time disavow said representation.

New Mexico adds the following sentence to Rule 4.2: "Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel."

New York: DR 7-104(A)(1) generally tracks ABA Model Rule 4.2 but requires the "prior" consent of the other lawyer and does not mention "a court order." New York also adds the following unique DR 7-104(B):

(B) Notwithstanding the prohibitions of DR 7-104(A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

North Carolina: Rule 4.2(a) adds: "It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy." North Carolina also adds a new Rule 4.2(b) that provides as follows:

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body, even if the lawyer knows that the

government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

- (1) in writing, if a copy of the writing is promptly delivered to opposing counsel;
- (2) orally, upon adequate notice to opposing counsel; or
- (3) in the course of official proceedings.

Oregon: Rule 4.2 provides as follows:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Texas: Rule 4.02 provides:

(a) In representing a client; a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding

that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, “organization or entity of government” includes:

(1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or

(2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the, first lawyer.

Utah: Rule 4.2 contains 17 separate paragraphs and subparagraphs. Rule 4.2(a) begins by tracking ABA Model Rule 4.2, but omits “or is authorized to do so by law or court order” and adds that an attorney may, without prior consent, communicate with another lawyer’s client “if authorized to do

so by any law, rule, or court order... or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.” Paragraphs (b) and (d) cover “Rules Relating to Unbundling of Legal Services” and “Organizations as Represented Persons.” Paragraph (c), which is highly unusual, provides as follows:

(c) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer’s direction in the matter, may communicate with a person known to be represented by a lawyer if:

(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

Paragraph (e), which covers “Limitations on Communications,” provides that when communicating with a represented person pursuant to this Rule, no lawyer may:

(e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person’s counsel; or

(e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.

Wyoming: Wyoming, makes clear that Rule 4.2 applies to communications with a person “or entity” represented by another lawyer.

Proposed Rule 4.3 [n/a]

“Dealing with Unrepresented Person”

(Draft #5.1, 10/15/08)

Summary: Proposed Rule 4.3(a) substantially follows Model Rule 4.3 by placing restrictions on a lawyer's communications with an unrepresented person and seeking to ensure that unrepresented persons are not misled when dealing with a lawyer who is acting on a client's behalf. A new paragraph (b) has been added to prohibit a lawyer from seeking to obtain privileged or other confidential information from an unrepresented person when the lawyer knows or reasonably should know the person may not reveal the information without violating a duty to another or which the lawyer is not otherwise entitled to receive.

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 3-600(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

(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 10
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:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

San Diego County Bar Association believes common law provides sufficient protection against lawyers' abuses toward the unrepresented without adding a disciplinary rule.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.3* Dealing with Unrepresented Person

October 2009

Draft rule following consideration of public comment

INTRODUCTION:

Proposed Rule 4.3 is similar to Model Rule 4.3 in placing restrictions on a lawyer's communications with an unrepresented person. Restrictions on a lawyer's communications with a represented person are governed by proposed rule 4.2. Rule 4.3 is intended to ensure that unrepresented persons are not misled when dealing with a lawyer who is acting on a client's behalf and provides protection against overreaching by the lawyer. Paragraph (a) is a variation of Model Rule 4.3 in addressing the same three requirements as the Model Rule. First, a lawyer must not mislead the unrepresented person about the lawyer's role. Second, when the lawyer knows or reasonably should know that the person incorrectly believes the lawyer is disinterested, the lawyer must take reasonable steps to correct the misunderstanding. Third, when the lawyer knows or reasonably should know that interests of the unrepresented non-client are in conflict with the interests of the lawyer's client, the lawyer shall not give legal advice to the unrepresented person except that the lawyer may advise the person to secure counsel.

Paragraph (b) is new and provides that in communicating with an unrepresented person, a lawyer shall not seek to obtain information that should not be disclosed by the unrepresented person because the information is privileged or is subject to another legally recognized confidentiality obligation. Paragraph (b) is intended to further the lawyer's obligations under Model Rule 4.4(a) in the context of communicating with an unrepresented person.

* Proposed Rule 4.3, Draft 5.1 (10/15/08).

INTRODUCTION (Continued):

Minority. A minority of the Commission objects to paragraph (a) because it creates a situation in which lawyers act at their peril in dealing with an unrepresented person on behalf of a client, which, in turn, compromises the lawyer's ability to represent a client. The term "disinterested" does not have a clear meaning. The prohibition on "implying" that the lawyer is "disinterested" furthers the ambiguity, so that lawyers dealing with unrepresented persons on behalf of a client do not have a clear statement of what the Rule prohibits. The minority of the Commission also objects to the last sentence in paragraph (a), which prevents giving legal advice to unrepresented persons. When a lawyer communicates with an unrepresented person on behalf of a client, communication of information about the law and how it relates to the unrepresented person's dispute with the client is inevitable. While Comment [3] allows lawyers "merely" to state a client's legal position to an unrepresented person, the Comment does not explain what distinguishes a mere statement of a client's legal position from advice that would subject the lawyer to discipline. California law historically has avoided imposing duties on lawyer's to non-clients in order to avoid conflicts of interest that could compromise the lawyer's representation of the client. Paragraph (a) would create such a conflict.

A minority of the Commission objects to paragraph (b) because it also compromises a lawyer's ability to represent a client with respect to an unrepresented person. There are many seemingly innocent inquiries that may result in the revelation of privileged or confidential information. The knows or reasonably should know standard exposes a lawyer to being second guessed in the disciplinary process, which would chill communications with an unrepresented person on behalf of a client. In addition, paragraph (b) does not distinguish situations where the revelation of privileged or confidential information may be appropriate or necessary, such as when the interests of the unrepresented person and the lawyer's client are aligned. The lawyer would be able to obtain such information from a lawyer representing the person, but would be subject to discipline under paragraph (b) if the same information comes from a person who chooses not to be represented. The minority believes that paragraph (b) would do more harm than good.

Current California Law and Variations in Other Jurisdictions. Although there is no counterpart to Model Rule 4.3 which imposes duties on a lawyer in dealing with unrepresented persons, current California rule 3-600(D) imposes similar duties on lawyers representing an organization as to constituents of an organization. Approximately 12 states have adopted variations of Model Rule 4.3. Kansas, Maryland and Michigan, for example, retain the pre-2002 version of the rule which does not include the third requirement against giving legal advice to

INTRODUCTION (Continued):

an unrepresented person. Several states, including New Jersey, have added a provision dealing with communications with persons who are officers, directors or other constituents of an organization represented by the lawyer. Florida's rule provides that a lawyer shall not give legal advice to any unrepresented person other than advice to secure counsel. Florida's rule also has a separate paragraph on communicating with a person to whom limited representation is being provided. Georgia's rule includes a 30 day cooling off period prior to any contact with a potentially adverse party in a matter involving an accident or disaster involving that person or a relative of that person. Utah has added a provision on who qualifies as a represented and unrepresented person for purposes of rules 4.2 and 4.3. Washington adds a comment on communications by government lawyers that do not violate the rule. Several other jurisdictions, including the District of Columbia, North Carolina and Pennsylvania track the substance of the Model Rule but reorder the language and divide the rule into subparagraphs.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person	<u>Commission's Proposed Rule*</u> Rule 4.3 Dealing With Unrepresented Person	<u>Explanation of Changes to the ABA Model Rule</u>
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.	(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person ~~misunderstands~~ <u>incorrectly believes</u> the ~~lawyer's role~~ <u>lawyer is disinterested</u> in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. ~~The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if~~ <u>the lawyer knows or reasonably should know that the interests of such an unrepresented person are or have a reasonable possibility of being</u> in conflict with the interests of the client, <u>the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.</u>	The first sentence in paragraph (a) follows Model Rule 4.3. The second sentence is revised to make it clearer that the lawyer's duty to correct the unrepresented person's misunderstanding arises when the lawyer knows or reasonably should know that the person "incorrectly believes the lawyer is disinterested" rather than "misunderstands the lawyer's role" in the matter. No substantive change is intended. The third sentence is rewritten to make the lawyer's obligation more definite by removing the phrase "or have a reasonable possibility of being in conflict" and reversing the order of the sentence. The sentence is also changed to provide that advising the person to secure counsel is discretionary depending on the circumstances and not a requirement.

* Proposed Rule 4.3, Draft 5.1 (10/15/08). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person	<u>Commission's Proposed Rule*</u> Rule 4.3 Dealing With Unrepresented Person	<u>Explanation of Changes to the ABA Model Rule</u>
	(b) <u>In communicating with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.</u>	Paragraph (b) does not have a counter-part in Model Rule 4.3 although there is a similar concept in Model Rule 4.4(a) that prohibits a lawyer from using methods of obtaining evidence that violates the legal rights of a third person. The Commission believes that including a requirement in this Rule that prohibits a lawyer from seeking to obtain privileged or other confidential information that the lawyer knows or reasonably should know the person may not reveal without violating a duty to another, or which the lawyer is not otherwise entitled to receive, is important to protect the attorney-client privilege and legal rights of third persons with whom the lawyer interacts.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Commission's Proposed Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).	[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In ~~orderacting~~ to ~~avoid~~<u>correct</u> a misunderstanding ~~about the lawyer's role,~~ a lawyer ~~will typically need to identify~~<u>may disclose the client's identity if it is not confidential.</u> ~~Whether the lawyer identifies~~ the lawyer's client ~~and,~~ <u>the lawyer shall explain,</u> where necessary, ~~explain~~ that the client has interests opposed to those of the unrepresented person. For ~~misunderstandings that sometimes arise~~<u>guidance</u> when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(~~df~~).	Comment [1] explains the purpose of the Rule and is a modified version of Comment [1] to Model Rule 4.3. The second sentence has been changed to point out that the client's identity may be disclosed if it is not confidential and that the lawyer must explain if necessary that the client has interests opposed to those of the unrepresented person whether the client's identity is disclosed. The third sentence has been shortened and the cross reference changed to the relevant paragraph of proposed Rule 1.13 dealing with the Organization as Client
	<u>[2] Paragraph (a) requires that a lawyer not mislead the person concerning the lawyer's role in the matter, or the identity or interest of the person whom the lawyer represents. For example, a lawyer may not falsely state or create the impression that the lawyer represents no one, or that the lawyer is acting impartially or that the lawyer will protect the interest of both the client and the unrepresented non-client. Paragraph (a) also requires that the lawyer not take advantage of the unrepresented person's misunderstanding.</u>	Comment [2] is new and is intended to provide guidance by identifying erroneous assumptions and other misunderstandings that an unrepresented person might have when dealing with a lawyer.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Commission's Proposed Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.	[23] ~~The Rule~~ <u>Paragraph (a)</u> distinguishes between ~~situations involving~~ <u>the situation in which a lawyer knows or reasonably should know that an unrepresented person has</u> interests ~~may be that are~~ <u>adverse</u> to those of the lawyer's client and ~~those~~ <u>the situation</u> in which the ~~person's interests are~~ <u>lawyer does not in conflict with the client's have that actual or presumed knowledge</u>. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. ~~This Rule~~ <u>A lawyer</u> does not ~~prohibit~~ <u>give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer from also does not give legal advice merely by</u> negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may <u>state a legal position on behalf of the lawyer's client</u>, inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.	Comment [3] is a modified version of Model Rule 4.3, cmt. [2]. The first sentence is revised to be more precise and to conform to the wording of the Rule without changing its meaning. The third sentence clarifies that simply stating the client's legal position is not giving legal advice under the rule. The fourth sentence has been changed to make to same point.

<u>ABA Model Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Commission's Proposed Rule</u> Rule 4.3 Dealing With Unrepresented Person Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. A lawyer who obtains information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure might also violate Rules [4.4], 8.4(c) and 8.4(d).	Comment [4] is new and explains the prohibition in paragraph (b) against seeking to obtain information that should not be disclosed by an unrepresented person due to its privileged nature or some other legally-cognizable confidentiality obligation. A cross reference has been added to other rules that might also be violated if the lawyer knows or reasonably should know that the information obtained is legally protected from disclosure. Brackets have been placed around "4.4" pending the Commission final consideration of that Rule.
	[5] Paragraph (b) does not prohibit a lawyer from seeking to obtain information from an unrepresented person through the use of discovery in litigation or interrogation at trial.	Comment [5] is new and explains that paragraph (b) does not prohibit seeking information from third persons through the use of discovery in litigation or at trial.
	[6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.	Comment [6] is new and points out that paragraph (a) does not apply to lawful government or private covert criminal and civil investigations.

Rule 4.3 Dealing With Unrepresented Person Rules Revision Commission – Minority Dissent

This Rule should not be adopted. The Rule creates a special burden on lawyers in communicating with unrepresented person that does not exist when communicating with other lawyers. In so doing, the Rule creates a situation in which lawyers act at their peril in dealing with an unrepresented person on behalf of a client, which, in turn, compromises the lawyer's ability to represent a client.

The proposed Rule has three significant flaws. The term "disinterested" is ambiguous. Because of its ambiguity, lawyers dealing with unrepresented persons on behalf of a client do not have a clear statement of what the Rule prohibits. The last sentence in paragraph (a), which prevents giving legal advice to unrepresented persons, and related Comment [3] are unclear and do not clarify the difference between merely stating a client's legal position and advice that would subject a lawyer to discipline. Paragraph (b) is overbroad and would chill communications with unrepresented persons on behalf of a client.

California law historically has avoided imposing duties on lawyers to non-clients in order to avoid conflicts of interest that could compromise the lawyer's representation of the client. Paragraph (a) would create such conflicts. It will permit discipline of lawyers for saying things that are not improper, are not misleading, might be in the best interests of lawyers' clients, and

might be in the best interests of unrepresented persons. This rule contains oversimplifications that do not apply in the day to day practice of law and will be wrong as disciplinary standards.

The Disinterested Standard in Paragraph (a) Is Ambiguous

We would have no objection if the Rule stated that, in communicating with an unrepresented person, a lawyer shall not represent that the lawyer is not communicating on behalf of a client, when that is not the case. Lawyers cannot engage in a fraud when dealing with other lawyers or an unrepresented person. However, this proposed rule does not say that. Instead, it creates a special prohibition with respect to an unrepresented person that would discipline a lawyer for implying that he or she is "disinterested."

The word "disinterested" is ambiguous because it has no established meaning. It can have multiple meanings to different people on different occasions. For example, it might mean impartiality, or it might mean that the lawyer does not own an interest in the matter at hand. The rule increases the ambiguity of the word "disinterested" by coupling that word with the word "imply." The rule does not prohibit a lawyer from telling an unrepresented party that the lawyer has no client. Instead, it forbids a lawyer from "implying" that the lawyer is "disinterested."

As a result, the rule creates a situation where a lawyer acts at his or her peril in communicating with an unrepresented person on behalf of a client. No one can tell from the rule what statement is sufficient to “imply” that he or she is “disinterested” and lead to disciplinary proceedings. A totally innocent statement can be interpreted to “imply” that a lawyer is “disinterested.” Consequently, a legitimate statement may lead to a disciplinary complaint.

For example, an attorney for an employee may tell his client’s employer that he represents the employee, that the employer is subject to the Fair Employment and Housing Act, and that racial discrimination is prohibited under FEHA. That comment may be totally correct and not misleading; it may even be in the best interests of the lawyer’s client. But if the employer thinks the lawyer is being objective, that innocent statement is prohibited because it “implies” that the lawyer is disinterested.

Conversely, the lawyer may tell the employer that the lawyer does not have a stake in the dispute between the employee and the employer. That statement may literally be true because the lawyer does not have a contingent fee. However, the statement can be argued to “imply” that the lawyer is “disinterested.” Therefore, it would be a violation of this ambiguous rule.

Comment [1] furthers the problem with the Rule by suggesting that a lawyer may be disciplined for implying that he or she “is a disinterested authority on the law.” Suppose a lawyer is recognized as an expert in employment law. She truthfully states that “I lecture to

employers, law schools, and business schools on wage and hours laws. In my opinion, you have violated those laws, but I want to try to reach an agreement with you to head off a lawsuit that you and my client should want to avoid.” It violates both proposed rule 4.3(a) and its Comment [1]. It is a violation, even if it is the literal truth, even if the employer knows who the lawyer’s client is, even though the employer knows the lawyer is not representing the employer, and even if both the client employee and the unrepresented employer would both be benefitted by a settlement instead of litigation. The rule prohibits a lawyer from expressing objectivity.

All of this impacts the representation of clients. In ways that would be detrimental to the client, it impedes the role of lawyers who communicate with unrepresented persons on behalf of clients. Proposed Rule 3.4(a) would make totally truthful statements, that cause no harm, disciplinable offenses.

The Prohibition on Giving Legal Advice Is Ambiguous and Improper

Paragraph (a)’s prohibition on giving legal advice also is problematic. When a lawyer communicates with an unrepresented person on behalf of a client, communication of information about the law and how it relates to the unrepresented person’s dispute with the client is inevitable. The Rule does not define what constitutes giving legal advice. While Comment [3] allows lawyers “merely” to state a client’s legal position to an unrepresented person, the Comment does not explain what distinguishes a “mere” statement of a client’s legal

position from advice that would subject the lawyer to discipline.

The lack of clarity in this Rule creates a conflict between a lawyer's duty to represent a client's interests and a new duty to an unrepresented adverse party, which inevitably will impact the representation of clients. The Rule creates this conflict by creating a situation in which a lawyer communicates with an unrepresented person at his or her peril.

For example, assume a lawyer is communicating with an unrepresented person who is trespassing on a client's property. We presume that writing a letter to an unrepresented person saying you are trespassing is merely stating the client's legal position. But does the Rule apply if the lawyer goes on to say, "your actions are a violation of the Penal Code and may subject you to arrest and prosecution." How about if the lawyer goes on to say, "if you continue, my client will sue you and you could be liable for damages in excess of \$\$\$\$." That arguably exceeds "merely" stating the client's legal position. How about if the lawyer says, "If you want to avoid incurring any further liability, we advise you to take the following steps." Does using the word "advise" subject the lawyer to discipline? Would the result be different if the lawyer says, "My client is willing to drop this matter if you take the following steps." How is a lawyer, who is not steeped in these rules and who will have no precedent as guidance for interpreting them, going to understand the differences?

Another example would be settling a matter with an unrepresented person. Assume the settlement requires the unrepresented person to take certain legal steps to effectuate the settlement. Suppose the lawyer needs to explain how to perform those legal steps to the unrepresented person in order to assure that the client's interests in an effective settlement are achieved. Is that giving legal advice? Is that just a "mere" statement of a client's legal position? What distinguishes "merely stating a client's legal position" from non-mere statements of a client's legal position that get the lawyer disciplined?

Furthermore, there often are situations where lawyers should give legal advice to unrepresented persons, even if they do not represent that person. Such advice often benefits both the lawyer's client and the unrepresented person.

For example, if the client and the other person have conflicts of interest, but the client might be vicariously liable for the acts of the unrepresented person, this rule would forbid the lawyer from telling the unrepresented person that she should file an answer to the complaint a third person filed against both the client and the unrepresented person. Even if the client is not vicariously liable for the conduct of the unrepresented person, if they are both defendants in the same case, there is nothing improper about a lawyer warning the unrepresented defendant that she "should file an answer to the complaint." However, that innocent advice would violate both the first sentence of paragraph (a) [because the defendant can interpret the statement as "implying"

that the lawyer is disinterested because it hints that the lawyer is impartial], and it also violates the last sentence of paragraph (a), because it is legal advice given when the lawyer knows there is a conflict of interest.

Even if the lawyer knows the unrepresented person has no money with which to hire a lawyer, all the lawyer will be permitted to say is the unhelpful statement, “Hire a lawyer.” If a lawyer helps a *pro se* party avoid a default, and that advice does not harm the lawyer’s client, why should the lawyer be disciplined for doing so?

Many states have declined to adopt the second sentence in paragraph (a) to the Model Rule. California would be well served to join those states. The last sentence in paragraph (a) is not necessary and should be deleted along with the related discussion in Comment [3].

Paragraph (b) Would Interfere with Proper Representation of Clients

Paragraph (b) of this rule is also wrong. It prohibits a lawyer from asking for information that might help the lawyer’s client and, if interpreted literally, prohibits asking questions that should be permissible.

There are many seemingly innocent inquiries that may result in the revelation of privileged or confidential information. The “knows or reasonably should know” standard exposes a lawyer to being second guessed in the disciplinary process, which would chill communications with an unrepresented person on behalf of a client. In addition, paragraph (b) does not provide

any exception for situations where the revelation of privileged or confidential information may be appropriate or necessary, such as when the interests of the unrepresented person and the lawyer’s client are aligned. The lawyer would be able to obtain such information from a lawyer representing the person, but would be subject to discipline under paragraph (b) if the same information comes from a person who chooses not to be represented.

For example, suppose an opposing party has fired his lawyer. In conversation with that party, the lawyer asks whether the unrepresented party was ever told about the wage and hours laws. The unrepresented party has a choice: answer or refuse to answer. The question is permissible. The *pro se* litigant knows that the lawyer is not representing him. Not hiring a lawyer inherently places the unrepresented party in the position of having to decide for himself whether to answer questions asked by an opposing lawyer. The lawyer who asks the question is not doing anything improper, is not deceiving the unrepresented party, and is properly representing his client. However, the lawyer will have violated paragraph (b) because she has asked the other party a question that might elicit privileged information. That should not be a disciplinable offense. Yet it could be under the proposed Rule.

Suppose a lawyer represents a shareholder, interviews a corporation’s unrepresented former employee, and asks her why options were backdated. She might reply that they were backdated “. . . because our lawyer told me and the chief financial officer that we could and should do

so.” The lawyer asked a legitimate question but has violated paragraph (b) of the proposed rule because the question asks that person to reveal information that arguably violates a duty to the former employer.

Suppose a lawyer doing tax or estate planning for an adult child asks a parent questions that elicit information that the parent could be privileged not to disclose, such as tax return information, but which is relevant estate planning for the child (such as whether gift tax returns were filed and, if so, the value used for an asset in the return, or whether the parent has depreciated an asset, and, if so, what depreciation has been claimed on the parent's income tax return). The lawyer is asking an unrepresented party for information that is privileged because the tax or gift tax returns are confidential. Those innocent questions would be disciplinable under paragraph (b) of this rule.

These examples show that paragraph (b) would do more harm than good. Paragraph (b) is not in the Model Rule. The new requirement in paragraph (b) is overbroad and would produce results that are unwarranted.

Conclusion

As shown by the examples above, this rule would apply in infinite numbers of situations in which it should not apply. It is overbroad, poorly worded, inconsistent with lawyers' duties to their clients in many circumstances, and forbids lawyers from saying words that might benefit both their own clients and unrepresented persons.

This proposed Rule will impose special duties on lawyers to unrepresented persons that will conflict with the lawyer's duties to their clients. Its ambiguities will cause lawyers to communicate with unrepresented persons at their peril and at the cost of effective client representation. It should not be adopted.

Rule 4.3 Dealing with Unrepresented Person (Commission's Proposed Rule – Clean Version)

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

COMMENT

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

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

- [3] Paragraph (a) distinguishes between the situation in which a lawyer knows or reasonably should know that an unrepresented person has interests that are adverse to those of the lawyer's client and the situation in which the lawyer does not have that actual or presumed knowledge. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. A lawyer also does not give legal advice merely by negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may state a legal position on behalf of the lawyer's client, inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the

meaning of the document or the lawyer's view of the underlying legal obligations.

- [4] Paragraph (b) prohibits a lawyer, in communicating with a person who is not represented by counsel, from seeking to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege, or is otherwise protected from disclosure by a legally cognizable duty owed by the unrepresented person. A lawyer who obtains information from an unrepresented person that the lawyer knows or reasonably should know is legally protected from disclosure might also violate Rules [4.4], 8.4(c) and 8.4(d).
- [5] Paragraph (b) does not prohibit a lawyer from seeking to obtain information from an unrepresented person through the use of discovery in litigation or interrogation at trial.
- [6] Paragraph (a) does not apply to lawful covert criminal or civil investigations by government or private lawyers.

Rule 4.3: Dealing with Unrepresented Person

STATE VARIATIONS

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

California has no comparable provision.

District of Columbia: Rule 4.3 contains the same words as ABA Model Rule 4.3, but D.C. divides the rule into paragraphs and subparagraphs.

Florida: The last sentence of Rule 4.3 provides only that a lawyer “shall not give legal advice to an unrepresented person, other than the advice to secure counsel.” Florida also adds a new Rule 4.3(b) that provides as follows:

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating the Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written note of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(Florida’s version of Rule 1.2(c) provides, in part) that “a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation.”)

Georgia adds that a lawyer shall not:

(c) initiate any contact with a potentially adverse party in a matter concerning personal injury or wrongful death or otherwise related to an accident or disaster involving the person to whom the contact is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the contact.

Kansas, Maryland, and Michigan retain the pre-2002 version of Rule 4.3,

New Jersey: Rule 4.3 deletes the last sentence of ABA Model Rule 4.3 and adds the following new sentence:

If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer’s representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization’s attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization’s attorney.

New Jersey Rule 4.3 must be read in conjunction with New Jersey Rule 1.13(a), which provides that, for purposes of Rules 4.2 and 4.3, a lawyer employed or retained to represent an organization represents not only the organization but also the members of its “litigation control group,” which includes “current agents and employees responsible for, or significantly involved in, the determination of the organization’s legal position in the matter....” Former employees who were members of the litigation control group “shall presumptively be deemed to be represented in the matter by the organization’s lawyer but may at any time disavow said representation.”

New York: DR 7-104(A)(2) provides that a lawyer, while representing a client shall not give advice to a “party” who is not represented by a lawyer, other than the advice to secure counsel, “if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.”

North Carolina and Pennsylvania: Rule 4.3 tracks the substance of ABA Model Rule 4.3, but reorders the language and divides the rule into subparagraphs.

Utah adds Rule 4.3(b), which provides that if a person’s counsel does not represent the person in all aspects of a particular matter, a lawyer may consider the person to be entirely “unrepresented” for purposes of this Rule and Rule 4.2, “unless that person’s counsel has provided written notice, to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.”

Washington: Washington adds the following new Comment to Rule 4.3: “Government lawyers are frequently called upon by unrepresented persons, and in some

instances by the courts, to provide general information on laws and procedures relating to claims against the government. The provision of such general information by government lawyers is not a violation of this Rule.”

Wisconsin: The first sentence of Rule 4.3 provides that in dealings on behalf of a client with a person who is not represented by counsel, “a lawyer shall inform such person of the lawyer’s role in the matter.”

Proposed Rule 5.1 [RPC N/A]

“Responsibilities of Partners, Managers, and Supervisory Lawyers”

(Draft #10, 9/13/09)

Summary: Proposed Rule 5.1 imposes a duty on partners, lawyers with comparable managerial authority and lawyers who directly supervise other lawyers to oversee the conduct of lawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of *respondeat superior* is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by firm lawyers, orders or ratifies the misconduct of another lawyer, or has knowledge of the other lawyer's misconduct and fails to take steps to prevent or mitigate the consequences.

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 3-110, Discussion

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 7
Opposed Rule as Recommended for Adoption 3
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:

The California Public Defenders Association, California Council of Chief Defenders and several District Attorney and Public Defender offices in California. See Public Comment Chart for a complete list of commenters.

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The California Public Defenders Association and several District Attorney and Public Defender offices in California expressed concerns that adoption of proposed Rule 5.1 could result in the imposition of vicarious responsibility on experienced lawyers in the office who informally take on the mentoring of recent hires. They also argue that adoption of the Rule would discourage such mentoring, which is critical in the training of new lawyers. See Public Comment Chart for Commission responses to their expressed concerns.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.1* Responsibilities of Partners, Managers, and Supervisory Lawyers

October 2009

(Draft rule following initial round of public comment.)

INTRODUCTION:

Proposed Rule 5.1, which substantially tracks Model Rule 5.1, imposes a duty on partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers, to oversee the conduct of lawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of *respondeat superior* is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by firm lawyers, orders or ratifies the misconduct of another lawyer, or has knowledge of the other lawyer's misconduct and fails to take steps to prevent or mitigate the consequences.

Paragraph (a) of the rule imposes a duty on a lawyer who is a partner or who, individually or with other lawyers, possesses comparable managerial authority to make reasonable efforts to establish measures to ensure compliance with the rules of professional conduct. Paragraph (b) imposes a duty on a lawyer, whether or not a partner or a manager, who has direct supervisory responsibility over another lawyer to make reasonable efforts to ensure the other lawyer complies with the rules. Under paragraph (c)(1) any lawyer may be held responsible in discipline for another lawyer's ethical violation if the lawyer orders or ratifies the misconduct. Under paragraph (c)(2), a lawyer who is a partner, manager or direct supervisor of the offending lawyer, may be subject to discipline for the other lawyer's misconduct if the lawyer has knowledge of it at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action.

* Proposed Rule, Draft 10 (9/13/09).

INTRODUCTION (Continued):

Current California Law and Variations in Other Jurisdictions. Model Rule 5.1 is the rule in nearly every jurisdiction, with only minor variations. For example, both Illinois and New Hampshire impose Rule 5.1's duties on "each" managing partner, in effect preventing such managerial partners from delegating responsibility to a single managing partner. New York and New Jersey both provide for discipline of a law firm, in addition to the individual lawyers in the firm, under Rule 5.1. All jurisdictions have adopted some version of Model Rule 5.1(c). California does not have a counterpart to Rule 5.1. However, the Discussion to current rule 3-110 provides that the duties set forth in the rule include the duty to supervise the work of subordinate lawyers and non-lawyer employees and agents. Proposed Rule 5.1 establishes in a separate rule the principle of supervisory responsibility and is consistent with existing California case law.

Minority. A minority of the Commission views proposed Rule 5.1 as an overly ambitious rule that represents a serious departure from the traditional notion of viewing compliance with ethical rules as the personal responsibility of individual lawyers, instead effectively imposing a strict liability standard on lawyers who did not engage in misconduct. The minority takes the position that the Rule unfairly imposes collective guilt on innocent lawyers in a firm for violations of the Rules of Professional Conduct by other lawyers, without adequately describing in advance what conduct will fall within its proscriptions and without clearly delineating which management or supervisory lawyers will be subject to the Rule. Specifically, the minority opposes the Rule because the Rule: (1) imposes discipline for negligent conduct contrary to the Supreme Court's admonition that the disciplinary system should not be used to punish acts of negligence; (2) fails to articulate specific, definable or consistent standards for enforcement, and as result, is unconstitutionally vague; and (3) fails to give notice as to which lawyers in a law firm are subject to its requirements because the phrase "comparable managerial authority" is vague and undefined.

A detailed statement of the minority's position, with citation to authority, is provided in these materials after the Comment Comparison Chart, below. See Minority Dissent.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.	(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm ~~conform to~~ <u>comply with the these Rules of Professional Conduct and the State Bar Act</u>.	<u>Paragraph (a)</u> is identical to Model Rule 5.1(a) except for replacing "conform to" with "complies with" for to clarify that the provision is mandatory. No change in meaning is intended. In addition, "these Rules" has been substituted for "the Rules of Professional Conduct" because the former is the standard term used throughout the Rules.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.	(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer ~~conforms to~~ <u>complies with the these Rules of Professional Conduct and the State Bar Act</u>.	<u>Paragraph (b)</u> is identical to Model Rule 5.1(b) with the exception of the same change as in paragraph (a). Again, no change in meaning is intended.
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:	(c) A lawyer shall be responsible for another lawyer's violation of ~~the these Rules of Professional Conduct~~ <u>and the State Bar Act</u> if:	<u>Paragraph (c)</u>. The introductory clause to paragraph (c) is identical to Model Rule 5.1(c).
(1) the lawyer orders or, with [knowledge] of the specific conduct, ratifies the conduct involved; or	(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or	<u>Subparagraph (c)(1)</u> is identical to Model Rule 5.1(c)(1).

* Proposed Rule, Draft 10 (9/13/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	(2) the lawyer is a partner, or <u>individually or together with other lawyers</u> has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	<u>Subparagraph (c)(2)</u> is identical to Model Rule (c)(2) except it has been changed to conform the wording with the language in paragraph (a). This additional language clarifies that the responsibility to take reasonable remedial action under this paragraph applies when the lawyer is a partner or, individually or together with other lawyers, has comparable managerial authority.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.	<u>Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.</u> [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a <u>law</u> firm. See Rule 1.0.1 (<u>Law Firm definition</u>).	Headings have been added to separate the comments pertaining to the three paragraphs under the rule. The second sentence in Model Rule Comment [1] has been deleted because not all partners in law firms today are equity partners exercising managerial or supervisory authority over lawyers, particularly those lawyers with whom they do not regularly collaborate. The first sentence and the reference to the definition of law firm in rule 1.0.1 sufficiently identifies lawyers with managerial authority under the rule.
[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.	[2] Paragraph (a) requires lawyers with managerial authority within a <u>law</u> firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the <u>law</u> firm will <u>comply with these Rules and the State Bar Act</u>. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.	Comment [2] is based on Model Rule 5.1, Cmt. [2]. The Commission recommends several changes to conform to non-substantive language changes in paragraph (a). The word “law” has been added as a modifier of “firm” because “law firm” is a defined term in these Rules.

* Proposed Rule, Draft 10 (9/13/2009). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).</u>	Comment [3] is has no counterpart in the Model Rule. It clarifies that the duty of lawyers with managerial authority to make reasonable efforts to have measures in place to ensure conformity with the rules applies to internal policies and procedures affecting lawyer compensation and career development that might induce a violation of the rules.
[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.	<u>[4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.</u>	Comment [4] is a revised and more succinct version of Model Rule 5.1, Cmt. [3]. No change in meaning is intended.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[5] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities, including lawyers with intermediate managerial responsibilities in a legal services organization, a law department of an enterprise or a governmental agency, may not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, such a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.	Comment [5] has no counterpart in the Model Rule. It is included to clarify that paragraph(a) does not apply to every lawyer with intermediate managerial responsibilities where the organization has a designated managing lawyer or committee or other body with appropriate managerial authority and is charged with the responsibilities under paragraph (a). Comment [5] was added to address concerns raised by lawyers practicing in public offices that adopting the Model Rule without further clarification would deter mid-level managers in such offices from engaging in the kind of informal mentoring that is critical to a subordinate lawyer's development in that environment. The comment further clarifies that a lawyer with intermediate responsibilities continues to be responsible to take corrective measures if the lawyer knows or reasonably should know that the person or body with managerial authority is not complying with the requirements of the rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[6] Paragraph (a) also requires managers, including lawyers who are in charge of a public sector legal agency or the head of a legal department, to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).	Comment [6] has no counterpart in the Model Rule. It clarifies that the duties under paragraph (a) apply to lawyers in charge of public sector legal agencies, such as a public defender, and head of corporate legal departments. Similar to Comment [5], Comment [6] was added to address concerns raised by public defenders that adoption of the Model Rule language without clarification would undermine the ability of managing lawyers in those organizations to make effective use of available resources. Of particular concern to these managing lawyers was a recently-issued ABA Ethics Opinion that conflicts with the principles set forth in the State Bar's Guidelines, cited in Comment [6]. See ABA Formal Ethics Op. 06-441 (5/13/06) ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation"). The second sentence of Comment [6] has been added to make it clear that reasonable guidelines relating to case assignments and distribution of work among lawyers in the organization will satisfy the requirements of the rule.
	[7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].	Comment [7] has no counterpart in the Model Rule. It clarifies that the conduct of a lawyer with intermediate managerial responsibilities in a public sector legal agency or law department is governed by paragraph (b) and not paragraph (a) of the rule. See also Explanation of Changes for proposed Comments [5] and [6].

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u><i>Paragraph (b) – Duties of Lawyer as Supervisor</i></u> <u>[8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.</u>	Comment [8] has no counterpart in the Model Rule. It is intended to distinguish between those lawyers in a law firm who have responsibilities as direct supervisors under paragraph (b) of the rule from those with managerial responsibilities under paragraph (a). The Comment also points out that paragraph (b) applies to supervising attorneys who are inside as well as outside of the law firm. The Model Rule does not have a separate comment on the duties of a lawyer under paragraph (b) of the rule.
	<u>[9] A lawyer with supervisory responsibility over another lawyer has an obligation to make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.</u>	Comment [9] has no counterpart in the Model Rule. It expands on the last sentence in Model Rule 5.1, Cmt. [2].
	<u>[10] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.</u>	Comment [10] has no counterpart in the Model Rule. It is intended to provide further guidance on when a lawyer has direct supervisory responsibilities under paragraph (b) of the rule. The first sentence is the second sentence from Model Rule 5.1, Cmt. [5], and is included in this comment because it pertains to paragraph (b).

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).	<u>Paragraph (c) – Responsibility for Another's Lawyer's Violation</u>	Model Rule 5.1, Cmt. [4] has been replaced with the heading to the comments regarding paragraph (c) of the rule. See also proposed Comment [14].
	<u>[11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer's conduct that violates these Rules and the State Bar Act.</u>	Comment [11] is new and is intended to explain the scope of paragraph (c)(1). The Model Rule does not have a separate comment regarding paragraph (c)(1) of the rule.

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.	[12] <u>Under paragraph</u> (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, <u>and</u> a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, <u>may be responsible</u> for the <u>conduct</u> of the <u>other lawyer, whether or not the other lawyer is a member or employee of the law firm.</u> Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension <u>consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1).</u>	Comment [12] is based on Model Rule 5.1, Cmt. [5] and is intended to capture the concept that paragraph (c)(2) applies to both partners and other lawyers with managerial authority in a law firm and lawyers who have direct supervisory authority. The comment also clarifies that the rule applies whether or not the lawyer is a member or employee of the firm. Grammatical changes have been made for clarity without changing the substance of the comment. The final sentence has been added as a reminder that corrective action required by the rule should be consistent with the lawyer's duties under Business and Professions Code section 6068(e).

<u>ABA Model Rule</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Commission's Proposed Rule*</u> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.	[13] <u>A supervisory lawyer may violate paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.</u>	Comment [13] is based on Model Rule 5.1, Cmt. [6]. However, it has been rewritten so that its concept is more clearly stated, i.e., even if a lawyer does not violate paragraph (c) because the lawyer neither ordered or ratified a subordinate lawyer's conduct, or failed to avoid or mitigate the known consequences of the conduct, the lawyer acting as direct supervisor may nevertheless violate paragraph (b).
[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.	[14] <u>Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.</u> Apart from <u>paragraph (c) of</u> this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.	Comment [14] is based on Model Rule 5.1, Cmt. [7]. The Model Rule comment has been expanded to make it clear that the obligations under paragraphs (a), (b) and (c) of the Rule provide independent bases for discipline and do not impose vicarious responsibility for the acts of another attorney.
[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).	[15] <u>This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).</u>	Comment [15] is based on Model Rule 5.1, Cmt. [8]. No change in meaning is intended by the clarifying revisions.

Proposed Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers Rules Revision Commission – Minority Dissent

1. Rule 5.1 Unfairly Imposes Disciplinary Liability On Innocent Lawyers For The Misdeeds And Culpable Misconduct Of Other Lawyers.

Rule 5.1 represents a serious departure from the traditional notion of viewing compliance with ethical rules as the personal responsibility of individual lawyers and unfairly imposes collective guilt on innocent lawyers in a firm for violations of the Rules of Professional Conduct of other lawyers without describing in advance what conduct will fall within its proscriptions and without clearly delineating which management or supervisory lawyers will be subject to the Rule.

In general, the Rule blurs the lines between the entity and its individual constituents. Partnerships and corporations are created precisely so as to create a separate entity from its constituents. But the Rule for all practical purposes potentially imputes the conduct of an individual culpable lawyer to the entity, and then effectively imputes the wrongdoing lawyer's conduct to its innocent constituents. This has been done because the Rules were not designed to impose discipline on law firms.

However, regulating law firms through their constituent lawyers is the wrong approach.

Paragraph (a) requires that partners in a law firm, which is defined to include lawyers with “comparable

managerial authority” in corporate law departments and public agencies, “make *reasonable efforts* to ensure that the firm has in effect measures giving *reasonable assurance* that all lawyers in the firm comply with the Rules of Professional Conduct.” Paragraph (b) provides that a “lawyer having direct supervisory authority over another lawyer shall make *reasonable efforts* to ensure that the other lawyer complies with the Rules of Professional Conduct.”

Paragraphs (a) and (b) are in stark contrast to accepted notions of derivative liability found in tort law where liability is only imposed on a person for the tortious conduct of another if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement or (b) gives substantial assistance in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846, citing, Rest.2d Torts, § 876. See also *Casey v. United States Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1146 (“a defendant can only aid and abet another's tort if the defendant knows what that tort is”).

Similarly, under criminal law a person who aids and abets the commission of a crime must have (1) knowledge of the unlawful purpose of the perpetrator and (2) act with the intent of committing, encouraging, or facilitating the

commission of the offense. *People v. Beeman* (1984) 35 Cal.3d 547, 554-555.

In contrast, Paragraphs (a) and (b) contain no knowledge or scienter requirement, and as explained below, operate to impose discipline *ex post facto*.

2. **Rule 5.1 Imposes Discipline For Negligent Conduct Contrary To The Supreme Court's Admonition That The Disciplinary System Should Not Be Used To Punish Acts Of Negligence.**

The Rule as a whole is structured so that innocent lawyers in a law firm will be disciplined for negligence. Rather than imposing discipline for intentional or knowing conduct, Rule 5.1 imposes discipline on lawyers for negligence by embracing what are essentially tort standards--"reasonable efforts" and "reasonable assurance" that another lawyer will comply with the Rules of Professional Conduct. However, the Supreme Court has rejected the concept that lawyers should be disciplined for negligence or mistakes in judgment. As the Supreme Court has noted: "This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." *Lewis v. State Bar* (1981) 23 Cal.3d 683, 688.

Worse yet, the Rule imposes discipline on lawyers merely for their perceived managerial authority because of their *status* as partners. The Rule approaches strict

liability by bringing within its scope not only lawyers with actual managerial authority, but also lawyers who "individually or together with other lawyers" possess what the Rule characterizes as "comparable managerial authority."

3. **The Rule Fails To Articulate Specific, Definable Or Consistent Standards For Enforcement, And As Result, Is Unconstitutionally Vague.**

Paragraphs (a) and (b) do not tell lawyers *before the fact* what measures or firm policies will run afoul of the Rule or what policies should be implemented to prevent violations of other rules. Paragraph (a) provides no standards to guide lawyers as to what "reasonable efforts" should be taken, or what "measures" should be in place that would "give reasonable assurance" that other lawyers comply with an endless number of Rules and ways in which the Rules may be violated. Once there is an underlying violation of a Rule, innocent lawyers in a firm will be blamed for failing to implement measures that would have prevented the violation by the culpable lawyer. The Rule is inherently hindsight-driven.

Similarly, paragraph (b) offers no guidance to supervisory lawyers as to what "reasonable efforts" are sufficient to ensure that a supervised lawyer complies with the Rules of Professional Conduct.

Paragraphs (a) and (b) purport to tell lawyers to abide by a standard of care, without defining what that standard is. Paragraphs (a) and (b), by imposing "reasonable efforts" or "reasonable assurances," effectively require proof of

breach of an unstated *standard of care*—which must be proved by expert testimony, essentially converting a State Bar proceeding into a claim for legal malpractice. Proof of a violation will turn on a “swearing contest” between experts testifying on questions of law practice management—i.e., as to whether a violation of a given Rule by a given lawyer could have been prevented by supposed “reasonable efforts” of other individual lawyers in firm—all with the benefit of hindsight.

Because proof of a violation will turn on undefined and unarticulated standards of care, rather than articulated and objective standards, the Rule will invite State Bar prosecutors to engage in post hoc second-guessing of firm policies and procedures to establish the causation element that paragraphs (a) and (b) necessarily implicates. In looking for violations, a State Bar prosecutor can “audit” the firm’s practices to find areas where the firm did not have appropriate preventive measures and file charges against individual lawyers for what are perceived to be the “bad practices” of the firm.

In fact, a violation can be charged under paragraphs (a) and (b) of Rule 5.1 even where there has been no underlying misconduct or violation of any Rule by a subordinate or other lawyer. By analogy, the Supreme Court has rejected attempts to impose liability for abstract negligence where there has been no proof of a causal nexus between the conduct and the injury—i.e., “abstract negligence” or “negligence in the air.” *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 773 (“abstract negligence,” without proof of a causal connection between the defendant’s breach and the

plaintiff’s injury, is insufficient); *Noble v. Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912 (classic example of abstract negligence where property owner’s security did not comport with plaintiffs’ expert’s notion of “adequacy,” but whether there was no proof of any causal connection between that negligence and the injury.) Similarly, paragraphs (a) and (b) allow the State Bar to bring disciplinary charges against lawyers for abstract negligence where there has been no underlying predicate violation of another Rule by a subordinate or other lawyer.

By failing to articulate specifically tailored regulatory standards, paragraphs (a) and (b) are unconstitutionally vague. To avoid a vagueness challenge a statute or regulation must be sufficiently clear so as to give a fair warning of the conduct prohibited, and to provide a standard against which conduct can be uniformly judged by courts. *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109. To pass constitutional muster, a rule or statute must be sufficiently definite to provide adequate notice of the conduct proscribed and must provide sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107.

4. The Rule Also Fails To Give Notice As To Which Lawyers In A Law Firm Are Subject To Its Requirements Since The Phrase "Comparable Managerial Authority" Is Vague And Undefined.

Rule 5.1 is aimed at partners in a law firm, and lawyers who possess "comparable managerial authority" in a law firm, as that term is used in paragraphs (a) and (c)(2). However, this term is inherently vague and over broad.

First, because the definition of "law firm" in Rule 1.0.1 broadly includes not only private law partnerships and law corporations, but also government entities and corporate legal departments, the attempt to analogize law partnerships to government lawyers and corporate legal departments is misplaced. Government offices and corporate legal departments are not operated like partnerships. Transmuting a "partnership model" to government agencies makes no sense. This is especially true with respect to government agencies in which managerial authority may be vested in an elected official. As an elected official, the head of a public office may have greater obligations to the public at large that override the objectives of Rule 5.1. For example, if caseloads of public defenders or deputy district attorneys are excessively high due to budget cuts such that those attorneys cannot adequately perform their professional responsibilities to clients, the Rule would mandate that lawyer supervisors, including heads of public defenders' offices and elected district attorneys, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently

handled. (See ABA Formal Opinion 06-441.) It is questionable, given the separation of powers doctrine, whether the State Bar and the Supreme Court can dictate to public officials facing severe budget cuts that they must reduce work loads by hiring more attorneys, while ignoring the corresponding costs to the public and taxpayers. (Comment [6] attempts to address the issue, but raises more questions than it answers.)

Second, even as applied to private law firms, the term "comparable management authority" is hopelessly vague and reaches partners who have no management authority. The reality today is that even lawyers who have the title of "partner" frequently have no management role in the firm and are more like employees than owners of the firm. *Smith v. Diner* (7th Cir. 2006) 453 F.3d 971 ("Someone can be called a 'partner,' for example, yet in fact lack any authority to make decisions for the firm; he might be just as much at the mercy of those who really run the firm as a clerk would be."); *EEOC v. Sidley Austin Brown & Wood* (7th Cir. 2002) 315 F.3d 696 (partners may be deemed "employees" where they lack any meaningful control over the firm's affairs).

Comment [5] attempts to address this problem by suggesting that lawyers with "intermediate managerial responsibilities" "may not" be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer or a management committee. However, by stating that the Rule "may not" apply to certain lawyers, Comment [5] fails to resolve the underlying uncertainty and only serves to highlight the

fact that the term "comparable managerial authority" is vague and undefined. In fact, Comments [5] and [7] are inconsistent in that the latter states (as an exception not found in the Rule itself) that "Paragraph (a) *does not apply* to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments."

Paragraph (b) is similarly unclear as to which lawyers have "direct supervisory authority." In theory, all partners in a law firm have "direct supervisory authority" over all subordinate lawyers in the firm. The Rule fails to limit its scope to the supervision by a *specific* partner over a *specific* subordinate lawyer concerning a *specific* case.

Paragraph (b) is thus overly broad in its potential to reach innocent lawyers.

Finally, the inherent problems with this overly ambitious Rule are illustrated by the large number of comments that accompany it (15 comments, twice the number in the ABA Model Rule). Rather than adding clarity to the Rule, the comments merely expose its flaws.

In conclusion, the deficiencies in the Rule unfairly operate to impose disciplinary liability on innocent lawyers by invoking what amounts to a strict liability standard. It is an overly broad, shotgun approach to regulation.

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
(Commission's Proposed Rule – Clean Version)

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these Rules and the State Bar Act.
 - (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.
 - (c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- COMMENT**
- Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.*
- [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition).
 - [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the law firm will comply with these Rules and the State Bar Act. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.
 - [3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).
 - [4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may depend upon the law firm's structure and the nature of its practice , including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.
 - [5] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities, including lawyers with intermediate managerial responsibilities in a legal services organization, a law department of an enterprise or a governmental

agency, may not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, such a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.

- [6] Paragraph (a) also requires managers, including lawyers who are in charge of a public sector legal agency or the head of a legal department, to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).
- [7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].

Paragraph (b) – Duties of Lawyer as Supervisor

- [8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation.

Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.

- [9] A lawyer with supervisory responsibility over another lawyer has an obligation to make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.
- [10] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

- [11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer's conduct that violates these Rules and the State Bar Act.
- [12] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, may be responsible for the conduct of the other lawyer, whether or not the other lawyer is a member or employee of the law firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer

knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1).

- [13] A supervisory lawyer may violate paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.
- [14] Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.
- [15] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

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

STATE VARIATIONS

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

California has no counterpart to Rule 5.1.

District of Columbia: Rule 5.1 substantially tracks the Model Rule.

Illinois provides that “[e]ach” partner or lawyer shall make the reasonable efforts specified in Rule 5.1(a) and (b).

New Hampshire Rules 5.1(a) and (b) impose duties on “each” partner in a firm, “each” lawyer with comparable managerial authority, and “each” lawyer with direct supervisory authority. A New Hampshire Comment explains that the change “is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.”

New Jersey begins Rule 5.1 (a) with: “Every law firm and organization authorized by the Court Rules to practice law in this jurisdiction ...n instead of “A partner in a law firm.” Rule 5.1(c)(2) applies only to lawyers having “direct supervisory authority”; it deletes “is a partner or has comparable managerial authority in the law firm in which the other lawyer practices.”

New York: New York's DR 1-104 imposes like duties on supervisory lawyers and partners but goes further and imposes duties on law firms as entities, as follows:

A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

Oregon: Rule 5.1 deletes the language of ABA Model Rules 5.1(a) and (b), but adopts ABA Model Rule 5.1(c) verbatim.

Texas: The text of Texas Rule 5.01 has no equivalent to ABA Model Rules 5.1(a) and (b), but Comment 6 to Texas Rule 5.01 provides:

Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.

Texas Rule 5.01(b), which is similar to ABA Model Rule 5.1(c)(2), also applies to “the general counsel of a government agency's legal department.”

Proposed Rule 5.2 [n/a]

“Responsibilities of a Subordinate Lawyer”

(Draft #6, 9/17/09)

Summary: Proposed Rule 5.2 confirms that a subordinate lawyer must comply with the Rules of Professional Conduct and State Bar Act notwithstanding that the subordinate is acting under the direction of a supervisory lawyer and provides guidance to subordinates in those situations.

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

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 8
Opposed Rule as Recommended for Adoption 1
Abstain 1

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:

Representatives from the California Public Defenders Association and various Public Defender offices in California. See Public Comment Chart for a complete list of commenters.

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

Representatives from the California Public Defenders Association and various Public Defender offices in California expressed concerns that adoption of proposed Rule 5.2 could result in subordinate lawyers not following the direction of supervisory lawyers, even in situations where the supervisor's decision is a reasonable resolution of an arguable question of professional duty. Please see Public Comment Chart for Commission response to their concerns.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.2* Responsibilities of a Subordinate Lawyer

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 5.2 addresses the responsibilities of a subordinate lawyer and is intended to work in conjunction with Rules 5.1 and 5.3. Paragraph (a) substantially follows Model Rule 5.2(a) in requiring that a subordinate lawyer comply with the rules of professional conduct and the State Bar Act when the lawyer acts under the supervision or direction of another lawyer or other person. Paragraph (b) tracks Model Rule 5.2(b) by providing that a subordinate lawyer who abides by a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility does not violate the Rules or the State Bar Act.

The comments to the Rule have been modified to conform to California rule drafting style, (See, e.g., Bryan A. Garner, *GUIDELINES FOR DRAFTING AND EDITING COURT RULES* (1996)), and to more clearly explain a subordinate lawyer's responsibilities when a supervisor has instructed the subordinate to follow a particular course of action.

Although California does not have a comparable rule, the provisions of Rule 5.2 are consistent with existing California law.

Variations in Other Jurisdictions. Rule 5.2 has been adopted in most jurisdictions with the exception of Virginia. Connecticut has deleted paragraph (b) from its rule. New York and Ohio have made minor revisions to the rule.

* Proposed Rule 5.2, Draft 6 (9/17/09).

<u>ABA Model Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.2 Responsibilities of a Subordinate Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.	(a) A lawyer ~~is bound by the~~ <u>shall comply with these</u> Rules ~~of Professional Conduct~~ <u>and the State Bar Act</u> notwithstanding that the lawyer ~~acted~~ <u>acts</u> at the direction of another <u>lawyer or other</u> person.	Paragraph (a) tracks the Model Rule but replaces the less mandatory phrase "is bound by the" to "shall comply with these" to underscore the affirmative obligation lawyers have to comply with the rules. The rule adds the obligation of California lawyers to also comply with the State Bar Act. The paragraph has been modified to be in the active voice in accordance with California rule drafting style and to make clear that the Rule applies whether the lawyers acts at the direction of another lawyer or other person.
(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.	(b) A subordinate lawyer does not violate ~~the~~ <u>these</u> Rules ~~of Professional Conduct~~ <u>or the State Bar Act</u> if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.	Paragraph (b) tracks the Model Rule, but the phrase "the Rules of Professional Conduct" has been replaced with "these Rules and the State Bar Act" to conform to the wording in other rules.

* Rule 5.2, Draft 6 (9/17/09); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.2 Responsibilities a Subordinate Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.	[1] <u>The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act.</u> Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer ~~acted~~<u>acts</u> at the direction of a supervisor, that fact may be relevant in determining whether ~~a lawyer had the knowledge required to render conduct a violation of~~<u>lawyer has violated</u> the Rules <u>or the Act. See Rule 8.4(a).</u> For example, if a subordinate ~~filed~~<u>signs</u> a frivolous pleading at the direction of a supervisor, the subordinate would not ~~be guilty of a professional violation~~<u>violate the Rules or the Act</u> unless the subordinate ~~knew~~<u>knows</u> of the document's frivolous character.	Comment [1] is based on Model Rule 5.2, cmt. [1]. A new first sentence has been added to make clear that the fact a lawyer acts under the supervision of another lawyer does not excuse the subordinate lawyer's failure to comply with the Rules or the State Bar Act. No substantive change is intended. The second sentence tracks the first sentence in the Model Rule comment, except that it has been changed to the active voice in accordance with California rule drafting style. In addition, the sentence has been modified to point out more clearly that the fact that a lawyer acts at the direction of a supervisor may be relevant in determining if the lawyer has violated the rules or the State Bar Act, rather than "whether the lawyer had the knowledge required to render conduct a violation of the Rules." A cross reference to proposed Rule 8.4(a), which provides it is professional misconduct to "knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act" has been added. The third sentence has been revised to more clearly state the example in the active voice in accordance with California rule drafting style.

<u>ABA Model Rule</u> Rule 5.2 Responsibilities a Subordinate Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.	[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ~~ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action~~<u>lawyers' responsibilities under these Rules or position could not be taken. If the State Bar Act and</u> the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. ~~However~~ <u>Accordingly, if the subordinate lawyer must comply with his or her obligations under paragraph (a). If</u> the question ~~is reasonably arguable~~<u>can be answered more than one way, someone has to decide upon</u> the ~~course~~<u>supervisory lawyer may assume responsibility for determining which of action. That</u> authority ~~ordinarily reposes in the supervisor~~<u>reasonable alternatives to select</u>, and ~~a~~<u>the</u> subordinate may be guided accordingly. ~~For example, if a question arises whether~~ <u>If the interests of two clients conflict under Rule 1.7, subordinate lawyer believes that</u> the supervisor's ~~reasonable~~<u>proposed</u> resolution of the ~~arguable~~<u>question should protect</u> of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate ~~professionally if the resolution is subsequently challenged~~<u>obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.</u>	The first three sentences in the Model Rule comment have been combined into a single sentence to more cogently state that the responsibilities of both the supervisor and the subordinate lawyer under the rule and the State Bar Act are clear and are the same when the issue can reasonably be answered only one way. A new second sentence has been added to affirmatively state that in that situation, the lawyer must comply with the requirements of paragraph (a). The third sentence is a revision of the last three sentences in the Model Rule Comment to more clearly state that where the issue can reasonably be answered in more than one way, the supervisory lawyer may assume responsibility to determine which of the reasonable alternatives to select. The sentence adds a further requirement that if the subordinate attorney believes that the resolution of the issue would result in a violation of the Rules or the State Bar Act, the subordinate must communicate that position to the supervisory lawyer.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(Commission's Proposed Rule – Clean Version)

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

select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the arguable question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

COMMENT

- [1] The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act. Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acts at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules or the Act. See Rule 8.4(a). For example, if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the Act unless the subordinate knows of the document's frivolous character.
- [2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to

Rule 5.2: Responsibilities of a Subordinate Lawyer

STATE VARIATIONS

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

California has no provision comparable to ABA Model Rule 5.2.

Connecticut deletes ABA Model Rule 5.2(b).

District of Columbia has adopted ABA Model Rule 5.2.

New York: DR 1-104(E) tracks ABA Model Rule 5.2(a), except New York says that a lawyer "shall comply with these Disciplinary Rules" rather than be bound by these Rules of Professional Conduct." DR 1-104(F) is substantially the same as ABA Model Rule 5.2(b).

Ohio: Rule 5.2(h) omits the word "arguable" before "question of professional duty."

Virginia omits Rule 5.2.

Proposed Rule 5.3 [RPC 1-300]

“Responsibilities Regarding Nonlawyer Assistants”

(Draft #10, 10/18/09)

Summary: Proposed Rule 5.3 is closely based on Model Rule 5.3 and sets forth the responsibilities of managerial and supervising lawyers in their oversight of nonlawyer assistants. The Rule is consistent with current California law. See California rule 3-110, Discussion.

Comparison with ABA Counterpart

Rule

Comment

☒ ABA Model Rule substantially adopted

☐ ABA Model Rule substantially rejected

☐ Some material additions to ABA Model Rule

☐ Some material deletions from ABA Model Rule

☐ No ABA Model Rule counterpart

☒ ABA Model Rule substantially adopted

☐ ABA Model Rule substantially rejected

☐ Some material additions to ABA Model Rule

☐ Some material deletions from ABA Model Rule

☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-110, Discussion.

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 7
Opposed Rule as Recommended for Adoption 1
Abstain 2

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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.3* Responsibilities Regarding Nonlawyer Assistants

October 2009

(Draft rule following consideration for public comment)

INTRODUCTION:

Proposed Rule 5.3, which substantially tracks Model Rule 5.3, imposes a duty on partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers, to oversee the conduct of nonlawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of respondeat superior is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by nonlawyers under the lawyer's supervision, orders or ratifies the misconduct of a nonlawyer, or has knowledge of the nonlawyer's misconduct and fails to take steps to prevent or mitigate the consequences. The Comment to the proposed Rule largely tracks the Model Rule comment.

Current California Law and Variations in Other Jurisdictions. Model Rule 5.3 is the rule in nearly every jurisdiction, with only minor variations. For example, both Illinois and New Hampshire impose Rule 5.3's duties on "each" managing partner, in effect preventing such managerial partners from delegating responsibility to a single managing partner. New York and New Jersey both provide for discipline of a law firm, in addition to the individual lawyers in the firm, under Rule 5.3. All jurisdictions have adopted some version of Model Rule 5.3(c). California does not have a counterpart to Rule 5.3. However, the Discussion to current rule 3-110 provides that the duties set forth in the rule include the duty to supervise the work of subordinate lawyers and non-lawyer employees and agents. Proposed Rule 5.3 establishes in a separate rule the principle of supervisory responsibility and is consistent with existing California case law.

* Proposed Rule 5.3, Draft 10 (10/18/09)

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Commission's Proposed Rule*</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Explanation of Changes to the ABA Model Rule</u>
With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;	With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner <u>in a law firm</u>, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the ~~person's~~<u>nonlawyer's</u> conduct is compatible with the professional obligations of the lawyer;	The Introductory paragraph to proposed Rule 5.3 is identical to Model Rule 5.3. Paragraph (a) largely tracks Model Rule 5.3(a), except for two clarifying changes: (1) the phrase "in a law firm" has been added after the words, "a partner," to create a parallel construction with the clause that follows and also to conform to the syntax used in the related Rule 5.1; and (2) "nonlawyer" has been substituted for "person" to refer back to the word "nonlawyer" that is used in the introductory clause.
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and	(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and	Paragraph (b) is identical to Model Rule 5.3(b).
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or	(c) a lawyer shall be responsible for conduct of such a person that would be a violation of ~~the~~<u>these</u> Rules ~~of Professional Conduct~~<u>or the State Bar Act</u> if engaged in by a lawyer if: (1) the lawyer orders or, with ~~the~~ knowledge of the specific conduct, ratifies the conduct involved; or	Paragraph (c) largely tracks Model Rule 5.3(c), except that the clause, "individually or together with other lawyers" has been added to subparagraph (c)(2) to parallel the language used in paragraph (a). The deletion of this language is an apparent oversight by the Model Rule drafters. The phrase, "these Rules or the State Bar Act" is a term the Commission has been using throughout the Rules in place of the Model Rules' "the Rules of Professional Conduct."

* Proposed Rule 5.3, Draft 10 (10/18/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Commission's Proposed Rule*</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	(2) the lawyer is a partner, or <u>individually or together with other lawyers</u> has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Commission's Proposed Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.	[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. <u>Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.</u> A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose <u>confidential</u> information relating to representation of the client, and should be responsible for their work product. <u>(See, e.g., <i>Waysman v. State Bar</i> (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; <i>Trousil v. State Bar</i> (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; <i>Palomo v. State Bar</i> (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; <i>Crane v. State Bar</i> (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670]; <i>Black v. State Bar</i> (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; <i>Vaughn v. State Bar</i> (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; <i>Moore v. State Bar</i> (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161].)</u> The measures employed in <u>instructing and</u> supervising nonlawyers should take account of the fact that they ~~do may~~ not have legal training ~~and are not subject to professional discipline~~.	Comment [1] largely tracks Model Rule 5.3, cmt. [1]. The word “confidential” has been added to the phrase, “information relating to the representation of the client,” because that term (“confidential information relating to the representation of the client”) is a defined term in these Rules. See proposed Rule 1.6, cmts. [3] et seq. Citations to several cases have been added for guidance. These citations are largely carried over from the Discussion to current rule 3-110 (“Competence”). The word “instructing” has been added to the last sentence of Comment [1] because instruction of nonlawyers of their responsibilities as employees of the law firm is an important component of providing assurance nonlawyers’ conduct is compatible with the lawyer’s professional obligations. The word “may” has been substituted for “do” because some nonlawyers will have had legal training. Finally, the last clause of the last sentence of Comment [1] has been deleted because whether a nonlawyer employee is personally subject to discipline is irrelevant to the care a lawyer should take in that person’s instruction and supervision.

<u>ABA Model Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Commission's Proposed Rule</u> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.	[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with ~~the~~<u>these</u> Rules ~~of Professional Conduct~~<u>and the State Bar Act</u>. See Comment [~~1~~<u>2</u>] to Rule 5.1. ~~Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer.~~ <u>Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in</u> ~~by a lawyer~~<u>private law firms</u>. [3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of ~~the~~<u>these</u> Rules ~~of Professional Conduct or the State Bar Act~~ if engaged in by a lawyer.	The next to last sentence of Model Rule 5.3, cmt. [2] has been deleted because it simply restates paragraph (b). In its place, a sentence has been added to clarify that the obligations set forth in Rule 5.3 apply equally to lawyers with managerial authority in corporate and government legal departments and legal service organizations. The phrase, "these Rules or the State Bar Act" is a term the Commission has been using throughout the Rules in place of the Model Rules' "the Rules of Professional Conduct." Comment [3] is identical to the last sentence of Model Rule 5.3, cmt. [2]. The sentence, which addresses a different part of the rule than the remainder of Comment [2], has been moved to its own comment for clarification.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

(Commission's Proposed Rule – Clean Version)

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

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

COMMENT

- [1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals.

Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161].) The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

- [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules and the State Bar Act. See Comment [2] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.
- [3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

STATE VARIATIONS

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

California has no provision comparable to ABA Model Rule 5.3.

Georgia adds a new Rule 5.3(d) that indirectly restricts the activities of suspended or disbarred lawyers who work in a law office.

Illinois: Rule 5.3(a) applies to “[t]he lawyer, and, in a law firm, each partner,” and refers to the professional obligations of the lawyer “and the firm.” Illinois Rule 5.3(b) applies to “each” lawyer having direct supervisory authority.

New Hampshire: Rules 5.3(a) and (b) impose duties on “each” partner in a firm, “each” lawyer with comparable managerial authority, and “each” lawyer with direct supervisory authority. Separately, New Hampshire Supreme Court Rule 35 (Guidelines for the Utilization by Lawyers of the Services of Legal Assistants under the New Hampshire Rules of Professional Conduct) contains nine rules for using the services of legal assistants in compliance with Rule 5.3. For example, Rule 1 provides:

It is the responsibility of the lawyer to take all steps reasonably necessary to ensure that a legal assistant for whose work the lawyer is responsible does not provide legal advice or otherwise engage in the unauthorized practice of law; provided, however, that with adequate

lawyer supervision the legal assistant may provide information concerning legal matters and otherwise act as permitted under these rules.

New Jersey: Rule 5.3(a) provides that “every lawyer or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.” In addition, New Jersey has added Rule 5.3(c)(3), which provides that a lawyer is responsible for the conduct of a nonlawyer employee if “the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.”

New York: See New York’s DR 1-104(C) under Selected State Variations for Rule 5.1. DR 1-104(D) makes a lawyer responsible for conduct of a nonlawyer subordinate or lawyer if, among other things, the lawyer “in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action... could have been taken at a time when its consequences... could have been avoided or mitigated.”

Oregon: Rule 5.3(b) begins: “except as provided by Rule 8.4(b)....” Under Oregon Rule 8.4(b), it is generally not professional misconduct for a lawyer to give advice about or to supervise “lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights” provided the lawyer otherwise abides by the Rules of Professional Conduct.

Rhode Island: Immediately after the Comment to Rule 5.3, Rhode Island includes a lengthy set of “Guidelines” for the use of legal assistants. These “Guidelines” are a heavily modified version of the ABA Model Guidelines for the Utilization of Paralegal Services (see Related, Materials below). For example, Rhode Island’s Guideline 3, which is closely related to Rule 5.3, provides as follows:

3. A lawyer shall direct a legal assistant to avoid any conduct which if engaged in by a lawyer would violate the Rules of Professional Conduct. In particular, the lawyer shall instruct the legal assistant regarding the confidential nature of the attorney/client relationship, and shall direct the legal assistant to refrain from disclosing any confidential information obtained from a client or in connection with representation of a client.

Texas relegates ABA Model Rule 5.3(a) to Comment 2 after Texas Rule 5.03. The Comment applies to “[e]ach lawyer in a position of authority in a law firm or in a government agency,” including lawyers having supervisory authority or “intermediate managerial responsibilities in the law department of any enterprise or government agency.” Texas Rule 5.03(b), which is equivalent to ABA Model Rule 5.3(c), subjects a lawyer to discipline for a nonlawyer’s misconduct if (1) the lawyer orders, “encourages, or permits” the conduct involved; or (2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency’s legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person’s misconduct.

Virginia: Rule 5.3(c)(2) applies if a lawyer knows “or should have known” of the conduct in question.

Proposed Rule 5.3.1

“Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member”

(Draft #5, 10/18/09)

Summary: Proposed Rule 5.3.1 places restrictions on the employment of disbarred, suspended, resigned or involuntarily resigned members of the State Bar. There is no ABA counterpart to this Rule. It carries forward current California rule 1-311, with changes that for the most part are not substantive and reflect adherence to the Model Rule format.

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 3-111

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 8
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:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

October 2009

(Draft rule revised following consideration of public comment)

INTRODUCTION:

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

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

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

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

* Proposed Rule, Draft 5 (10/18/09).

INTRODUCTION (continued):

Minority: A minority of the Commission takes the position that this Rule inhibits legitimate efforts to rehabilitate disbarred or suspended lawyers who have to demonstrate an ability to practice. The minority further notes that the Rule does not distinguish between lawyers who have been disciplined for conduct that suggests that they are a threat to the public and those who are not, for example, a lawyer who has forgotten to pay bar dues.

The minority notes that lawyers may employ others who are not subject to the proscriptions of this Rule. For example, a lawyer may employ without restriction a convicted felon who has never been admitted to practice law. That felon may be hired as a secretary, paralegal, or law clerk, with no notice to the bar. So long as the lawyer and the former lawyer do not deceive clients, the public, or others about the status of the former lawyer, the bar should not so burden the former lawyer that he or she finds it difficult or impossible to obtain legitimate employment that permits rehabilitation.

The minority contends this Rule is not needed to prevent a former, disciplined lawyer from practicing law, from forming a partnership with a lawyer, or from being hired to perform legal services by new or former clients. Those acts are prohibited by other rules and by the State Bar Act. Former lawyers should not be treated as pariahs, who cannot perform tasks that any other nonlawyer may lawfully perform, except under restrictions that make such employment burdensome and unlikely.

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

* Proposed Rule 5.3.1, Draft 5 (10/18/09). Redline comparisons are to current rule 1-311.

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client: (1) Render legal consultation or advice to the client; (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer; (3) Appear as a representative of the client at a deposition or other discovery matter; (4) Negotiate or transact any matter for or on behalf of the client with third parties; (5) Receive, disburse or otherwise handle the client's funds; or (6) Engage in activities which constitute the practice of law.	(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer's client: (1) Render legal consultation or advice to the client; (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer; (3) Appear as a representative of the client at a deposition or other discovery matter; (4) Negotiate or transact any matter for or on behalf of the client with third parties; (5) Receive, disburse or otherwise handle the client's funds; or (6) Engage in activities which constitute the practice of law.	See Explanation of Changes for paragraph (a).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to: (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents; (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or (3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.	(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to: (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents; (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or (3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.	See Explanation of Changes for paragraph (a).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.	(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The State Bar may make such information available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.	See Explanation of Changes for paragraph (a).

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.	(e) A lawyer may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.	See Explanation of Changes for paragraph (a).
(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.	(f) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall promptly serve upon the State Bar written notice of the termination.	See Explanation of Changes for paragraph (a).
<i>Discussion:</i> For discussion of the activities that constitute the practice of law, see Farnham v. State Bar (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; Bluestein v. State Bar (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; Baron v. City of Los Angeles (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; Crawford v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; People v. Merchants Protective Corporation (1922) 189 Cal. 531, 535 [209 P. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)	Comment ~~For discussion of the activities that constitute the practice of law, see Farnham v. State Bar (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; Bluestein v. State Bar (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; Baron v. City of Los Angeles (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; Crawford v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; People v. Merchants Protective Corporation (1922) 189 Cal. 531, 535 [209 p. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 p.2d 960].)~~	The Commission recommends the deletion of Discussion paragraph 1 to current rule 1-311 as the issue of what constitutes "practice of law" is beyond the scope of these Rules of Professional Conduct.

<u>No Comparable ABA Model Rule</u> (Text provided is current California Rule 1-311)	<u>Commission's Proposed Rule*</u> (Redline/strikeout showing changes to the current California Rule 1-311)	<u>Explanation of Changes to California Rule 1-311</u>
Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600.)	[1] Paragraph (d) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a lawyer's client is an organization, then the written notice required by paragraph (d) shall be served upon the <u>highest—duly</u> authorized officer, employee, or constituent overseeing the particular engagement. ~~(See 3-600~~Rule 1.13.)	See Explanation of Changes for paragraph (a). The substitution of “rule 1.13” for “rule 3-600” conforms the citation to the rule number assigned to current rule 3-600 under the new rules numbering system that tracks the Model Rules. The substitution of “duly” for “highest” conforms this Rule to the language used in proposed Rule 1.13.
Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 983, 983.1, 983.2, and 988 of the California Rules of Court, or any local rule of a federal district court concerning admission <i>pro hac vice</i>.	[2] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel <i>pro hac vice</i>], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission <i>pro hac vice</i>.	See Explanation of Changes for paragraph (a). The cross-references have been revised to reflect the Judicial Council's recent reorganization and renumbering of the California Rules of Court, to add references to multijurisdictional practice rules, and to provide parenthetical descriptions of the scope of the referenced rules.

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

- (a) For the purposes of this Rule:
- (1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
 - (2) "Member" means a member of the State Bar of California.
 - (3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d); and
 - (4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.
- (b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer's client:
- (1) Render legal consultation or advice to the client;
 - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
 - (3) Appear as a representative of the client at a deposition or other discovery matter;
 - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
 - (5) Receive, disburse or otherwise handle the client's funds; or
 - (6) Engage in activities which constitute the practice of law.
- (c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:
- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
 - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
 - (3) Accompanying an active member in good standing of the bar of a United States state in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (b) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The State Bar may make such

information available to the public. The lawyer shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.

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

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

COMMENT

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

[2] Nothing in this Rule shall be deemed to limit or preclude any activity engaged in pursuant to Rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel] 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in

California to provide legal services], 9.40 [counsel pro hac vice], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program] and 9.44 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice.

STATE VARIATIONS – CA RULE, NO ABA COUNTERPART

California Rule 1-311 Threatening Criminal, Administrative, or Disciplinary Charges

SELECTED STATES THAT HAVE RULES SIMILAR TO CALIFORNIA RULE 1-311

Minnesota

RULE 5.8: EMPLOYMENT OF DISBARRED, SUSPENDED, OR INVOLUNTARILY INACTIVE LAWYERS

(a) For purposes of this rule “employ” means to engage the services of another, including employees, agents, independent contractors, and consultants, regardless of whether any compensation is paid.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know has been disbarred, suspended, or placed on disability inactive status by order of the court to do any of the following on behalf of the lawyer's client:

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

(2) appear on behalf of the client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer, unless the rules of the tribunal involved permit representation by nonlawyers and the client has been informed of the lawyer's suspension, disbarment, or disability inactive status;

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

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

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

(6) engage in activities that constitute the practice of law.

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

(1) performing legal work of a preparatory nature for the active lawyer's review, such as legal research, gathering information, and drafting pleadings, briefs, and other similar documents;

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

(3) accompanying an active lawyer to a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, or disability inactive lawyer, the lawyer shall serve upon the Office of Lawyers Professional Responsibility written notice of the employment, including a full description of such person's current license status. The notice shall state that the suspended, disbarred, or disability inactive lawyer shall not be employed to perform any of the activities prohibited by paragraph (b).

(e) Upon terminating the employment of the disbarred, suspended, or disability inactive lawyer, the employing lawyer shall promptly serve upon the Office of Lawyers Professional Responsibility written notice of the termination.

Louisiana

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW (EXCERPT)

* * * * *

(e)(1) A lawyer shall not:

(i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or

(ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, during the period of suspension, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.

SELECTED STATE ETHICS OPINIONS

Washington

Formal Opinion 184 (1990)

<http://www.wsba.org/lawyers/ethics/formalopinions/184.htm>

Massachusetts

Massachusetts Supreme Judicial Court Rule 4:01, Section 17(7)

<http://www.mass.gov/obcbbo/rule401.htm#Actions>

Mississippi

Opinion No. 96 (1984)

http://www.msbar.org/ethic_opinions.php?id=353

South Carolina

Ethics Advisory Opinion 92-20

Q: Can a S.C. law firm/attorney hire a non-S.C. Bar member, who was formerly an attorney in another state and was disbarred from practice in that state, to do legal research and other paralegal work? [A: NO]

http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=333

Ethics Advisory Opinion 82-14

A suspended lawyer may be paid a legal fee for work done in a case prior to the suspension but may not receive any compensation for work done on the case following the suspension; and cannot assist the lawyer who takes over the case on a non-paid basis.

http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=86

Proposed Rule 5.4 [1-310][1-320][1-600] “Duty to Avoid Interference with a Lawyer’s Professional Independence”

(Draft # 14.1, 10/17/09)

Summary: Proposed Rule 5.4, which is based on Model Rule 5.4, gathers together in a single rule, concepts which are intended to promote the independence of a lawyer’s professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.

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 1-310, 1-320, 1-600

Statute

Business & Professions Code § 6155.

Case law

Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal.4th 23

☐ 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 10

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:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 5.4 closely follows the black letter rule of Model Rule 5.4, which is intended to protect the independence of a lawyer's professional judgment. However, the Commission recommends revisions and additions to the black letter, as well as addition of commentary, to afford greater client protection by providing (i) broader prohibitions on a lawyer's conduct and on relationships into which the lawyer might enter that would pose a threat to the lawyer's exercise of independent professional judgment, and (ii) better guidance on the exceptions to these prohibitions that are permitted under the Rule. These revisions include: (1) a prohibition on sharing legal fees either "directly or indirectly" with a nonlawyer (see Explanation for paragraph (a)); (2) extending that prohibition to sharing legal fees with an organization not authorized to practice law (id.); (3) extending the prohibition on practicing law with nonlawyers in a "partnership" to practicing law with nonlawyers in any kind of "organization" (see Explanation for paragraph (b)); (4) cautioning that a lawyer must avoid interference not only with the lawyer's independence of judgment but also with the lawyer-client relationship (see Explanation for paragraph (c)); (5) carrying forward explicitly the implied prohibition in current rule 1-320(A)(4) on a lawyer accepting referrals from a lawyer referral service that does not comply with the Board of Governors Minimum Standards on lawyer referral services; and (6) adding an express provision that clarifies the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that permits third parties to interfere with a lawyer's independence of judgment. (see Explanation for paragraph (f)).

* Proposed Rule 5.4, Draft 14.1 (10/17/09).

INTRODUCTION (Continued):

Minority. A minority of the Commission takes the position that proposed Rule 5.4 expands the monopoly granted lawyers contrary to *Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 919. The minority contends that the Rule prevents large organizations such as Target from providing low-cost legal services in the same manner as they provide other professional services.

Public Comment. Following public comment, the Commission revised the Rule extensively to provide better guidance to lawyers not only as to what conduct and relationships are prohibited under the Rule, but also as to the kinds of conduct and relationships that are expressly allowed. See Public Comment Chart, below.

Current California Law and Variations in Other Jurisdictions. Proposed Rule 5.4 gathers together in a single rule concepts which are intended to promote the independence of a lawyer's professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.

Every jurisdiction has adopted some version of Model Rule 5.4. Model Rule 5.4(a)(4) (sharing of court-awarded legal fees with a nonprofit organization), has been rejected or modified in numerous jurisdictions. For example, Connecticut, Illinois, Indiana, Iowa, and New York have rejected the provision. Minnesota and Rhode Island require court approval for such arrangements. Florida adds that such fees can also be shared with a "pro bono legal services organization." The District of Columbia and New Hampshire permit such sharing, whether or not court-awarded. The District of Columbia, perhaps because of the extensive government lobbying engaged in by law firms in that jurisdiction, is unique in broadly permitting a lawyer to practice in a partnership or organization with nonlawyers. See "Selected State Variations," below.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:	(a) A lawyer or law firm shall not share legal fees <u>directly or indirectly</u> with a ~~nonlawyer, except~~ <u>person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:</u>	The introductory paragraph to paragraph (a) is based on Model Rule 5.4(a), but has been modified in two important respects. First, the Rule carries forward the prohibition in current California rule 1-320 against sharing fees with a nonlawyer either directly or indirectly. The inclusion of the adverbs “directly or indirectly” was originally included in rule 1-320 to preclude lawyers from avoiding application of this client-protective rule by creatively structuring relationships with nonlawyers who send them clients. Proposed Comments [1A] and [1B] elaborate on the application of that term to lawyer's payment of nonlawyer employees and contractors. Second, paragraph (a) has been modified to add a prohibition against sharing legal fees with an organization not authorized to practice law. This same prohibition is found in current California rule 1-600, which regulates legal services programs. See also State Bar of California Minimum Standards for Lawyer Referral Services.
(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;	(1) an agreement by a lawyer with the lawyer's firm, partner, or associate ~~may to~~ <u>provide for the payment of money, or other consideration at once or</u> over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;	Subparagraph (a)(1) is based on Model Rule 5.4(a)(1), but with a change to clarify that the payment permitted under the provision need not be made over a period of time but can be made at once, and that consideration other than money may be paid.

* Proposed Rule 5.4, Draft 14.1 (10/17/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence	<u>Explanation of Changes to the ABA Model Rule</u>
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;	(2) ~~a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;~~ any payment authorized by Rule 1.17;	Model Rule 5.4(a)(2) has been simplified by including a reference to proposed Rule 1.17.
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and	(3) a lawyer or law firm ~~may include~~ including nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; ~~and, provided the plan does not otherwise violate these Rules or the State Bar Act; or~~	The word “including” has been substituted for “may include” to conform to the Commission's recommended syntax for the introductory clause to this Rule (“does not prohibit”). The proviso clause has been carried forward from current California rule 1-320(A)(3).
(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.	~~(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.~~	The Commission recommends that Model Rule 5.4(a)(4) not be adopted because of the demonstrated potential for abuse by lawyers who form issue-specific nonprofit organizations primarily to generate legal fees. However, see proposed Comment [5], which permits payment of court-awarded legal fees “to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law.”
	(4) the payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California.	Paragraph (a)(4) carries forward current California rule 1-320(A)(4). It is intended to provide an exception for lawyer's paying certain fees to lawyer referral services that are in compliance with the cited minimum standards.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.	(b) A lawyer shall not form a partnership <u>or other organization</u> with a ~~nonlawyer~~<u>person who is not a lawyer</u> if any of the activities of the partnership <u>or other organization</u> consist of the practice of law.	Paragraph (b) is based on Model Rule 5.4(b). The phrase “or other organization” has been added so a lawyer cannot avoid application of the Rule by entering a non-partnership arrangement with a nonlawyer.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.	(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's <u>provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship</u>, in rendering such legal services.	Paragraph (c) is based on Model Rule 5.4(c). The Model Rule provision has been revised to clarify that it is generally interference with a lawyer's decisions concerning the legal services that are being provided that interfere with the lawyer's professional judgment. In addition, to enhance client protection, a prohibition on permitting interference with the lawyer-client relationship has been added.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:	(d) A lawyer shall not practice with or in the form of a professional corporation or ~~association~~<u>organization</u> authorized to practice law for a profit; if:	The introductory clause to paragraph (d) is based on Model Rule 5.4(d). The term “organization” has been substituted for “association” because the former term is broader in scope.
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;	(1) a ~~nonlawyer~~<u>person who is not a lawyer</u> owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;	Subparagraph (d)(1) is identical to Model Rule 5.4(d)(1), except that “person who is not a lawyer” has been substituted for “nonlawyer”.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence	<u>Explanation of Changes to the ABA Model Rule</u>
(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or	(2) a ~~nonlawyer~~person who is not a lawyer is a corporate director or officer thereof or occupies ~~the~~a position of similar responsibility in any form of ~~association~~organization other than a corporation; or	Subparagraph (d)(2) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer" and "organization" for "association." See Explanation of Changes for paragraph (d). The word "a" has been substituted for "the" because it refers back to the non-specific "director or officer."
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.	(3) a ~~nonlawyer~~person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.	Subparagraph (d)(1) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer". The word "influence" has been added to reach those situations where a nonlawyer might, by indirect means, seek to "influence" a lawyer's exercise of professional judgment.
	(e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.	Paragraph (e) has no counterpart in the Model Rule. It carries forward the implied prohibition current found in California rule 1-320(A)(4).
	(f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment.	Paragraph (f) has no counterpart in the Model Rule. It has been added to address the concerns raised by the California Supreme Court in <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer	<u>Commission's Proposed Rule*</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence	<u>Explanation of Changes to the ABA Model Rule</u>
	or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.	

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.	[1] <u>A lawyer is required to maintain independence of professional judgment in rendering legal services.</u> The provisions of this Rule ~~express traditional limitations on sharing fees. These limitations are to~~ protect the lawyer's ~~professional~~ independence of <u>professional</u> judgment. ~~Where someone other than~~ <u>by restricting</u> the ~~client pays the lawyer's fee or salary, or recommends employment~~ <u>sharing of the</u> lawyer, ~~that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere~~ <u>fees</u> with <u>a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling</u> the lawyer's professional judgment <u>when rendering legal services to another.</u>	Comment [1] is based on Model Rule 5.4, cmt. [1]. It has been modified to focus on the policy that underlies the Rule – protecting the lawyer's independence of professional judgment.
[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).	~~[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).~~	The Commission recommends that Model Rule 5.4, cmt. [2], not be adopted. The Model Rule simply restates language from the black letter rule that is self-explanatory. The cross-reference to Rule 1.8(f) in the second sentence appears in Comment [4] as a reference to proposed Rule 1.8.6, the counterpart of Model Rule 1.8(f), together with references to other proposed Rules concerned with protection a lawyer's exercise of judgment. See also Explanation of Changes for Comment [4], below.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[2] The prohibition against sharing fees "directly or indirectly" in paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.</u>	Comment [2] has no counterpart in the Model Rule. It was added following public comment to address concerns that the phrase "directly or indirectly" was too broad and might sweep within it legitimate nonlawyer <i>employee</i> compensation methods and plans that do not pose a threat a lawyer's independence of judgment.
	<u>[3] Paragraph (a) also does not prohibit the payment to a third party who is not a lawyer for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. However, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in matters that have been concluded that the third party collects on the lawyer's behalf.</u>	Comment [3] has no counterpart in the Model Rule. It was added following public comment to address concerns that the phrase "directly or indirectly" was too broad and might sweep within it legitimate <i>nonlawyer consultant and contractor</i> compensation methods and plans that do not pose a threat a lawyer's independence of judgment.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Other rules also protect the lawyer's independence of professional judgment. (See, e.g., Rule 1.5.1, Rule 1.8.6, and Rule 5.1.)	Similar to Model Rule 5.4, cmt. [2], proposed Comment [4] provides a cross-reference to Rule 1.8.6, as well as other Rules that operate to safeguard a lawyer's independence of professional judgment.
	[5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.	Comment [5] has no counterpart in the Model Rule. It has been added to provide important guidance to lawyers in dealing with a situation involving firm ownership that often arises in estate planning.
	[6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.	Comment [6] has no counterpart in the Model Rule. It has been added to provide a cross-reference to the Rule that governs fee divisions among lawyers.
	[7] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule. See also Business and Professions Code section 6155.	Comment [7] has no counterpart in the Model Rule. It has been added to clarify that a lawyer is not only permitted to participate in a lawyer referral service that complies with California law, but is also encouraged to do so, as such services contribute to increase access to justice.

<u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[8] Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule [6.3].)	Comment [8] has no counterpart in the Model Rule. Comment [8] and [9] have been added to clarify the holding in the Supreme Court's decision in <i>Frye</i>.
	[9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.	See Explanation of Changes for Comment [9].
	[10] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See <i>Gafcon, Inc. v. Ponsor Associates</i> (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)	Comment [10] has no counterpart in the Model Rule. It has been carried over from the Discussion to current California rule 1-600. It is an important clarification that the Rule does not override common arrangements between lawyers and insurers in providing legal services to insureds.

Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate to provide for the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) any payment authorized by Rule 1.17;
 - (3) a lawyer or law firm including nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these Rules or the State Bar Act; or
 - (4) the payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California.
- (b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization authorized to practice law for a profit if:
 - (1) a person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation; or
 - (3) a person who is not a lawyer has the right to direct or control the professional judgment of a lawyer.
- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.
- (f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.

COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.
- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. However, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in matters that have been concluded that the third party collects on the lawyer's behalf.
- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., Rule 1.5.1, Rule 1.8.6, and Rule 5.1.
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule. See also Business and Professions Code section 6155.
- [8] Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule [6.3].)
- [9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

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

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

STATE VARIATIONS

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

California: Rule 1-310 forbids lawyers to form partnerships with non lawyers if "any of the activities of that partnership consist of the practice of law." Rule 1-320 forbids sharing legal fees with non lawyers with exceptions, including those described in Rules 5.4(1) and (3).

Colorado: Colorado restores language from the 1983 version of ABA Model Rule 5.4 providing that "a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer." Colorado Rule 5.4(d) provides that a lawyer shall not practice with or in the form of a professional corporation, association, or limited liability company, authorized to practice law for a profit, "except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court."

Connecticut: Connecticut omits ABA Model Rule 5.4(a)(4) (relating to fee sharing with nonprofit organizations).

District of Columbia: D.C. Rules 5.4(a)(4) and (b), which are unique in the United States, permit fee sharing between lawyers and nonlawyers "in a partnership or other

form of organization which meets the requirements of paragraph (b)." Paragraph (b) provides:

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

In addition, D.C. Rule 5.4(a)(5) permits a lawyer to “share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.”

Florida: In place of ABA Model Rule 5.4(a)(2), Florida retains the language from the 1983 Model Rule providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.”

Florida Rule 4-8.6 describes the business entities through which lawyers may practice law and forbids practice other than through “officers, directors, partners, agents, or employees who are qualified to render legal services in this state.” Further, only persons who are so qualified may serve as “a partner, manager, director, or executive officer” of such an entity. Florida has substantially adopted Rule 5.4(a)(4).

Georgia adopts the pre-2002 version of ABA Model Rule 5.4 verbatim, but also restores language from the 1983 Model Rule permitting a lawyer who completes the unfinished business of a deceased lawyer to pay the deceased lawyer’s estate “that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.”

Illinois: Rule 5.4(a)(2) permits a lawyer who undertakes to “complete unfinished legal business of a deceased lawyer” to pay the deceased lawyer’s estate “that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer,” or to make payments in accordance with Rule 1.17, which governs the

sale of a law practice by a deceased or disabled lawyer (but Illinois makes no reference to a “disappeared” lawyer). Illinois omits ABA Model Rule 5.4(a)(4). Illinois Rule 5.4(d)(2) permits a nonlawyer to serve as secretary for a professional corporation or for-profit association authorized to practice law “if such secretary performs only ministerial duties.”

Indiana deletes ABA Model Rule 5.4(a)(4).

Iowa deletes ABA Model Rule 5.4(a)(4).

Kansas: Kansas replaces ABA Model Rule 5.4(a)(2) with language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Kansas makes no reference to the purchase of a law practice or to Rule 1.17, which Kansas has not adopted.

Maryland restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased, retired, disabled, or suspended lawyer may pay to that lawyer or that lawyer’s estate the proportion of the total compensation which fairly represents the services rendered by the former lawyer.”

Massachusetts: Rule 5.4(a) allows a lawyer or law firm to share “a statutory or tribunal-approved” legal fee with “a qualified legal assistance organization that referred the matter to the lawyer or law firm” if the organization is not for profit and tax-exempt, the fee is made in connection with a proceeding to advance the organization’s purposes, and the client consents. The Comment to this rule explains that the “financial needs of these organizations, which serve important public ends, justify a limited exception to the

prohibition against fee-sharing with nonlawyers.” The Comment also explains that the exception does not extend to fees generated in connection with proceedings unrelated to the organization’s tax-exempt purpose, “such as generating business income for the organization.” Massachusetts Rule 5.4(b) prohibits a lawyer from forming a partnership “or other business entity” with a nonlawyer if any of the activities of the “entity” consist of the practice of law. “

Minnesota: Rule 5.4(a)(4) permits a lawyer to share court-awarded fees with a nonprofit organization only “subject to full disclosure and court approval,” and Rule 5.4(a)(5) restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.”

Missouri: Missouri restores language from the 1983 version of ABA Model Rule 5.4(a) permitting a lawyer who completes unfinished legal business of a deceased lawyer to pay the deceased lawyer’s estate “that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.”

New Hampshire: Rule 5.4(a)(4) permits a lawyer to “share legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter,” whether or not the fees are “court-awarded.”

New York: DR 1-107 permits lawyers and law firms to have a contractual relationship with certain categories of nonlawyers “for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal

professional services.” DR 1-107(D) provides that notwithstanding the rule prohibiting lawyers from sharing legal fees with non lawyers (DR 3-102), “a lawyer or law firm may allocate costs and expenses with a non-legal professional... pursuant to a contractual relationship permitted by DR 1-107(A), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each.”

North Carolina omits ABA Model Rule 5.4(d)(2) and adds Rule 5.4(a)(3), which permits a lawyer who undertakes to complete unfinished legal business of a deceased lawyer “or a disbarred lawyer” may pay to the estate of the deceased lawyer “or to the disbarred lawyer” that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer “or the disbarred lawyer.”

Ohio: Rule 5.4 permits a lawyer to “share legal fees with a non-profit organization that recommended employment of the lawyer in the matter,” whether or not the fees are court-awarded, provided that the nonprofit organization complies with Ohio’s Supreme Court Rules governing lawyer referral and information services.

Oklahoma: Rule 5.4(2A) adds language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased, lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Oklahoma Rule 5.4(d) says, in brackets: “The concept of this subsection of the ABA Model Rule is addressed in the Comment.” Oklahoma’s Comment says that Rule 5.4(a) “does not prohibit a lawyer from voluntarily sharing court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the

lawyer in the matter. This shall not be deemed a sharing of attorneys fees.” (Emphasis added.)

Oregon adds a new Rule 5.4(e) providing that a lawyer “shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.”

Pennsylvania adds Rule 5.4(d)(4), which provides that “in the case of any form of association other than a professional corporation, the organic law governing the internal affairs of the association provides the equity owners of the association with greater liability protection than is available to the shareholders of a professional corporation.” Rule 5.4(d) concludes by stating that subparagraphs (d)(1)-(3) “shall not apply to a lawyer employed in the legal department of a corporation or other organization.”

Rhode Island: After some uncertainty over whether Rhode Island would subscribe to the position in Rule 5.4(a)(4), as described in Selected State Variations for our 2008 edition, Rhode Island has adopted the following version of ABA Model Rule 5.4(a)(4):

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with an organization that referred the matter to the lawyer or law firm if:

- (i) the organization is one that is not for profit;
- (ii) the organization is tax-exempt under federal law;
- (iii) the fee award or settlement is made in connection with a proceeding to advance one or

more of the purposes by virtue of which the organization is tax-exempt; and

(iv) the tribunal approves the fee-sharing arrangement.

Texas: Under Texas Rule 5.04(a)(1), either a lawyer’s agreement or a lawful court order may provide for the payment of money over time to the lawyer’s estate “to or for the benefit of the lawyer’s heirs or personal representatives, beneficiaries, or former spouse, after the lawyer’s death or as otherwise provided by law or court order.”

Proposed Rule 5.5 [RPC 1-300]

“Unauthorized Practice of Law; Multijurisdictional Practice of Law”

(Draft #8.1, 9/17/09)

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

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 1-300; Rules 9.40-9.41, 9.43, 9.45-9.48, California Rules of Court

Statute

Bus. & Prof. Code, sec. 6125-6126.

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 1

Abstain 2

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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

October 2009

(Draft rule revised following consideration of public comment.)

INTRODUCTION:

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

The proposed Rule does not adopt either paragraph (c) or (d) to Model Rule 5.5, or most of the comment to MR 5.5 because the subject matter of those Model Rule provisions are governed by decisional law and by California Rules of Court 9.47 and 9.48, both of which were promulgated by the California Supreme Court's Multijurisdictional Practice Task Force. See Explanation of Changes for paragraph (c). The Commission did not include in Rule 5.5 other temporary practice rules that are found in the California Rules of Court (e.g., Rules 9.41 – 9.44), but did include a cross-reference to them in the Comment. See Comment [2]. Finally, the Commission did not consider several Model Rules of Court that were proposed by the ABA Multijurisdictional Practice Commission that address issues such as temporary practice by foreign nationals.

* Proposed Rule, Draft 8 (6/27/09).

<u>BA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law	<u>Explanation of Changes to the ABA Model Rule</u>
	(a) <u>A lawyer admitted to practice law in California shall not:</u>	Proposed paragraph (a) is an introductory paragraph to subparagraphs (1) and (2). This provision deals with two different scenarios. The first [covered by paragraph (a)] is misconduct by a lawyer admitted to practice law in California. The second [proposed paragraph (b)] is misconduct by a lawyer who is not admitted to practice in this State. Because proposed paragraph (a) deals with two different offenses, it was given an introductory paragraph for the two different offenses that are described in the subparagraphs (1) and (2).
(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.	(a1) ~~A lawyer shall not~~ practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; ~~or assist another in doing so.~~	Proposed subparagraph (a)(1) is substantially the same as the first clause of ABA Model Rule 5.5(a). By drafting an introductory paragraph (a) in the proposed rule, in subparagraph (1) we were able to combine the two complementary concepts of current Rule of Professional Conduct 1-300 in one part of the proposed rule applicable to California lawyers and made the proposed rule briefer by deleting the first four words of the Model Rule. The second clause of Model Rule 5.5(a) is covered by subparagraph (a)(2). See explanation for paragraph (a)(2).
	(2) <u>knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.</u>	Current California Rule of Professional Conduct 1-300(A) is an important public protection rule. It subjects a lawyer who is admitted in California to discipline if he or she aids another person or entity in the unauthorized practice of law. Absent such a rule, a lawyer who commits that offense would not likely be subject to discipline in the State Bar Court. However, the Model Rule is not as explicit as the current California rule, and the second clause of

* Redline/strikeout showing changes to the ABA Model Rule

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

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

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

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

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

* Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~of Law; Multijurisdictional Practice ~~Of~~of Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
	[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See, e.g., California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel <i>pro hac vice</i>], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and <i>Sperry v. Florida ex rel. Florida Bar</i> (1963) 373 U.S. 379 [83 S.Ct. 1322]; <i>Augustine v. Dept. of Veteran Affairs</i> (Fed. Cir. 2005) 429 F.3d 1334.)	In place of ABA Comment [2], the proposed rule substitutes a new Comment [2] that refers the public, courts, and lawyers to relevant statutes, rules of court, and federal decisions. See explanation of changes regarding paragraph (c), <i>supra</i>. The Commission endeavored to draft a definition of the practice of law in this State but does not recommend that such a definition be included in these rules. It would lengthen the Comment by at least six pages and would still not be a complete definition of what constitutes the practice of law in this State, for judicial decisions are constantly re-interpreting that concept in light of the facts of specific cases.

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se. [4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).	~~[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.~~ ~~[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).~~	ABA Comment [3] is deleted from the proposed rule because it is an incomplete and inaccurate statement of the law in California regarding lawful practice by non-lawyers. See, for example, Bus. & Prof. Code §§ 6400, <i>et seq.</i>, dealing with Legal Document Assistants and Unlawful Detainer Assistants. This subject is best addressed in Rule 5.3. Comment [4] has been deleted from the proposed rule because it is an incomplete and inaccurate restatement of part of paragraph (b) of the proposed rule.

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.	~~[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.~~	Comments [5] through [21] have been deleted because they discuss paragraphs (c) and (d), both of which have been deleted from the proposed Rule because the subject matter is already governed by Rules of Court, Rules 9.47 and 9.48, and decisional law.
[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.	~~[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.	~~[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.	~~[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

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

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

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.	~~[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized	~~[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide <i>pro bono</i> legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].	~~expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide <i>pro bono</i> legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].~~	
[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.	~~[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.	~~[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.	~~[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

<u>ABA Model Rule</u> Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law Comment	<u>Commission's Proposed Rule*</u> Rule 5.5 Unauthorized Practice ~~Of~~^{of} Law; Multijurisdictional Practice ~~Of~~^{of} Law Comment	<u>Explanation of Changes to the ABA Model Rule Comments</u>
[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.	~~[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).	~~[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).	~~[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].
[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.	~~[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.~~	See Explanation of Changes for paragraphs (c) and (d) and Comment [5].

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

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

of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel pro hac vice], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

COMMENT

- [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.
- [2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See, e.g., California Business and Professions Code, sections 6125 and 6126. See also California Rules

Rule 5.5: Unauthorized Practice of Law; Multi-jurisdictional Practice of Law

STATE VARIATIONS

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

Alabama: Alabama Rule 5.5(b) is similar to ABA Model Rule 5.5(b), but Alabama limits the activities of out-of-state lawyers to mediation services, services under authority of federal law, serving as in-house counsel in nonlitigation situations, or engaging in “transactional, counseling, or other nonlitigation services” unless they are admitted to Alabama courts pro hac vice.

Arizona augments ABA Model Rule 5.5 by adding these paragraphs:

(e) Any attorney who engages in the authorized multijurisdictional practice of law in the State of Arizona under this rule must advise the lawyer’s client that the lawyer is not admitted to practice in Arizona, and must obtain the client’s informed consent to such representation.

(f) Attorneys not admitted to practice in the State of Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in the State of Arizona, must also comply with Rules of the Supreme Court of Arizona governing pro hac vice admission.

(g) Any attorney who engages in the multijurisdictional practice of law in the State of Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.

California: California Supreme Court Rules 9.45, 9.46, 9.47, and 9.48 give lawyers admitted in other American jurisdictions limited authority to provide legal services in California. The four rules deal with in-house counsel, legal services lawyers, lawyers involved in dispute resolution, and lawyers providing other legal services in California. The California rules are less expansive than ABA Model Rule 5.5(c). In addition, two other rules--9.43 and 9.44--provide authority for lawyers who enter California to participate in arbitrations and for lawyers admitted in foreign countries to register as foreign legal consultants.

Colorado Rule of Civil Procedure 220, entitled “Out-of-State Attorney-Conditions of Practice,” is essentially equivalent to ABA Model Rule 5.5. Rule 220 permits an out-of-state attorney who is not domiciled in Colorado and has not established a place for the regular practice of law in Colorado to “practice law in the state of Colorado except that an out-of-state attorney who wishes to appear in any state

court of record must comply with [rules] concerning pro hac vice admission.” Unlike ABA Model Rule 5.5, Colorado’s Rule 220 does not restrict out-of-state lawyers to “temporary” law practice. However, Rule 220 permits an out-of-state lawyer to practice in Colorado only if the lawyer “has not established domicile in Colorado” and “has not established a place for the regular practice of law in Colorado from which such attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.”

Connecticut adopts most of ABA Model Rule 5.5 verbatim, with some additions and modifications. Rule 5.5(a) adds that the “practice of law” in Connecticut “is defined in Practice Book Section 2-44A,” a lengthy and detailed court rule. Rule 5.5(a) also adds that conduct described in Rules 5.5(c) and (d) in another jurisdiction “shall not be deemed the unauthorized practice of law for purposes of this paragraph (a).”

Most significantly, Connecticut Rule 5.5(c) extends temporary practice privileges only to a lawyer admitted in another United States jurisdiction “which accords similar privileges to Connecticut lawyers in its jurisdiction.” Connecticut Rule 5.5(d)(1) applies only if the lawyer “is an authorized house counsel as provided in Practice Book Section 2-15A.” Section 2-15A(c)(1) authorizes an in-house lawyer to engage in the following activities in Connecticut:

- (A) the giving of legal advice to the directors, officers, employees, and agents of the organization with respect to its business and affairs;

- (B) negotiating and documenting all matters for the organization; and

- (C) representation of the organization in its dealings with any administrative agency, tribunal or commission

having jurisdiction; provided, however, authorized house counsel shall not be permitted to make appearances as counsel before any state or municipal administrative tribunal, agency, or commission, and shall not be permitted to make appearances in any court of this state, unless the attorney is specially admitted to appear in a case before such tribunal, agency, commission or court.

However, §2-15(A)(c)(4) provides that an authorized house counsel “shall not express or render a legal judgment or opinion to be relied upon by any third person or party other than legal opinions rendered in connection with commercial, financial or other business transactions to which the authorized house counsel’s employer organization is a party and in which the legal opinions have been requested from the authorized house counsel by another party to the transaction.”

Drawing on ABA Model Rule 8.5(a), Connecticut adds a new Rule 5.5(e), which provides: “A lawyer not admitted to practice in this jurisdiction and authorized by the provisions of this Rule to engage in providing legal services on a temporary basis in this jurisdiction is thereby subject to, the disciplinary rules of this jurisdiction with respect to the activities in this jurisdiction.” Finally, Connecticut adds an unusual new Rule 5.5(f), which provides:

A lawyer desirous of obtaining the privileges set forth in subparagraphs (c)(3) or (4), (1) shall notify the Statewide Bar Counsel as to each separate matter prior to any such representation in Connecticut, (2) shall notify the Statewide Bar Counsel upon termination of each such representation in Connecticut, and (3) shall pay such fees as may be prescribed by the Judicial Branch.

Delaware has adopted Rule 5.5 and adds lawyers “admitted... in a foreign jurisdiction” to the authority granted

in Rule 5.5(c) and 5.5(d). Delaware Supreme Court Rule 5.55 implements the authority of Rule 5.5(d)(1).

District of Columbia retains the pre-2002 version of ABA Model Rule 5.5. In addition, D.C. has developed one of the most detailed unauthorized practice rules in the country (D.C. Rule 49). The rule contains many exceptions to the general prohibition against unauthorized practice. These include exceptions for lawyers providing legal services to the United States while employed by the United States; lawyers appearing before a “special court, department or agency of the United States” where authorized by statute; employees of the District of Columbia and lawyers practicing before “a department or agency of the District of Columbia” pursuant to statutory authorization; employed lawyers where the employer “does not reasonably expect that it is receiving advice from a person” admitted in the District; lawyers who have moved to the District for a period of 360 days while applying for admission in the District and so long as they are under “the direct supervision of an enrolled, active member” of the D.C. Bar; up to five appearances per year for lawyers coming into the district for an ADR proceeding; up to five pro hac vice applications per year; and lawyers providing pro bono services under limited circumstances. Foreign lawyers are also exempt from the UPL prohibition for “incidental and temporary” work in the District.

Florida: Rule 5.5 is based on ABA Model Rule 5.5 but has many significant differences. For example, Florida Rule 5.5(c) permits temporary practice only by lawyers who have neither been disbarred from practice in any jurisdiction “nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule.” Florida Rule 5.5(c)(3) adds that a lawyer may provide temporary legal services related to an alternative dispute resolution proceeding “if the services are performed for a client who resides in or has an office in

the lawyer’s home state.” Florida also adds a subparagraph entitled “Authorized Temporary Practice by Lawyer Admitted in a Non-United States Jurisdiction,” which largely parallels the portions of Rule 5.5 governing temporary practice by lawyers admitted in other U.S. jurisdictions.

Georgia: Rule 5.5 generally tracks ABA Model Rule 5.5, but Georgia distinguishes between a “Domestic Lawyer” (defined in Georgia’s Terminology section as, essentially, a lawyer admitted elsewhere in the United States or its territories but not in Georgia) and a “Foreign Lawyer” (defined as “a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation” but not by Georgia). Georgia adds Rule 5.5(e) to permit temporary practice in Georgia by Foreign Lawyers on terms roughly equivalent to those that govern Domestic Lawyers, provided the foreign lawyer is “a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.”

Illinois: Supreme Court Rule 716, entitled “Limited Admission of House Counsel,” permits an out-of-state lawyer to receive a limited license to perform legal services in Illinois when the lawyer is “employed in Illinois as house counsel exclusively for a single... legal entity (as well as any parent, subsidiary or affiliate thereof)....” The legal services must be limited to (a) advising the directors, officers, employees and agents of the employer regarding its business and affairs, and (b) negotiating, documenting and consummating transactions to which the employer is a party. An in-house lawyer may not appear as counsel before any court, administrative tribunal, agency or commission in Illinois unless (a) that body’s rules authorize the appearance or (b) the body specially admits the lawyer for the particular

matter. Lawyers licensed under the house counsel rule “shall not offer legal services or advice to the public or in any manner hold themselves out to be so engaged or authorized.”

Illinois Supreme Court Rule 717, entitled “Limited Admission of Legal Service Program Lawyers,” permits an out-of-state lawyer to receive a limited license to practice law in Illinois, for a maximum of 18 months, when the lawyer is “employed in Illinois for an organized legal service, public defender or law school clinical program providing legal assistance to indigent persons.” A lawyer holding this limited license may perform legal services “solely on behalf of such employer and the indigent clients represented by such employer,” and in felony cases the lawyer may participate in the proceedings only as “an assistant of a supervising member of the bar who shall be present and responsible for the conduct of the proceedings.”

Kansas: Kansas retains the original 1983 version of ABA Model Rule 5.5 verbatim.

Minnesota: Rule 5.5(a) adds an “immunity clause” for Minnesota lawyers by providing that a Minnesota lawyer “does not violate this rule by conduct in another jurisdiction” that an out-of-state lawyer may do in Minnesota pursuant to Rules 5.5(c) and (d). Minnesota also deletes Rule 5.5(d)(1) (which governs legal services provided to a lawyer’s employer).

Missouri renumbers paragraph (c)(4) as (c)(5) and adds as Rule 5.5(c)(4) permission for temporary legal services that “are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.” In addition, Missouri Rule 5.5(d) omits paragraph (d)(2) and substantially adopts paragraph (d)(1) but requires that the lawyer have “obtained

a limited license pursuant to Rule 8.105” (quoted below). Finally, Missouri adds a new Rule 5.5(e), which prohibits the practice of law by a lawyer who has been reported to the authorities for failure to comply with Missouri’s Continuing Legal Education requirements.

Missouri Supreme Court Rule 8.105 provides:

A lawyer admitted to the practice of law in another state or territory of the United States may receive a limited license to practice law in this state if the lawyer:

(1) Is employed in Missouri as a lawyer exclusively for: a corporation, its subsidiaries or affiliates; an association; a business; or a governmental entity and the employer’s lawful business consists of activities other than the practice of law or the provision of legal services;

(2) Was conferred a professional degree in law (J.D. or L.L.B) by a law school that at the time of the lawyer’s graduation was approved by the American Bar Association.

(3) Has filed such application forms as prescribed by the board and paid the prescribed fee, which is non-refundable; and

(4) Receives the approval of the board.

New Jersey: Rule 5.5(b) permits an out-of-state lawyer to practice in New Jersey only if (among other conditions):

(2) the lawyer is an in-house counsel and complies with R. 1:27-2 [excerpted below]; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or

(iv) the lawyer practices under circumstances other than (i) through (iii) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to subparagraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction; and

(4) not hold himself or herself out as being admitted to practice in this jurisdiction....

New Jersey defines in-house counsel for purposes of its Rule 5.5(b)(2) as follows:

In-House Counsel is "a lawyer who is employed in New Jersey for a corporation, a partnership, association, or other legal entity (taken together with its respective parents, subsidiaries, and affiliates) authorized to transact business in this State that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization.

New Jersey Rule 1:21-1(d) provides:

(d) *Legal Services Organizations.* Nonprofit organizations incorporated in this or any other state for the purpose of providing legal services to the poor or functioning as a public interest law firm, and other federally tax exempt legal services organizations or trusts... which provide legal services to a defined and limited class of clients, may practice law in their own names through staff attorneys who are members of the bar of the State of New Jersey, provided that: (1) the legal work serves the intended beneficiaries of the organizational purpose, (2) the staff attorney responsible for the matter signs all papers prepared by the organization, and (3) the relationship between staff attorney and client meets the attorney's professional responsibilities to the client and is not subject to interference, control, or direction by the organization's board or employees except for a supervising attorney who is a member of the New Jersey bar.

New Jersey Rule 1:21-1(a) requires that every attorney practicing law in New Jersey maintain "a bona fide office for the practice of law" in any United States jurisdiction, not necessarily New Jersey. The rule continues as follows:

For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

New York: Compare ABA Model Rule 5.5 to New York's DR 3-101, which is the same as the ABA Model Code provision.

North Carolina: Rule 5.5 does not use the word "temporary" as it appears in ABA Model Rule 5.5(c), but Rule 5.5(b)(1) forbids a "systematic and continuous presence" in the jurisdiction for the practice of law. North Carolina Rule 5.5(c)(2)(E) adds an additional category that permits a lawyer admitted in another jurisdiction to practice in North Carolina if "the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction, or the law of the jurisdiction in which the lawyer is admitted to practice."

Ohio: Rule 5.5(c)(4) permits a lawyer to "provide legal services on a temporary basis" in Ohio if "the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

Oregon moves Rule 5.5(d)(1) (which permits temporary legal services that are provided to the lawyer's employer or its affiliates) to Rule 5.5(c)(5), meaning that these services may be performed only on a "temporary" basis.

Pennsylvania changes the lead-in language to Rule 5.5(c) to apply to a lawyer admitted in another United States jurisdiction "or in a foreign jurisdiction." Pennsylvania Rule 5.5(b)(2) provides that a lawyer shall not hold out "or advertise" to the public that the lawyer is admitted to practice in Pennsylvania.

Utah: The Utah Supreme Court has amended subparagraph (c)(3) of Utah State Bar Rule 14-0802 (Authorized Practice of Law) to make clear that, whether or not it constitutes the practice of law, a nonlawyer who is not claiming to be a lawyer may provide “clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.”

Washington: Rule 5.5(e) permits lawyers practicing in the state under the equivalent to Rule 5.5(d)(1) also to provide pro bono services to clients through a “qualified legal services provider.”

Wisconsin retains the original 1983 version of ABA Model Rule 5.5 verbatim.

Rule 5.6 [RPC 1-500]

“Restriction on a Lawyer’s Right to Practice”

(Draft #5, 08/07/09)

Summary: Proposed Rule 5.6 adopts verbatim the language of ABA Model Rule 5.6 prohibiting certain agreements restricting the right of a lawyer to practice law with the exception of an agreement concerning benefits upon retirement. The Comments to Proposed Rule 5.6 adopt verbatim the language of the Comments to ABA Model Rule 5.6, except that a sentence has been added to the end of Comment [1] noting an exception to paragraph (a) under the California Supreme Court’s decision in *Howard v. Babcock* (1993) 6 Cal.4th 409, 425. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 1-500

Statute

Business and Professions Code sections 6092.5(i), 6093

Case law

Howard v. Babcock (1993) 6 Cal.4th 409

- ☐ 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 9
Opposed Rule as Recommended for Adoption 1
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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.6* Restrictions on a Lawyer's Right To Practice

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 5.6 adopts verbatim the language of ABA Model Rule 5.6, as amended in February 2002.

In addition, Comments [1]-[3] to Proposed Rule 5.6 are identical to the comments to ABA Model Rule 5.6 with one addition: the Commission voted to add to Comment [1] a reference to an exception to paragraph (a) articulated by the California Supreme Court in *Howard v. Babcock* (1993) 6 Cal.4th 409, 425. The Court in *Howard* held that an agreement requiring a departing partner to forego certain benefits otherwise due, if the departing partner competes in specified geographical regions following withdrawal, is permissible and is not inconsistent with Rule 1-500 of the California Rules of Professional Conduct, if the agreement complies with Bus. & Prof. Code §§ 16600 et seq. The Commission considered the policy decision made by the Supreme Court in *Howard* and determined that this policy continues to be the appropriate policy for California and, as such, it should be explicit in the rule comments. As the Supreme Court reasoned, permitting such an exception “strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment.”

* Proposed Rule 5.6, Draft 5 (8/7/09).

<u>ABA Model Rule</u> Rule 5.6 Restrictions On Right To Practice	<u>Commission's Proposed Rule</u>[*] Rule 5.6 Restrictions on a Lawyer's Right to Practice	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or	A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or	The introductory clause and paragraph (a) are identical to the Model Rule.
(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy	(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.	Paragraph (b) is identical to the Model Rule.

^{*} Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 5.6 Restrictions On Right To Practice Comment	<u>Commission's Proposed Rule</u> Rule 5.6 Restrictions on a Lawyer's Right to Practice Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.	[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for ~~restrictions incident to provisions concerning retirement benefits for service with the firm~~ <u>an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See <i>Howard v. Babcock</i> (1993) 6 Cal.4th 409, 425.</u>	Comment [1] is based on Model Rule 5.6, cmt. [1], except that the second sentence has been revised to include language and a citation to the California Supreme Court decision in <i>Howard v. Babcock</i>. The stated rationale for permitting such an exception, that it “strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment,” is language taken directly from the decision. See Introduction.
[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.	[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.	Comment [2] is identical to the Model Rule.
[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.	[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.	Comment [3] is identical to the Model Rule.

Rule 5.6 Restrictions on a Lawyer's Right to Practice
(Commission's Proposed Rule – Clean Version)

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy

COMMENT

- [1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area as such an agreement strikes a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment. See *Howard v. Babcock* (1993) 6 Cal.4th 409, 425.
- [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
- [3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

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

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.)

Arkansas: Rule 5.6(a) deletes references to a shareholder, operating, or other similar type of agreement, but adds a reference to “an agreement pursuant to the provisions of Rule 1.17” (which governs the sale of a law practice).

California: Rule 1-500 is essentially the same as Rule 5.6, but adds references to certain statutory exceptions.

Florida: In 1997, without amending the text of Rule 5.6, Florida added the following new paragraph to the Comment to its version of Rule 5.6:

This rule is not a per se prohibition against severance agreements between lawyers and law firms. Severance agreements containing reasonable and fair compensation provisions designed to avoid disputes required by time-consuming quantum merit analysis are not prohibited by this rule. Severance agreements, on the other hand, that contain punitive clauses, the effect of which are to restrict competition or encroach upon a client's inherent right to select counsel, are prohibited....

In addition, a new Florida Rule 4-5.8 prohibits a lawyer who is leaving a law firm from unilaterally notifying clients of the anticipated departure, or soliciting representation of the firm's clients, unless bona fide negotiations between the

lawyer and the law firm to draft a joint communication have failed. Similarly, a lawyer in a law firm undergoing dissolution must not unilaterally contact the firm's clients unless bona fide negotiations among authorized members of the firm have failed to produce an agreement on a method for notifying clients of the dissolution.

Georgia has adopted the pre-2002 version of ABA Model Rule 5.6 and its Comment essentially verbatim. (Georgia's previous DR 2-108(B) permitted a lawyer to agree in a settlement not to “accept any other representation arising out of a transaction or event embraced in the subject matter of the controversy or suit thus settled.”)

New York: DR 2-108 provides as follows:

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.

Oregon: Rule 5.6(b) applies to a “direct or indirect” restriction on a lawyer’s right to practice.

Pennsylvania: Rule 5.6(a) permits an agreement that restricts the rights of a lawyer to practice as part of “an agreement for the sale of a law practice consistent with Rule 1.17.”

Texas: Rule 5.06(b) adds that “as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Virginia: Rule 5.6(b) forbids an agreement in which a restriction of the lawyer’s right to practice is part of the settlement of a controversy, “except where such a restriction is approved by a tribunal or a governmental entity.”

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 rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ 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).

<u>ABA Model Rule</u> Rule 6.3 Membership in Legal Services Organization	<u>Commission's Proposed Rule</u> Rule 6.3 Membership in Legal Services Organization	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:	A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:	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).

<u>ABA Model Rule</u> Rule 6.3 Membership in Legal Services Organization Comment	<u>Commissions Proposed Rule</u> Rule 6.3 Membership in Legal Services Organization Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.	[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.	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, <u>including assurances that confidential client information will be protected.</u>	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.

respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

COMMENT

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

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"

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 rejected
- ☐ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ 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.

<u>ABA Model Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests	<u>Commission's Proposed Rule*</u> Rule 6.4 Law Reform Activities Affecting Client Interests	<u>Explanation of Changes to the ABA Model Rule</u>
A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.	A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. ~~When the lawyer knows that the interests of a client may be materially benefitted 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.

<u>ABA Model Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests Comment	<u>Commission's Proposed Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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

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."

Proposed Rule 7.1 [RPC 1-400]

“Communications Concerning Availability of Legal Services”

(Draft #7, 5/30/09)

Summary: Proposed Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services and largely carries forward the definition of “communication” in current rule 1-400(A). It also carries forward several Standards from rule 1-400 that create a presumption that the rules in the 7 series have been violated.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☒ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 1-400

Statute

Bus. & Prof. Code §§ 6157 et seq.

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 10

Opposed Rule as Recommended for Adoption 0

Abstain 1

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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed* Rule 7.1 Communications Concerning the Availability of Legal Services

October 2009

(Draft rule following initial round of public comment.)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. **Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services.** Rule 7.2 specifically addresses advertising, a subset of communication. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule, Draft 7 (5/30/09)

INTRODUCTION (continued):

3. Proposed Rule 7.1 entails the basic concept addressed in Model Rule 7.1: the prohibition on a lawyer making false and misleading communications concerning the availability of legal services.
4. However, proposed Rule 7.1 diverges from the Model Rule in a number of ways, including:
 - (i) it retains a definition of “communication” from current rule 1-400, updated to recognize changes occasioned by Internet usage (see paragraph (a));
 - (ii) it expands on the Model Rule’s definition of “false and misleading” communication (see paragraph (c));
 - (iii) it prohibits “any” misrepresentation of fact or law, and not just material misrepresentations (see paragraph (c)(2));
 - (iv) it retains a provision authorizing the Board to formulate and adopt standards designating certain communications that will be presumed violations of the Rule, and retains some of the standards presently found in current rule 1-400 (see paragraph (d)). The Office of the Chief Trial Counsel requested retention of these standards, and the Commission agrees.
5. The Commission recommends retaining for the most part the Comment to Model Rule 7.1, revised to conform to proposed changes to the Rule.
6. *Other Definitions.* The Commission does not recommend carrying forward other definitions from current rule 1-400 (e.g., “solicitation”) or including definitions currently found in the Business & Professions Code (e.g., “advertisement,” found in § 6157(c)). The regulation of advertising is now relatively well-settled and these definitions, originally drafted in the early stages of the regulation of lawyer advertising and solicitation to provide guidance to lawyers on precisely what kinds of communication were regulated, are no longer necessary.

INTRODUCTION:

7. *Retention of Marketing Materials.* Both current rule 1-400(F) and previous versions of the Model Rules contain a requirement that a lawyer retain, for two years, a copy of any communication the lawyer had made in electronic or written media. The Commission agrees with the ABA Ethics 2000 Commission that the requirement “has become increasingly burdensome, and such records are seldom used for disciplinary purposes,” (ABA Ethics 2000 Reporters Explanation of Changes, Rule 7.2), and so recommends that the retention requirement not be retained. However, the Commission notes that if this recommendation is accepted, Bus. & Prof. Code § 6159.1, which requires the retention of advertisements for a period of one year, should be repealed. Because it is necessary for Rule 7.1 and Bus. & Prof. Code § 6159.1 to be consistent, the potential alternative to a change in the statute would be for Rule 7.1 to require a one-year period of retention, but the Commission does not favor that alternative.
8. *Variations in Other Jurisdictions.* There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape, and to obviate potential constitutional infirmities.

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	(a) <u>For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:</u> (1) <u>Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or</u> (2) <u>Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or</u> (3) <u>Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or</u>	Title of Rule. The substitution in the title of the phrase "the Availability of Legal Services" for "a Lawyer's Services" is intended to convey that proposed Rule 7.1 regulates only those instances when a lawyer or law firm communicates to prospective clients their availability to provide legal services. Paragraph (a). Paragraph (a) defines the term "communication," and imports paragraph (A) of current rule 1-400 into Rule 7.1, with some revisions. The Commission determined that a definition of communication, updated to address new forms of communication, is warranted in order to enhance client protection by reducing the risk of uncertainty as to what this Rule covers; the Model Rule has no such definition. The listing in subparagraphs (a)(1) – (4) of the kinds of communication covered by the Rule is not exclusive. Subparagraph (a)(1). Is identical to current rule 1-400(A)(1), except that "lawyer" is substituted for "member." Subparagraph (a)(2). The phrase, "domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission," has been substituted for "or other comparable written material" in rule 1-400(A)(2) in order to provide guidance on the kinds of communication, including those commonly found on the Internet, that are regulated under Chapter 7 of the Proposed Rules. Subparagraph (a)(3) is identical to current rule 1-400(A)(3), except that "lawyer" is substituted for "member."

* Proposed Rule, Draft 7 (5/30/09). Redline/strikeout showing changes to the ABA Model Rule
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<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.</u>	<i>Subparagraph (a)(4).</i> The phrase “electronic transmission, or other writing” has been added to subparagraph (4) to conform its construction to revised subparagraph (2).
		<i>Paragraphs (b) and (c) – Introduction.</i> The two sentences that comprise Model Rule 7.1 have been divided into two separate paragraphs. Because the concepts contained in those two sentences are distinct, the Commission believes that readers of the Rule will more easily grasp their different meanings by placing them in different paragraphs: The first sentence contains the operative prohibition and states generally what kind of conduct is prohibited (making “a false or misleading communication”); the second sentence defines with specificity the prohibited conduct.
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.	<u>(b)</u> A lawyer shall not make a false or misleading communication ~~about the lawyer or the lawyer's services~~ <u>as defined herein.</u>	<u>Paragraph (b).</u> Paragraph (b) largely tracks the first sentence of Model Rule 7.1. However, the phrase “about a lawyer's or the lawyer's services” in Model Rule 7.1 has been replaced by the phrase “as defined herein,” as that limitation is now contained in paragraph (a), which defines the term “communication.”
A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.	<u>(c)</u> A communication is false or misleading if it:	<u>Paragraph (c).</u> Paragraph (c) is largely derived from current rule 1-400(D) and identifies with greater specificity than the second sentence of Model Rule 7.1 when a communication is false or misleading.

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	(1) <u>Contains any untrue statement; or</u>	<i>Subparagraphs (c)(1), (3) and (4)</i> are identical to subparagraphs (1), (2) and (3) of current rule 1-400(D), respectively.¹ Subparagraphs (c)(1), (3) and (4) add clarity as to precisely what is prohibited by the operative language of proposed Rule 7.1(b).
	(2) <u>Contains a material misrepresentation of fact or law; or</u>	<i>Subparagraph (c)(2)</i> adopts verbatim part of the second sentence to Model Rule 7.1.
	(3) <u>Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or</u>	<i>Subparagraph (c)(3)</i> is identical to current rule 1-400(D)(2).
	(4) <u>Omits to state any a</u>-fact necessary to make the statements <u>made, considered as a whole in the light of circumstances under which they are made,</u> not materially misleading.	<i>Subparagraph (c)(4)</i> is identical to current rule 1-400(D)(3). It is similar in concept to the second sentence of Model Rule 7.1.

¹ The concepts found in subsections (4), (5) and (6) of rule 1-400(D) have been moved to other rules in the Chapter 7 series of proposed Rules. The concepts now found in rule 1-400(D)(4) and (5) may now be found in proposed Rules 7.3(c) and 7.3(b)(2), respectively. See proposed Rule 7.3 for a further discussion of these concepts. The language formerly appearing in rule 1-400(D)(6) may now be found in proposed Rule 7.4(d).

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services	<u>Commission's Proposed Rule</u>* Rule 7.1 Communications Concerning ~~A Lawyer's~~ <u>the Availability of Legal</u> Services	<u>Explanation of Changes to the ABA Model Rule</u>
	(d) <u>The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.</u>	Paragraph (d) retains, with minor revisions, current rule 1-400(E), which authorizes the Board of Governors of the State Bar of California to promulgate standards that may be used as presumptions affecting which party has the burden of proof in disciplinary proceedings. The word "shall" in current rule 1-400(E) has been changed to "may," as the Board's authority to promulgate any standards beyond those already extant is discretionary.

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.	[1] This Rule governs all communications about ~~a lawyer's~~<u>the availability of legal</u> services <u>from lawyers and law firms</u>, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. <u>The requirement of truthfulness in a communication under this Rule includes representations about the law.</u>	Comment [1] is based on Model Rule 7.1, cmt. [1]. Similar to the title, comment [1] emphasizes that proposed Rule 7.1 governs all communications "about the availability of legal services from lawyers and law firms." The Commission added the last sentence of the comment to stress that the Rule also governs representations about the law in covered communications. See Explanation of Changes, paragraph (c)(2).
[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.	[2] ~~Truthful~~<u>This Rule prohibits truthful</u> statements that are misleading ~~are also prohibited by this Rule.~~ A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.	Comment [2] is based on Model Rule 7.1, cmt. [2]. The changes to the first sentence are made to conform to California Rule style. See, e.g., Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996). No change in substance is intended. The second and third sentences of comment [2] are identical to the second and third sentences of Model Rule 7.1, cmt. [2].
[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference	[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference	Comment [3] is nearly identical to Model Rule 7.1, cmt. [3]. The only change to the Model Rule comment entails revising the last sentence as follows: "The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client." The foregoing revision is intended to address the concern that the language in

* Proposed Rule, Draft 7 (5/30/09). Redline/strikeout showing changes to the ABA Model Rule
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<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.	to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may ~~preclude a finding that a statement is likely to create~~<u>avoid creating</u> unjustified expectations or otherwise ~~mislead~~<u>misleading</u> a prospective client.	comment [3] might be construed to suggest that a disclaimer is a panacea for any misstatement or misrepresentation, intended or otherwise.
	<u>[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.</u>	Comment [4] has no counterpart in Model Rule 7.1. Comment [4] is intended to provide lawyers with a convenient cross-reference to the meaning of "writing" as used in the Rule. See also current rule 3-310(A)(3).
	<u>[5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.</u>	Comment [5] has no counterpart in Model Rule 7.1. Comment [5] is intended to avoid the misapprehension that the list of communications in subparagraphs (a)(1) – (4) was intended to be exclusive, and gives an example of a type of communication not expressly listed (metatag) that nevertheless would be regulated under the Rule.
[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.	~~[4]~~ See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate ~~the~~<u>these</u> Rules ~~of Professional Conduct~~ or other law.	Comment [6] is identical to Model Rule 7.1, cmt. [4], which provides a cross-reference to Rule 8.4(e). Placing the prohibition against such statements in Rule 8.4(e) emphasizes that the prohibition is not limited to statements made in connection with the marketing of legal services. See ABA Ethics 2000 Reporter's Explanation of Changes.

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Standards</u> <u>Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:</u>	Pursuant to proposed Rule 7.1(d), the Board of Governors has authority to “formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5.” This provision is a carryover from current rule 1-400(E). The Commission recommends that current standards (1), (2), (13), (14), (15) and (16) be retained in paragraph (e) as standards (1), (2), (3), (4), (5) and (6), respectively. The Commission has made this recommendation on the advice of the Office of Chief Trial Counsel of the State Bar of California (“OCTC”) that deleting these standards would make prosecution difficult were the conduct proscribed under those standards to occur. After reviewing these current standards, the Commission concluded that no such dilution of the effect of the Rule would be appropriate, and it therefore recommends their retention. In addition, on the recommendation of OCTC, several of the current standards have been deleted. They are current standards (3), (4), (7) and (9). OCTC’s position is that they simply set forth conduct which is untruthful, deceptive or misleading in and of itself, and that a violation of the Rule can still be shown because the conduct violates proscriptions set out in Rule 7.1(b), 7.3(a) or 7.3(b). Further, the concepts in several of the current standards have been retained either as part of another rule or as part of the Discussion to another rule. They are: (i) current standard (5), which has been retained as proposed Rule 7.3(c), with modifications to conform it to the language of Model Rule 7.3(c); (ii) current standard (6), which has been retained, with modifications, as proposed Rule 7.5(a);

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		(iii) current standard (8), which has been retained largely intact as proposed Rule 7.5(d) and the second sentence of proposed Rule 7.5, cmt. [2]; (iv) current standard (10), which has been retained, with slight modifications, as proposed Rule 7.2(b)(2); and (v) current standard (12), which has been retained as proposed Rule 7.2(c), with modifications to conform it to the language of Model Rule 7.2(c). Finally, note that standard (11) previously had been repealed, effective June 1, 1997. Its operative language was inserted as current rule 1-400(D)(6), and that language may now be found in proposed Rule 7.4(d).
	(1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.	Current rule 1-400, Standard (1).
	(2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."	Current rule 1-400, Standard (2), with "lawyer" substituted for "member."

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	(3) <u>A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.</u>	Current rule 1-400, Standard (13).
	(4) <u>A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.</u>	Current rule 1-400, Standard (14).
	(5) <u>A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.</u>	Current rule 1-400, Standard (15), with "lawyer" substituted for "member."
	(6) <u>An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days</u>	Current rule 1-400, Standard (16).

<u>ABA Model Rule</u> Rule 7.1 Communications Concerning A Lawyer's Services Comment	<u>Commission's Proposed Rule*</u> Rule 7.1 Communications Concerning the Availability of Legal Services Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.</u>	

Rule 7.1 Communications Concerning the Availability of Legal Services
(Commission's Proposed Rule – Clean Version)

- (a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
- (1) Contains any untrue statement; or
 - (2) Contains a material misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading.
- (d) The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

- [1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.
- [2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the

lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

- [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.
- [4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.
- [5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.
- [6] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards

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

- (1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
- (3) A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.
- (4) A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
- (5) A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

- (6) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

Rule 7.1: Communications Concerning a Lawyer's Services

STATE VARIATIONS

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

California: Rule 1-400 provides, in pertinent part, as follows:

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity....

(C) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct....

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used

as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules... Such standards... shall be effective and binding on all members.

The Standards adopted by the State Bar's Board of Governors pursuant to rule 1-400(E) are long and detailed. For example, Standards 1 and 2 provide that the following forms of communication "are presumed to be in violation of rule 1-400":

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

See also Business & Professions Code §§6157-6159.2 (generally prohibiting "any false, misleading, or deceptive statement" in a lawyer advertisement; imposing detailed restrictions on advertisements containing dramatizations, impersonations, and spokespersons; and prohibiting various specific claims and techniques); California Labor Code §139.45 ("the Industrial Medical Council and the administrative director shall take particular care to preclude any advertisements with respect to industrial injuries or illnesses that are false or mislead the public with respect to workers' compensation. In promulgating rules with respect to advertising, the State Bar... shall also take particular care to achieve the same goal"); and California Labor

Code §5432 (requiring every advertisement soliciting workers' compensation clients to state conspicuously: "Making a false or fraudulent workers' compensation claim is a felony subject to up to 5 years in prison or a fine of up to \$50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine").

Colorado: Colorado retains the pre-2002 version of ABA Model Rule 7.1(a) and adds the following paragraphs:

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

District of Columbia: Rule 7.1(a) adds that a communication is false or misleading if it “[c]ontains an assertion about the lawyer or the lawyer’s services that cannot be substantiated.”

Florida: Florida’s lawyer advertising rules are more comprehensive and detailed than the ABA Model Rules of Professional Conduct or those in any other American jurisdiction. They are often revised and defy easy summary or comparison with the ABA rules. They address in depth the content of advertisements, electronic and computer advertising, referral services, and filing requirements. Some of the more noteworthy Florida advertising and solicitation provisions appear in Selected State Variations under other rules in Article 7.

Georgia generally tracks the pre-2002 version of ABA Model Rule 7.1, but adds special subparagraphs requiring that all advertisements mentioning contingent fees or stating “no fee unless you win or collect” or any similar phrase must also conspicuously present a disclaimer stating: “Court costs and other additional expenses of legal action usually must be paid by the client contingent fees are not permitted in all types of cases.”

Iowa has many rules on lawyer advertising. Its version of Rule 7.1 adds the following:

(b) A lawyer shall not communicate with the public using statements that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer’s 32—s legal services.

Louisiana: In the rules effective December 1, 2008, Rule 7.1(a) identifies a non-exclusive list of advertising

methods that lawyers may use. Among other variations, Rule 7.1(c) explicitly exempts from the rules any advertising that is not “motivated by pecuniary gain.”

Mississippi: Rule 7.5(a) requires that a copy or recording of any lawyer advertisement to be published must be submitted to the Office of the General Counsel of the Mississippi Bar “prior to its first dissemination” unless exempted under an extensive list in Rule 7.5(b). If a lawyer submits a proposed advertisement 45 days before its dissemination, the lawyer may request an “advisory opinion.” If the Office of the General Counsel does not respond within 45 days, the advertisement will be “deemed approved,” but if the Office of General Counsel determines within the 45-day period that there is “reasonable doubt” that the advertisement complies with the rules, it may extend the 45-day period.

Missouri: Rule 7.1 adds that a communication is false or misleading if it:

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer’s record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;

(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;

(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;

(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation. . . .

Nevada: Among many other variations, Rule 7.1(d) adds that a communication is false or misleading if it "contains a testimonial or endorsement which violates any portion of this Rule."

In addition, Rule 1.4(c) requires every lawyer or law firm to "have available" a "Lawyer's Biographical Data Form" that must "be provided upon request of the State Bar or a client or prospective client. . . ." Rule 1.4(c) also specifies information that must be included in the form and included with every written advertisement, and it specifies other detailed information that must be provided to a client or prospective client upon request (such as a "good faith estimate of the number of jury trials tried to a verdict by the lawyer to the present date, identifying the court or courts").

These requirements are also reinforced in Rule 1.18(g) (relating to prospective clients).

New Jersey: Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer, the lawyer's services, or "any matter in which the lawyer has or seeks professional involvement." A communication is false or misleading under New Jersey Rule 7.1(a) if (among other things) it "(4) relates to legal fees other than" a specified list of permitted statements, including "the fee for an initial consultation," "fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or deceptive," and "specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter. . . ." Rule 7.1(b) makes it "unethical" for a lawyer to use an advertisement "known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee...."

New York: New York adds these definitions to its Code of Professional Responsibility:

(11) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(12) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

In addition, New York's definition of "solicitation" appears in DR 2-103(B).

New York DR 2-101(A) provides that a lawyer or law firm "shall not use or disseminate ... any advertisement that contains . . . statements or claims that are false, deceptive, or misleading." DR 2-101(B) lists numerous items (e.g., "legal and nonlegal education," "foreign language fluency," "fees for initial consultation," and "bona fide professional ratings") that it is ordinarily "proper" for an attorney to include in an advertisement. DR 2-101(C)-(P) impose additional restrictions and mandate various disclosures and disclaimers. Some of the restrictions were held unconstitutional in *Alexander v. Catalano*, 2007 WL 2120024 (N.D.N.Y. 2007), but when we went to press, the appeal was fully briefed but still pending.

North Carolina retains the subparagraphs that were deleted from the pre-2002 version of ABA Model Rule 7.1. North Carolina also adds a Rule 7.1(b) providing that a "dramatization depicting a fictional situation is misleading unless it . . . contains a conspicuous written or oral statement at the beginning and end of the communication, explaining that the communication contains a

dramatization and does not depict actual events or real persons."

Ohio: Rule 7.1 also prohibits a lawyer from making or using a "nonverifiable" communication about the lawyer or the lawyer's services.

Oregon: Rule 7.1 (a) contains a list of 12 specific items that may not appear in advertisements or may only appear under particular circumstances. Actors may be used if the communication "clearly and conspicuously discloses" that status.

Pennsylvania: Rule 7.1 tracks ABA Model Rule 7.1 verbatim—but Pennsylvania Rule 7.2 contains numerous restrictions designed to prevent false or misleading communications. For example, Rule 7.2 prohibits endorsements by any celebrity or public figure; prohibits lawyers from stating or implying that they are associated together in a law firm if that is not the case; prohibits any portrayal of a client by a non-client; and prohibits the use of "pictures, or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization." An unusual Rule 7.2(k) provides that "[i]f a lawyer or law firm advertises for a particular type of case that the lawyer or law firm ordinarily does not handle from intake through trial, that fact must be disclosed. A lawyer or law firm shall not advertise as a pretext to refer cases obtained from advertising to other lawyers."

South Carolina: Rule 7.2(f) prohibits lawyer advertisements that are "merely self-laudatory" or that "describe or characterize the quality of the lawyer's services;" but the provision does not apply to "information furnished to a prospective client at that person's request or to information supplied to existing clients."

Virginia has divided the substance of ABA Model Rule 7.1 into two separate rules. Rule 7.1 applies to all “public communication,” defined as “all communication other than ‘in-person’ communication,” while Rule 7.2 applies only to “advertising.” Rule 7.1 generally tracks the pre-2002 version of ABA Model Rule 7.1, but adds that a communication is improper if it “states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits.” Rule 7.2 governs various specific types and styles of lawyer advertising. For example, Rule 7.2(a) provides that an advertisement violates Rule 7.1 if it “(1) contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement,” or “(2) contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization,” or:

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results...

Proposed Rule 7.2 [RPC 1-400] “Advertising”

(Draft #8, 10/1/09)

Summary: Proposed Rule 7.2 is the second of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.2 specifically addresses advertising, a subset of communication, that typically involves communications directed at the general public.

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 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

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 9
Opposed Rule as Recommended for Adoption 0
Abstain 1

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:

Lawyers who advertise in various media and legal advertising consultants participated in the deliberations concerning this Rule.

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 7.2* Advertising

October 2009

(Draft rule following initial round of public comment.)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. **Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public.** Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.2, Draft 8 (10/1/09).

INTRODUCTION:

3. Proposed Rule 7.2 includes the basic concepts contained in Model Rule 7.2: a provision expressly sanctioning the use of advertising by lawyers, (see paragraph (a)); a provision identifying exceptions to the general prohibition on paying a person to recommend the lawyer's services, (see paragraph (b)); and a provision requiring identifying information in any legal advertisement to facilitate the Bar's enforcement of the rules, (see paragraph (c)).
4. Proposed Rule 7.2 diverges from the Model Rule by broadening the kinds of media in which advertising is permitted (paragraph (a)); addressing specifics of the California statutes or regulations (paragraph (b)(2)); and including provisions currently found in the California Rules (paragraph (b)(5)).
5. The Model Rule Comment has been revised to remove purely expository language, (e.g., Comment [2]) or to conform the comment to the revised Rule, (e.g., Comment [5]).
6. *Variation in Other Jurisdictions.* There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape, and to obviate potential constitutional infirmities.

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.	(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through <u>any</u> written, recorded or electronic ~~communication~~<u>media</u>, including public media.	<u>Paragraph (a)</u> is based on Model Rule 7.2(a). Model Rule 7.2(a) was revised by the ABA Ethics 2000 Commission through the deletion of references to specific types of public media (e.g., telephone directory, newspaper) and the addition of a reference to "electronic communications". The Commission recommends substituting "media" for Model Rule word, "communication." The reference to "electronic" media has been added in recognition that much of modern advertising is accomplished through such means. Specific examples of the kinds of communications contemplated by paragraph (a), including types of electronic communications, have been added to Comment [2], with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications.
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may	(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may	<u>Paragraph (b)</u> is based on Model Rule 7.2(b) and provides five (as opposed to the Model Rule's four) exceptions to the general prohibition against a lawyer giving anything of value to a person to recommend the lawyer's services. Paragraph (b) is intended to strike a balance between loyalty to the client, which could be adversely affected by the payment of referral fees, and a lawyer's need to pay for the legitimate costs of marketing the lawyer's legal services.

* Proposed Rule 7.2, Draft 8 (10/1/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;	(1) pay the reasonable costs of advertisements or communications permitted by this Rule;	<i>Subparagraph (b)(1)</i> is identical to Model Rule 7.2(b)(1) and permits payment of the “reasonable costs” of advertisements. Comment [5] gives examples of kinds of costs that may be expended. A similar exception may be found in current rule 1-320, Discussion.
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;	(2) pay the usual charges of a legal ~~service~~<u>services</u> plan or a ~~not-for-profit or~~ qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service ~~that has been approved by an appropriate regulatory authority~~<u>established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;</u>	<i>Subparagraph (b)(2)</i> is based on Model Rule 7.2(b)(2), with modifications to conform the Rule to the current regulatory landscape in California. See Bus. & Prof. Code § 6155 and associated regulations. The phrase “legal services” has been added to modify the word “plan” for clarity. The phrase “not-for-profit or” has been deleted because in California, a “qualified lawyer referral service” may be “not-for-profit” or “for-profit.” The clause “established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California” has been substituted to identify the specific regulatory mechanism in California.
(3) pay for a law practice in accordance with Rule 1.17; and	(3) pay for a law practice in accordance with Rule 1.17; and	<i>Subparagraph (b)(3)</i> is identical to Model Rule 7.2(b)(3).

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.	(4) refer clients to another lawyer or ~~a nonlawyer~~ ~~professional~~ <u>non-lawyer</u> pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.	<i>Subparagraph (b)(4)</i> is nearly identical to Model Rule 7.2(b)(4), except that the word “professional” has been deleted, with the intention that subparagraph (b)(4)’s exception for reciprocal referral agreements should apply not only to other lawyers and non-lawyer “professionals,” but also to arrangements with any non-lawyer. The two qualifications to the exception in subparagraph (4)(i) and (ii) – that the reciprocal referral arrangement is non-exclusive and that the client is informed of the arrangement – remain the same as in the Model Rule.
	<u>(5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.</u>	<i>Subparagraph (b)(5)</i> has no counterpart in Model Rule 7.2. It is a carryover from the current California Rules and incorporates the concepts found in current rules 1-320(B) and 2-200(B). These latter rules address fee division or sharing with lawyers or non-lawyers. The Commission determined that this exception to the conditional prohibition on dividing fees with lawyers and the general prohibition on sharing fees with non-lawyers should be retained as a reasonable compromise between maintaining loyalty to the client and making a reasonable payment for marketing services provided the lawyer.

<u>ABA Model Rule</u> Rule 7.2 Advertising	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising	<u>Explanation of Changes to the ABA Model Rule</u>
(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.	(c) Any communication made pursuant to this ~~rule~~Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.	Paragraph (c) is identical to paragraph (c) of Model Rule 7.2. Model Rule 7.2(c) itself was revised by the ABA Ethics 2000 Commission through the addition of the phrase “law firm” and the requirement that the advertisement include the “office address” of the lawyer or law firm responsible for the advertisement. A lawyer's name and office address should be sufficient to enable the State Bar disciplinary authorities to take action necessary to protect the public from false or misleading advertising. The requirement that the “office address” of the responsible lawyer or law firm be included in the advertisement was added because lawyers frequently use trade names and advertise in areas in which they do not maintain offices (e.g., providing an 800 number in local telephone directories throughout a state.) Notwithstanding the burden this requirement may place on lawyers or law firms that engage in cooperative advertising, it was believed that this information was necessary not only to enable the State Bar disciplinary authorities to track down those responsible for an advertisement, but also to provide prospective clients with information about where the lawyer or law firm is located, which may be an important factor in the prospective client's decision to retain counsel. Comment [9], which has no counterpart in the Model Rule, specifically provides that paragraph (c) applies to lawyers who engage in group advertising. See Explanation of Changes, Comment [9].

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.	[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through ~~organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the~~ <u>The</u> public's need to know about legal services ~~can be fulfilled in part through advertising. This need~~ is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. ~~The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless~~ <u>Lawyers must be aware, however, that</u> advertising by ~~lawyers~~ <u>them</u> entails the risk of practices that are misleading or overreaching.	The Commission recommends that Model Rule 7.2, cmt. [1], be revised to remove the Model Rule's expository language, which provides no guidance beyond that provided by the language the Commission recommends.
[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.	[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.	Proposed Comment [1] is identical to Model Rule 7.2, cmt. [2].

* Proposed Rule 7.2, Draft 8 (10/1/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.	~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.~~ <u>This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.</u>	Comment [3], addresses the same general subject matter as Comment [3] to Model Rule 7.2, but has been significantly truncated to delete the purely expository language in the Model Rule. Proposed comment [2] is limited to providing specific examples of electronic communications that are permitted, including the Internet, with a cross-reference to the prohibition in Rule 7.3(a) of solicitation of clients through real-time electronic communications.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.	[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as ~~notice to members of a class in~~<u>court-approved</u> class action ~~litigation~~<u>notices</u>.	Comment [4] is identical to Model Rule 7.2, cmt. [4], except that the Model Rule's reference to class action notices has been revised to clarify that only court-approved notices fall outside this Rule.
<i>Paying Others to Recommend a Lawyer</i> [5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.	<i>Paying Others to Recommend a Lawyer</i> [5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may <u>also</u> compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.	Comment [5] is based on Model Rule 7.2, cmt. [5], which provides examples of advertising and communications for which payment is permitted under subparagraph (b)(1). Comment [5] is nearly identical to the Model Rule comment except that the word “also” has been added to emphasize that not only may lawyers engage the services of advertisers, but may also retain intermediaries to help them obtain those services. The Commission recommends not carrying forward current rule 1-320(C), because the substance of that provision is already contained in paragraph (b) and this comment. Current rule 1-320(C) provides: (C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry	~~[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry~~	Comment [6] addresses the same substantive concepts as does Model Rule 7.2, cmt. [6], which elaborates on the exception contained in subparagraph (b)(2). However, the language of Model Rule 7.2, cmt. [6] has been replaced with a specific reference to the applicable California statutes that regulate lawyer referral services in this state.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)	~~reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)~~ Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).	

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.	[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See ~~Rule~~Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.	Comment [7] is identical to Model Rule 7.2, cmt. [7], except for the addition of a reference to proposed Rule 5.4. Among other things, Rule 5.4 prohibits a lawyer sharing fees or entering into partnerships with non-lawyers, concerns that are evident in the regulatory framework of lawyer referral services.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.	[8] ~~A Paragraph (b)(4) permits a lawyer also may agree to refer clients~~<u>make referrals</u> to another ~~lawyer or a nonlawyer professional~~, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See ~~Rules 2.1 and Rule 5.4 (c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the A~~ lawyer does not violate paragraph (b)<u>(4)</u> of this Rule by agreeing to refer clients ~~to the other lawyer or nonlawyer professional~~<u>customers to another</u>, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by ~~such~~ <u>arrangements made pursuant to paragraph (b)(4)</u> are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within ~~firms~~<u>a law firm</u> comprised of multiple entities. <u>A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.</u>	Comment [8] is based on Model Rule 7.2, cmt. [8]. It elaborates on the exception to payment for referrals in subparagraph (b)(4), which permits reciprocal referral arrangements with lawyers and non-lawyers so long as those arrangements are not exclusive and the client or customer is informed of the arrangement. A cross-reference to proposed Rule 5.4(c), which is the counterpart to Model Rule 5.4(c), has been included to emphasize that a lawyer may not permit the referring person to interfere with the lawyer's independent judgment.

<u>ABA Model Rule</u> Rule 7.2 Advertising Comment	<u>Commission's Proposed Rule*</u> Rule 7.2 Advertising Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>Required information in advertisements</u> <u>[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to this Rule shall include the name and office address of at least one member of the group responsible for its content. See also Business & Professions Code section 6155(h). See also Business & Professions Code section 6159.1, concerning the requirement to retain any advertisement for one year.</u>	Comment [9] has no counterpart in Model Rule 7.2. The two sentences of Comment [8] emphasize that paragraph (c)'s requirement of including the name of a lawyer or law firm and the lawyer's or law firm's office address in any advertisement also applies to a group of lawyers that engages in cooperative advertising. Comment [8] includes a reference to California Business & Professions Code § 6155(h), which relates to lawyers jointly advertising their services. Comment [9] also includes a cross-reference to California Business & Professions Code § 6159.1, concerning the requirement to retain any advertisement for a period of one year. Notwithstanding the inclusion of this cross-reference, the Commission has followed the ABA in recommending the removal of the requirement to retain for a period of two years a copy of "any communication made by written or electronic media," currently found in CRPC 1-400(F). The Commission has also voted to recommend that the State Bar seek the repeal of section 6159.1 and, if the Legislature agrees, the cross-reference to section 6159.1 will be removed. See proposed Rule 7.1, Introduction.

Rule 7.2 Advertising
(Commission's Proposed Rule – Clean Version)

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through any written, recorded or electronic media, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (5) offer or give a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.
- (c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

- [1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through advertising. The public's need to know about legal services is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Lawyers must be aware, however, that advertising by them entails the risk of practices that are misleading or overreaching.
- [2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly

represented; and other information that might invite the attention of those seeking legal assistance.

- [3] This Rule permits advertising by electronic media, including but not limited to television, radio and the Internet. But see Rule 7.3(a) concerning real-time electronic communications with prospective clients.
- [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

Paying Others to Recommend a Lawyer

- [5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.
- [6] Paragraph (b)(2) permits a lawyer to pay the usual charges of a group or pre-paid legal service plan exempt from registration under Business & Professions Code section 6155(c). Paragraph (b)(2) permits a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar

of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See also Rule 5.4(a)(4).

- [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 5.4. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.
- [8] Paragraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule 5.4 (c). A lawyer does not violate paragraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within a law firm comprised of multiple

entities. A division of fees between or among lawyers not in the same law firm is governed by Rule 1.5.1.

Required information in advertisements

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

Rule 7.2: Advertising

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 omits Rule 7.2(b)(4) (governing reciprocal referral agreements), and adds Rule 7.2(d), which sets forth detailed requirements for all advertisements containing information about legal fees. Arizona also adds Rule 7.2(e), which provides:

(e) ...If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full-time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm. Finally, Arizona adds Rule 7.2(f), which requires that certain information be "clear and conspicuous."

Arkansas permits actors to be used in advertisements so long as they are identified by name and relationship to the advertising lawyer. Dramatizations are forbidden. Clients and former clients "shall not be used in any manner whatsoever in advertisements."

California: Rule 1-320 provides, in pertinent part, as follows:

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that . . .

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any

promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Rule 1-400(F) provides:

(D) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

The Standards adopted by the State Bar pursuant to Rule 1-400 provide that a communication is “presumed to be in violation of rule 1-400” if it “implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.” Rule 1-600(B) provides that the State Bar’s Board of Governors “shall formulate and adopt Minimum Standards for Lawyer Referral Services, which . . . shall be binding on members.” Those standards are found after California Business & Professions Code §6155, which governs lawyer referral services.

Also relevant to ABA Model Rule 7.2 are Business & Professions Code §6129 (prohibiting lawyers from purchasing claims) and §§6157.1-6159.2 (governing lawyer advertising, especially in the electronic media).

Connecticut adds many paragraphs with no counterpart in ABA Model Rule 7.2 but omits ABA Model Rule 7.2(b)(4) (regarding reciprocal referral agreements).

District of Columbia omits ABA Model Rule 7.2, but D.C. Rule 7.1(c) provides that a lawyer “shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer’s services . . . as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.”

Florida: Rule 4-7.1 permits attorneys to advertise through “computer-accessed communications” and through “recorded messages the public may access by dialing a telephone number.” Rule 4-7.4(b)(2) provides that “[e]very written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.” Rule 4-7.10 sets forth elaborate requirements for lawyer referral services. In addition, Chapter 8 of the Rules Regulating the Florida Bar sets forth extensive requirements for the operation of lawyer referral services by local bar associations, and no local bar association may operate a referral service absent express approval from the state bar.

Georgia moves Rule 7.2(b) and its Comment to Georgia Rule 7.3(c), and modifies and expands the exceptions in ABA Model Rule 7.2(c) regarding lawyer referral services.

Illinois prohibits giving anything of value for recommending “or having recommended” the lawyer’s services.

Iowa: Rule 7.2 does not govern communications between lawyers, but prohibits any “visual display” on television unless the same display would be “allowed in print”; prohibits “background sound” in electronic media; and expressly permits lawyers to communicate 14 items to the public provided if it is done “in a dignified style.” Rule 7.2 also imposes extensive limitations on advertising fee information; and requires any communication advising the institution of litigation to “disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.” In addition, borrowing from the ABA Model Code of Professional Responsibility, Iowa has a detailed rule (Rule 7.7) called “Recommendation of Professional Employment” and another (Rule 7.8) on “Suggestion of Need of Legal Services.”

Louisiana: In the rules effective December 1, 2008, Rule 7.2 is considerably more detailed than Model Rule 7.2. Among other variations, 7.2(c) prohibits any advertising that could be “false, misleading or deceptive” and includes a lengthy list of advertising methods that would violate the rule. The rule also contains many other restrictions, such as provisions related to how long a lawyer must honor an advertised fee and an unusual provision concerning the use of dual language advertisements. Finally, subject to some exceptions in Rule 7.8, Rule 7.7 requires lawyers to file their advertising with the Louisiana State Bar Association, which is charged with ensuring that advertising complies with the advertising rules.

Maryland: Among other variations, Maryland adds Rule 7.2(e), which provides that “[a]n advertisement or communication indicating that no fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses,” and Rule 7.2(f), which requires lawyers, including those participating in an advertising group or lawyer referral service, to be “personally responsible for compliance with the provisions of Rules 7.1, 7.2, 7.3, 7.4, and 7.5.”

Massachusetts: Rule 7.2(a) adds that lawyers may advertise in “an electronic or computer accessed directory.” Comment 3A provides, in part, as follows:

The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a web site or home page would generally be considered advertising subject to this rule, rather than solicitation subject to Rule 7.3. . . .

Michigan: Rule 6.3(b) permits a lawyer to “participate in and pay the usual charges of a not-for-profit lawyer referral service that recommends legal services to the public” only if the referral service meets detailed requirements, including that the service:

(3) is open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who:

(i) meet reasonable and objective requirements of experience . . . ;

(ii) pay reasonable registration and membership fees not to exceed an amount established by the State Bar to encourage widespread lawyer participation; and

(iii) maintain a policy of errors and omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the State Bar.

(4) ensures that the combined fees and expenses charged a prospective client by a qualified service and a lawyer to whom the client is referred not exceed the total charges the client would have incurred had no referral service been involved. . . .

Under Rule 6.3(d), the State Bar or “any aggrieved person” may seek an injunction against violations of Rule 6.3(b), and if the injunction is granted, the petitioner shall be entitled to reasonable costs and attorney fees.

Missouri: Rule 7.2(a) adds permission to advertise “through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.” Missouri omits ABA Model Rule 7.2(b)(4). Rule 7.2(d) provides that a lawyer may not “pay all or a part of the cost of an advertisement in the public media unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.” In addition, Rules 7.2(f) and (g) require all advertisements (except

targeted letters and emails and advertisements limited to specified basic information such as name, address, and fields of practice) to state the following: “The choice of a lawyer is an important decision and should not be based solely upon advertisements.”

Nevada: Rule 7.2(b) provides, in part, as follows:

If a person appears as a lawyer in an advertisement for legal services . . . such person must be a member of the State Bar of Nevada . . . and must be the lawyer who will actually perform the service advertised or a lawyer associated with the law firm that is advertising. If a person appears in an advertisement as an employee of a lawyer or law firm, such person must be an actual employee of the lawyer or law firm whose services are advertised unless the advertisement discloses that such person is an actor. If an actor appears in any other role not prohibited by these Rules, the advertisement must disclose that such person is an actor.

Among other variations, Nevada Rule 7.2A requires lawyers to file all advertisements with the State Bar “within 15 days of first dissemination. . . .” Rule 7.2B(a) commands the State Bar to create “Standing Lawyer Advertising Advisory Committees . . . to review filings submitted under Rule 7.2A and to respond to written requests from an advertising lawyer or law firm voluntarily seeking an advance opinion regarding that lawyer’s compliance with the advertising rules.” Rule 7.2B(c) permits a lawyer or law firm to “file a written request with the state bar seeking an advance opinion on whether a proposed advertisement complies with these Rules.”

New Hampshire: Rule 7.2(b)(2) permits payment only to “an organization that is recognized by the Internal Revenue Service as exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.” New Hampshire omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements).

New Jersey: Rule 7.3(c) adds that a lawyer in private practice “shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer’s services” if the organization’s promotional activity (1) uses false or misleading statements or claims, or (2) uses “coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over-reaching, or vexatious or harassing conduct.” New Jersey regulates lawyer referral services in a lengthy Rule 7.3(e). New Jersey omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements).

To regulate broadcast advertising, New Jersey Rule 7.2(a) incorporates the following language taken verbatim from the New Jersey Supreme Court’s opinion in *Felmeister & Isaacs*, 518 A.2d 188, 208 (1986):

...All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

New York: New York DR 2-101(C) forbids endorsements by current clients; paid endorsements without indicating the fact of compensation; portrayal of a judge; use of a “fictitious” law firm or firm name; use of actors or depictions of fictionalized events without disclosure; “techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence”; advertisements “made to resemble legal documents”; and use of “a nickname, moniker, motto, or trade name that implies an ability to obtain results in a matter.” (Several of these restrictions were held unconstitutional in *Alexander v. Catalano*, 2007 WL 2120024 (N.D.N.Y. 2007), but when we went to press, an appeal was fully briefed but still pending.)

New York DR 2-101(D) permits:

- (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;
- (2) statements that compare the lawyer’s services with the services of other lawyers;
- (3) testimonials or endorsements of clients, where not prohibited by subdivision (c)(1) of this section, and of former clients; or
- (4) statements describing or characterizing the quality of the lawyer’s or law firm’s services.

However, DR 2-101(E) permits such statements only if they can be “factually supported” and the statements are

accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." DR 2-101(F) requires the notation "Attorney Advertising" on every "advertisement" (as that term is defined), including websites, other than advertisements in periodicals or on electronic media. E-mails must say "ATTORNEY ADVERTISING" in the subject line. DR 2-101(G) prohibits lawyers from using a "pop-up or pop-under advertisement" or "meta tags or other hidden computer codes" that would violate a disciplinary rule. The remainder of DR 2-101 mandates lengthy retention requirements for advertisements, computer-assisted communications, and web sites, and imposes extensive additional requirements when lawyers advertise fees.

DR 2-103(D) is comparable to ABA Model Rule 7.2(a). DR 1-107(C), which is comparable to ABA Model Rule 7.2(b)(4), provides that DR 1-107(A) (New York's complex strategic alliance rule) "shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a non-legal professional or non-legal professional service firm." DR 2-103(F) provides that a lawyer "may be recommended, employed or paid by, or may cooperate with" specified categories of legal offices, including certain legal aid or public defender offices, a lawyer referral service "operated, sponsored or approved by a bar association or authorized by law or court rule," or any "bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries" provided the organization meets six detailed conditions (e.g., the organization "is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization").

North Carolina omits ABA Model Rule 7.2(b)(4) and adds an unusual Rule 7.2(d) that permits a lawyer to participate in a lawyer referral service only if the lawyer and the referral service satisfy seven specific conditions.

Ohio: Rule 7.2(b) deletes the ABA reference to a "qualified lawyer referral service" and substitutes a reference to the Ohio Supreme Court Rules governing lawyer referral services. Ohio also deletes ABA Model Rule 7.2(b)(4), thus effectively prohibiting reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. Ohio adds Rule 7.2(d), which prohibits a lawyer from soliciting employment if the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

Pennsylvania: Rule 7.2 differs significantly from ABA Model Rule 7.2. For example, Pennsylvania omits ABA Model Rule 7.2(b)(4) (governing reciprocal referral agreements). Pennsylvania Rule 7.2(j) provides that a lawyer shall not pay "any part of the costs of an advertisement by a lawyer not in the same firm" unless the advertisement discloses the name and principal office address of each lawyer paying for the advertisement and, "if any lawyer or law firm will receive referrals from the advertisement, the circumstances under which referrals will be made and the basis and criteria on which the referral system operates."

Pennsylvania also adds Rule 7.7, which forbids lawyers to accept referrals from a "lawyer referral service" (a defined term) "if the service engaged in communication with the public or direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer."

Rhode Island: Among other variations, Rhode Island has adopted Rule 7.2(f), which provides as follows:

(f) Any lawyer or law firm who advertises that his or her practice includes or concentrates in particular fields of law and then refers the majority of cases in those fields of law or of that type to another lawyer, law firm or group of lawyers shall clearly state the following disclaimer:

(1) "Most cases of this type are not handled by this firm, but are referred to other attorneys," or if applicable:

(2) "While this firm maintains joint responsibility, most cases of this type are referred to other attorneys for principal responsibility."

Tennessee adds Rule 7.6 (Intermediary Organizations), which provides that a lawyer shall not seek or accept a referral of a client or compensation for representing a client from an "intermediary organization" (a defined term) if the lawyer knows or reasonably should know that the organization (i) is owned or controlled by the lawyer or by a lawyer or law firm with which the lawyer is associated; (ii) is engaged in the unauthorized practice of law; or (iii) engages in marketing activities that are false, misleading, or otherwise prohibited; or (iv) has failed to register with the Board of Professional Responsibility or comply with the Board's requirements. In addition, Supreme Court Rule 44, entitled "Regulation of Lawyer Intermediary Organizations," sets forth the requirements that lawyer intermediary organizations must meet in order to do business in Tennessee under Rule 7.6.

Texas: Rule 7.02 forbids "false or misleading communication about the qualifications or the services of any lawyer or firm." In addition, Texas has adopted guidelines for advertising on the Internet, including a requirement that "homepages" be submitted for review.

Virginia: Rule 7.2(d) requires targeted written or e-mail communications to display the statement "ADVERTISING MATERIAL" on the first page in a specified type size. Registered mail and other forms of restricted delivery are forbidden. Lawyers who advertise or solicit by e-mail must tell recipients how to "notify the sender that they wish not to receive such communications in the future." But Rule 7.2(d) does not apply to any communication that is "directed to be sent by a court or tribunal, or otherwise required by law."

Wisconsin: Rule 7.2(b)(4) permits referrals pursuant to a nonexclusive reciprocal referral agreement between a lawyer and another lawyer or nonlawyer professional if "(ii) the client gives informed consent; (iii) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (iv) information relating to representation of a client is protected. . . ."

Proposed Rule 7.3 [RPC 1-400]

“Direct Contact with Prospective Clients”

(Draft #8, 10/2/09)

Summary: Proposed Rule 7.3 is the third of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client, such as by live, telephonic or real-time electronic communication, or by targeted marketing.

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 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

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 8
Opposed Rule as Recommended for Adoption 3
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:

☒ Moderately Controversial – Explanation:

A number of legal professionals believe that the restrictions on direct marketing in Rule 7.3 run afoul of lawyers' First Amendment rights, citing to Supreme Court precedent. See Explanation of Changes for paragraph (a).

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 7.3* Direct Contact with Prospective Clients

October 2009

(Draft rule revised after consideration of public comment.)

INTRODUCTION:

1. The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.
2. Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. **Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client.** Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.3, Draft 8 (10/2/09)

INTRODUCTION (Continued):

3. Proposed Rule 7.3 includes the basic concepts contained in Model Rule 7.3: a prohibition on any form of real-time communication to solicit legal business unless the person being targeted is related to the lawyer or is also a lawyer (paragraph (a)); a prohibition on *any* kind of communication with prospective clients under certain circumstances (paragraph (b)); a provision imposing labeling requirements on written marketing materials to avoid confusing the recipient (paragraph (c)); and an exception permitting a lawyer to engage the services of a group legal services plan that does utilize real-time communication in its marketing (paragraph (d)).
4. Proposed Rule 7.3 diverges from the Model Rule by including a savings clause to avoid potential Constitutional problems, (paragraph (a)); prohibiting a broader range of overreaching conduct, (paragraph (b)(2)); and prohibiting the solicitation of a person known to be already represented, (paragraph (b)(3)).
5. The Model Rule comment has been revised to remove purely expository language, (e.g., Comments [3] and [6]) or to conform the comment to the revised Rule, (e.g., Comment [5]).
6. *Definition.* Commission considered whether to include a definition of “solicitation” in Rule 7.3, as found in current rule 1-400 (B). It determined that there was no need to for a separate definition as the subject of the prohibited conduct is sufficiently described in the Rule.
7. *Cooling-off Period.* A State Bar member suggested that the Commission consider a provision establishing a “cooling off” period after the occurrence of an event that gives rise to a need for legal services before a lawyer or a representative of the lawyer could communicate with a prospective client by targeted mail. See, e.g., *Fla. Bar v. Went for It, Inc.* (1995) 515 U.S. 618. The Commission does not believe such a provision is necessary because the concerns inherent in such a prohibition are adequately addressed in paragraph (b).
8. *Variation in Other Jurisdictions.* Despite the fact that advertising of legal services and the solicitation of prospective clients should be an area of lawyer regulation where national uniformity is warranted, there is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California regulatory landscape.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:	(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for ~~the lawyer's~~ doing so is the lawyer's pecuniary gain, <u>unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or</u> unless the person contacted:	<u>Paragraph (a)</u> tracks the language of paragraph (a) of Model Rule 7.3(a) in prohibiting in-person, live telephone or real-time electronic contact to solicit fee-paying employment from a prospective client. The phrase “real-time electronic contact” was added by the ABA Ethics 2000 Commission to extend the prohibition on solicitation to electronic communications with prospective clients in real time, for example, communications in Internet chat rooms or by instant messaging. The interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in real-time telephone contact. Paragraph (a) also adds the savings clause, “unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California,” language which is currently found in CRPC 1-400(C). It was suggested during Commission deliberations that the United States Supreme Court case, <i>Edenfield v. Fane</i> (1993) 507 U.S. 761, has arguably rendered prohibitions such as those found in Rule 7.3(a) constitutionally infirm and that the provision should be deleted. However, it was noted that this constitutional issue was one for the courts, not for the Commission, requiring a prediction of how a reviewing court might interpret the Rule. Nevertheless, it was determined that the constitutional issue would be adequately addressed and an “all or nothing” invalidation of the Rule avoided by extending and including the savings clause that now appears in current CRPC 1-400(C).

* Proposed Rule 7.3, Draft 8 (10/2/09); redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
		<i>Minority.</i> A minority of the Commission objects to paragraph (a) on the ground that a lawyer should be able to solicit sophisticated clients by a live, telephonic or real-time electronic communication as was sanctioned for accountants in <i>Edenfield</i>. The minority adds that unless the lawyer is willing to risk of discipline by appealing his or her case to the Supreme Court, the lawyer is prohibited from making such solicitations.
(1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.	(1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.	<i>Subparagraphs (a)(1) and (a)(2)</i> are identical to MR 7.1(a)(1), and recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer, or has a family, close personal or prior professional relationship with the soliciting lawyer. See also comment [4].
(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:	(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:	<u>Paragraph (b).</u> Paragraph (b) is intended to prohibit otherwise permitted forms of solicitation which, under particular circumstances, offer an opportunity for abuse by a lawyer. The introductory paragraph of paragraph (b) is identical to that of Model Rule 7.3 and describes the kind of conduct that ordinarily is permitted under Rules 7.1, 7.2 or 7.3(a).
(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or	(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or	<i>Subparagraph (b)(1)</i> is identical to Model Rule 7.3(b)(1).

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(2) the solicitation involves coercion, duress or harassment.	(2) the solicitation <u>is transmitted in any manner which</u> involves <u>intrusion, coercion, duress</u>~~—or—harassment,~~ <u>compulsion, intimidation, threats, or vexatious or harassing conduct; or</u>	<i>Subparagraph (b)(2)</i> addresses the same concept as Model Rule 7.3(b)(2), i.e., overreaching by a lawyer in the manner in which the solicitation is made. Subparagraph (b)(2) uses language currently found in CRPC 1-400(D)(5). The Commission believes that by providing a broader range of conduct that is prohibited, the language provides better protection for susceptible persons in need of legal services and better notice to lawyers than does the Model Rule's language. Subparagraph (b)(2) adds the concept of "intrusion". A minority of the Commission was concerned that prohibiting "intrusion" might result in a prospective client losing rights after being contacted by a non-lawyer defense representative (e.g., an insurance adjuster). The majority, however, believes that the prohibition's protection of privacy rights outweighed that concern. The minority also suggests that any communication to a prospective client is an "intrusion," making the rule overbroad and requiring lawyers to risk discipline for even non-objectionable communications.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).	(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" <u>or words of similar import</u> on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), <u>or unless it is apparent from the context that the communication is an advertisement.</u>	<u>Paragraph (c)</u> is based on Model Rule 7.3(c). The phrase "or words of similar import" has been added following "Advertising Material." That phrase is currently found in Standard (5) to CRPC 1-400. It provides lawyers with some flexibility in how they identify marketing materials they send to prospective clients. Regardless of the specific language used, the recipient must be made aware that the communication is an advertisement. Paragraph (c) also adds the clause: "or unless it is apparent from the context that the communication is an advertisement." That clause has been added in recognition that it is usually apparent from the communication itself that the communication is an advertisement.
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.	(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.	<u>Paragraph (d)</u> is identical to Model Rule 7.3(d). Paragraph (d) permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal services plan, so long as paragraph (d)'s conditions are satisfied. See also comment [8].

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.	[1] There is a potential for abuse inherent in direct in person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.	Comment [1] is identical to Model Rule 7.3, cmt. [1]. Comment [1] explains the rationale for prohibitions on solicitations made by lawyers in real-time.
[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available	[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available	Comment [2] is identical to Model Rule 7.3, cmt. [1]. Comment [2] explains the rationale for regulating "real-time" communications.

* Proposed Rule 7.3, Draft 8 (10/2/09).

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.	lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.	
[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.	[3] The use of general advertising and written, recorded or electronic communications to transmit information from <u>a</u> lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. <u>The</u> contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. <u>This</u> potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. ~~The contents of direct in person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~	Comment [3] is based on Model Rule 7.3, cmt. [3]. The last two sentences of Model Rule 7.3, cmt. [3], have been deleted as unnecessary exposition.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.	[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has <u>a</u> close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there ~~a~~ serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in ~~Rule 7.3~~<u>paragraph</u> (a) and the requirements of ~~Rule 7.3~~<u>paragraph</u> (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of <u>bona fide</u> public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.	Comment [4] is identical to Model Rule 7.3, cmt. [4], except that changes have been made to conform the comment to California Rule style and also to insert an “a” that is missing in the Model Rule. Comment [4] clarifies subparagraphs (a)(1) and (a)(2), which recognize that the concerns with overreaching by lawyers and lack of time for reflection in real-time communications is not present when the person being contacted is another lawyer or has a family, close personal or prior professional relationship with the soliciting lawyer. The phrase “bona fide” has been added to “public or charitable legal-service organizations” to create a parallel construction with the following clause.
[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2	[5] ~~But even~~<u>Even</u> permitted forms of solicitation can be abused. Thus, any solicitation which ~~(i)~~ contains information which is false or misleading within the meaning of Rule 7.1, ~~(ii) is transmitted in any manner~~ which involves <u>intrusion, coercion, duress, compulsion, intimidation, threats, or harassment</u>~~vexatious or harassing conduct~~ within the meaning of ~~Rule 7.3~~<u>paragraph</u> (b)(2), or ~~which~~<u>(iii)</u> involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ~~Rule~~	Comment [5] is based on Model Rule 7.3, cmt. [5]. Comment [5] clarifies subparagraphs (b)(1)-(2), which prohibit otherwise permitted forms of solicitation that, under the particular circumstances identified, present an opportunity for abuse by a lawyer. Changes from Model Rule 7.3, cmt. [5] are intended to conform the comment to the revised language in subparagraph (b)(2). See Explanation of Changes for subparagraph (b)(2). The last sentence of Model Rule 7.3, cmt. [5], has been deleted as unnecessary exposition.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)..	~~7.3 paragraph (b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).~~	
[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.	[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a <u>bona fide</u> group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. ~~This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~	The first sentence of Comment [6] is identical to Model Rule 7.3, cmt. [6], except that the phrase "bona fide" has been included to modify "group or prepaid legal plan." The remainder of Model Rule 7.3, cmt. [6] has been deleted as unnecessary exposition.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.	[7] The requirement in ~~Rule 7.3(c)~~ <u>this Rule</u> that certain communications be marked "Advertising Material" <u>or with words of similar import</u> does not apply to communications sent in response to requests of potential clients or their ~~spokespersons or sponsors~~ <u>representatives</u>. <u>Paragraph (c) does not apply to</u> general announcements by lawyers, including <u>but not limited to</u> changes in personnel or office location, ~~do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule, nor does it apply where it is apparent from the context that the communication is an advertisement.~~	Comment [7] is based on Model Rule 7.3, cmt. [7]. The changes conform the Comment to the revisions made to paragraph (c). The word "representatives," a more general term, has been substituted for the phrase "spokespersons and sponsors." The last clause of the last sentence of the Model Rule comment has been deleted in favor of the more concise, "does not apply to."
[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these	[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. <u>The</u> organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. <u>For example,</u> paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these	Comment [8] is identical to Model Rule 7.3, cmt. [8], except that it adds a cross-reference to Rule 5.4, which regulates lawyer's activities with non-lawyers.

<u>ABA Model Rule</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Commission's Proposed Rule*</u> Rule 7.3 Direct Contact with Prospective Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).	organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See also Rules 5.4 and 8.4(a).	

Rule 7.3 Direct Contact with Prospective Clients **(Commission's Proposed Rule – Clean Version)**

(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or

electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT

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

[2] This potential for abuse inherent in direct in person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and

recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

- [3] The use of general advertising and written, recorded or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.
- [4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in paragraph (a) and the requirements of paragraph (c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide

political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

- [5] Even permitted forms of solicitation can be abused. Thus, any solicitation which (i) contains information which is false or misleading within the meaning of Rule 7.1, (ii) is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of paragraph (b)(2), or (iii) involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (b)(1).
- [6] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.
- [7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) also does not apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.
- [8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact

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

Rule 7.3: Direct Contact with Prospective Clients

STATE VARIATIONS

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

Arizona adds a subparagraph (b)(3) prohibiting solicitation relating to a personal injury or wrongful death within 30 days after the occurrence, and Arizona adds detailed requirements regarding targeted mail.

California: Rule 1-400 provides, in pertinent part, as follows:

(B) For purposes of this rule, a “solicitation” means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is ...

(b) delivered in person or by telephone, or

(c) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the

United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited....

In addition, California Business & Professions Code §6152(a)(1) provides, in part, that it is unlawful for any person “to act as a runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever....”

Colorado: Rule 7.3(c) imposes a waiting period of 30 days after an event causing personal injury or death before a lawyer may solicit professional employment in connection with the event unless the lawyer has “a family or prior professional relationship with the prospective client.” The rule also prohibits solicitation if the sending lawyer “knows or reasonably should know” that the recipient is represented by a lawyer in the matter, and requires the sending lawyer to say whether that lawyer will “actually handle the case or

matter” or if it “will be referred to another lawyer or firm.” Rule 7.3(d) prohibits the envelope from revealing “the nature of the prospective client’s legal problem.”

Connecticut: Rule 7.3 differs significantly from ABA Model Rule 7.3. For example, Rule 7.3(a)(4) does not prohibit personal, live telephone, or real-time electronic contact with a prospective client that is “a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services related to the organization.” Rule 7.3(b)(b) forbids a lawyer to “contact, or send, a written or electronic communication to, a prospective client” if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer:...

(3) The communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; [or]

(4) The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter. , ..

Connecticut Rule 7.3(b)(5) prohibits written solicitation in personal injury or wrongful death matters for 40 days after an accident or disaster. Rule 7.3(c) requires every written communication used by a lawyer “for the purpose of obtaining professional employment from a prospective client known to be in need of legal services in a particular matter” to say “Advertising Material” on the envelope and first page “in red ink.” Rule 7.3(d) requires the first sentence of a written communication about a specific matter to say: “If you

have already retained a lawyer for this matter, please disregard this letter.”

District of Columbia: District of Columbia omits Rule 7.3, but D.C. Rule 7.1(b) generally permits in-person solicitation by providing as follows:

(1) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer’s advice regarding employment of a lawyer, if:

(A) The solicitation involves use of a statement or claim that is false or misleading...;

(B) The solicitation involves the use of coercion, duress or harassment; or

(C) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

(2) A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in person contact.

D.C. also has adopted an unusual Rule 7.1(e) that provides, in part, as follows:

Any lawyer... who solicits... any person incarcerated at the District of Columbia Jail... for the purpose of representing that person for a fee paid by or on behalf of that person... in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person’s then-current lawyer prior

to accepting any fee from or on behalf of the incarcerated person.

Florida: Rule 4-7.4(a) defines the term “solicit” to include (among other things) contact by fax. Rule 4-7.4(b)(1), which is essentially the rule upheld in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), prohibits a lawyer from soliciting prospective clients in writing if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication;

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter....

Rule 4-7.4(b)(2) imposes stringent, detailed requirements on all written communications to prospective clients, including that the first sentence of every written communication prompted by a specific occurrence must be: “If you have already retained a lawyer for this matter, please disregard this letter.”

Florida Rule 4-7.6, entitled “Computer-Accessed Communications,” provides that all web sites controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services “(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law.” A lawyer shall not send an “unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment” unless it complies with a host of requirements, including that the

subject line of the communication must state “legal advertisement.”

Georgia: Rule 7.3(a)(3) prohibits a written communication relating to an accident or disaster involving the person to whom the communication is sent for 30 days after the accident or disaster. Georgia omits ABA Model Rule 7.3(c), but adds Rule 7.3(e), which provides that a lawyer “shall not accept employment when the lawyer knows or it is obvious that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization prohibited under” these rules. Georgia’s rule also adds detailed provisions regarding a lawyer’s participation in referral services.

Illinois defines “solicit” as contact with a person “other than a lawyer,” and Illinois permits solicitation “under the auspices of a public or charitable legal services organization or a bona fide political, social, civic, charitable, religious, fraternal, employee or trade organization whose purposes include... providing or recommending legal services.”

Kentucky: An elaborate Rule 7.60 (Kentucky Disaster Response Plan) addresses problems that occur when lawyers and nonlawyers who are not subject to disciplinary jurisdiction in Kentucky “engage in the provision of legal services, legal advice, and outright solicitation of persons and their families affected by a disastrous event.” The policy of Rule 7.60 is to “[m]onitor the conduct of all attorneys, both members and non-members of the Kentucky Bar Association, and thereby deter violations of the rules of ethical conduct....”

Kentucky has also enacted a criminal statute, Ky. Rev. Stat. §21A.300, providing that for 30 days after “the filing of a criminal or civil action, or claim for damages, or a traffic citation, injury, accident, or disaster,” an attorney “shall not

directly solicit... a victim of the accident or disaster, or a relative of the victim, for the purpose of obtaining professional employment,” and “shall not knowingly accept a referral from an attorney referral service” if the referral service has violated that prohibition. Ky. Rev. Stat. §21A.310 makes violation of the 30-day blackout law a Class A misdemeanor, and may subject an attorney to professional discipline in addition to any criminal penalty. Kentucky Supreme Court Rule 3.130 provides:

If a lawyer illegally or unethically solicited a client for which compensation is paid or payable, all fees arising from such transaction shall be deemed waived and forfeited and shall be returned to the client. A civil action for recovery of such fees may be brought in a court of competent jurisdiction.

Louisiana: In the rules effective December 1, 2008, Louisiana deletes Rule 7.3 and addresses solicitation in Rule 7.4. Among other variations, Rule 7.4(b)(1)(A) contains a provision that prohibits any solicitation (including letters) that concern “an action for personal injury or wrongful death... unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.” Rule 7.4(b)(2) also requires lawyers to include a variety of information in letters to potential clients.

Massachusetts: Rule 7.3(b)(1) prohibits solicitation if “the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer,” unless the solicitation is “not for a fee.” Rule 7.3(d) prohibits solicitation in person “or by personal communication by telephone, electronic device, or otherwise,” but Rule 7.3(e) exempts: (1) communications with “members of the bar of any state or jurisdiction”; (2)(A)

“grandparents of the lawyer or the lawyer’s spouse, (B) descendants of the grandparents of the lawyer or the lawyer’s spouse, or (C) the spouse of any of the foregoing persons”; (3) “prospective clients with whom the lawyer had a prior attorney-client relationship”; (4)(i) “non-profit and governmental entities” regarding their activities and (ii) “persons engaged in trade or commerce” in connection with their trade or commerce.

Mississippi: Rule 7.2(a) defines an “advertisement” as “an active quest for clients involving a public or non-public communication.” Rule 7.5(a) requires a lawyer to submit a “copy or recording of any advertisement” to the Office of the General Counsel of the Mississippi Bar (OGCMB) “prior to its first dissemination,” but Rule 7.5(b) exempts 13 categories of advertisements from the filing requirement, such as telephone directory advertisements, business cards, web pages, and “scholarly writings.” Under Rule 7.5(d), a lawyer may request an “advisory opinion concerning the compliance of a contemplated advertisement or communication with these Rules in advance of disseminating the advertisement or communication,” provided the advertisement is submitted at least 45 days in advance. The OGCMB must “render its advisory opinion within forty-five days of receipt of a request unless the OGCMB determines that there is reasonable doubt that the advertisement or communication is in compliance with the Rules and that further examination is warranted but such evaluation cannot be completed within the forty-five day time period....” In that event, “the OGCMB shall complete its review as promptly as the circumstances reasonably allow. If the OGCMB does not send any correspondence or notice to the lawyer within forty-five days, the advertisement or communication will be deemed approved.” Under Rule 7.5(d)(2), a “finding by the OGCMB of either compliance or non-compliance shall not be binding in disciplinary proceedings, but may be offered as evidence.”

Missouri: Rule 7.3(a) provides that a lawyer may not “initiate” in-person, telephone, or real-time electronic solicitation of legal business “under any circumstance, other than with an existing or former client, lawyer, close friend or relative.” Regarding written communications to “others,” Rules 7.3(b) and (c) provide as follows:

(b)(3) each written solicitation must include the following:

“Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri.”...

(8) if a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the solicitation will actually handle the case or matter or that the case or matter will be referred to another lawyer or law firm, any written solicitation concerning a specific matter shall include a statement so advising the potential client; and

(9) a lawyer shall not send a written solicitation regarding a specific matter if the lawyer knows or reasonably should know that the person to whom the solicitation is directed is represented by a lawyer in the matter.

(c) A lawyer shall not send, nor knowingly permit to be sent... a written solicitation to any prospective client ... if:

(4) the written solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person if the accident or disaster occurred less than 30 days prior to the solicitation...; or

(5) the written solicitation vilifies, denounces or disparages any other potential party.

Montana: Rule 7.3(b)(4) prohibits a lawyer from contacting a prospective client if “the lawyer reasonably should know that the person is already represented by another lawyer.”

Nevada: Rule 7.3(d) provides, in part: “Written communication directed to a specific prospective client who may need legal services due to a particular transaction or occurrence is prohibited in Nevada within 45 days of the transaction or occurrence giving rise to the communication.”

New Hampshire: Rule 7.3(a) does not use the words “solicit” or “pecuniary gain” but provides that a lawyer “shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment,” unless the person contacted fits the exemptions in ABA Model Rule 7.3(a)(1)-(2) or:

(3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or

(4) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.

New Hampshire Rule 7.3(d)(iii) exempts contact with “those the lawyer is permitted under applicable law to seek to join in litigation in the nature of a class action, if success in asserting rights or defenses of the litigation is dependent upon the joinder of others.”

New Jersey omits Rule 7.3(c) and Rule 7.3(d). In addition, to control solicitation after mass disasters, New Jersey adds Rule 7.3(b)(4), which provides that a lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if “the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event.” To prevent out-of-state attorneys from improperly soliciting New Jersey victims and their families after mass disasters, the Court’s Clerk has issued a statement saying that it “has jurisdiction over out-of-state attorneys who make such solicitations to prospective claimants in New Jersey.”

Regarding events other than mass disasters, New Jersey adds Rule 7.3(b)(5)(iii), which generally permits targeted mail if (among other things) it contains an additional notice that “the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625,”

New York: DR 2-103(B) provides as follows:

For purposes of this section “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient

or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

DR 2-103(A) provides as follows: “A lawyer shall not engage in solicitation by in-person or telephone contact, or by real-time or interactive computer accessed communication unless the recipient is a close friend, relative, former client or existing client....” Solicitation by any means is forbidden if (among other things) “the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.” DR 2-103(C) imposes detailed filing requirements for most solicitations, including “a transcript of the audio portion of any radio or television solicitation” and “if the solicitation is in a language other than English, an accurate English language translation.”

DR 2-103(G) restricts solicitation in personal injury and wrongful death cases as follows: “No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.” DR 7-111(A) is to the same effect as DR 2-103(G), but DR 7-111(B) adds: “This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms... who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.”

Also, under 22 NYCRR §130-1.1a, an attorney filing an “initiating pleading” must certify that “(i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom” and (ii) the matter was not obtained in violation of DR 7-111.

DR 2-103(K) provides that New York’s solicitation rules apply to lawyers from out of state who solicit clients in New York.

North Carolina: Rule 7.3(d)(1) defines the phrase “prepaid or group legal services plan,” and Rule 7.3(d)(2) sets forth detailed conditions that a lawyer must satisfy before participating in such a plan.

Ohio: Rule 7.3(c) requires targeted direct mail solicitation to: “(1) Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee” and “(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee’s case.” Rule 7.3(d) provides that before soliciting professional employment from a defendant in a civil action, a lawyer “shall verify that the party has been served with notice of the action filed against that party.” Service shall be verified by “consulting the docket of the court in which the action was filed....”

Ohio Rule 7.3(e) provides that if a communication solicits professional employment in a potential claim for personal injury or wrongful death within 30 days of an accident or disaster, the communication must include a lengthy text headed “Understanding Your Rights,” which provides, in relevant part, as follows:

2. *You do not have to sign anything*--You may not want to give an interview or recorded statement without

first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. *Your interests versus interests of insurance company*--Your interests and those of the other person’s insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage....

8. *Check a lawyer’s qualification*--Before hiring any lawyer, you have the right to know the lawyer’s background, training, and experience in dealing with cases similar to yours.

9. *How much will it cost?* --In deciding whether to hire a particular lawyer, you should discuss, and the lawyer’s written fee agreement should reflect:

a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will

payment be arranged? c. Who will handle your case?
If the case goes to trial, who will be the trial attorney?

Furthermore, a footnote to “Understanding Your Rights” says, in part: “THE SUPREME COURT OF OHIO... NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS.”

Pennsylvania omits Rules 7.3(c) and (d).

Rhode Island: Rule 7.3(a)(3) permits “in-person, live telephone or real-time electronic contact” solicitation for profit if the prospective client is “a business organization, a not-for-profit organization, or governmental body and the lawyer seeks to provide services related to the organization.”

South Carolina: Rule 7.3(d) provides:

(2) Each written or recorded solicitation must include the following statements:

(A) “You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer” and

(B) “The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.”

Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication.

(3) Each written or recorded solicitation must include the following statement:

“ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 12159, COLUMBIA, SOUTH CAROLINA 29211 TELEPHONE NUMBER 803-734-2038.” Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

See more discussion of South Carolina Rule 418 in Selected State Variations under Rule 8.5.

Texas: Rule 7.06 provides that a lawyer “shall not accept or continue employment when the lawyer knows or reasonably should know that the person who seeks the lawyer’s services does so as a result of conduct prohibited by these Rules.” In addition, under §38.12 of the Texas Penal Code it is a crime if a lawyer, “with intent to obtain an economic benefit ... (2) solicits employment, either in person or by telephone, for himself or for another.” Section 38.01(11) of the Texas Penal Code defines the phrase “solicit employment” as follows:

(11) “Solicit employment” means to communicate in person or by telephone with a prospective client or a member of the prospective client’s family concerning professional employment... arising out of a particular occurrence or event, or series of occurrences or events, or concerning an existing problem of the prospective client... for the purpose of providing professional services

to the prospective client, when neither the person receiving the communication nor anyone acting on that person's behalf has requested the communication. The term does not include a communication initiated by a family member of the person receiving a communication....

Virginia: Rule 7.3 prohibits "in-person" communications to a "non-lawyer" if the communication "has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made." Rule 7.3(c) prohibits a lawyer from assisting a "nonprofit organization" that engages in such communications, or in communications on the lawyer's behalf that are "false, fraudulent, misleading, or deceptive," and Rule 7.3(f) provides that in no event may a lawyer "initiate" in-person solicitation "for compensation in a personal injury or wrongful death claim of a prospective client with whom the lawyer has no family or prior professional relationship."

Wisconsin: Rule 7.3(b)(1) adds that solicitation is prohibited if "(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer." Rule 7.3(e) (e) provides that ordinarily a lawyer "shall not draft legal documents, such as wills, trusts, instruments or contracts, which require or imply that the lawyer's services be used in relation to that document."

Proposed Rule 7.4 [RPC]

“Communication of Fields of Practice and Specialization”

(Draft #7, 5/31/09)

Summary: Proposed Rule 7.4 is the fourth of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.4 sets out basic rules governing the communication of a lawyer’s fields of practice and claims to specialization.

Comparison with ABA Counterpart	
Rule	Comment
☒ ABA Model Rule substantially adopted ☐ ABA Model Rule substantially rejected ☒ Some material additions to ABA Model Rule ☐ Some material deletions from ABA Model Rule ☐ No ABA Model Rule counterpart	☐ ABA Model Rule substantially adopted ☒ ABA Model Rule substantially rejected ☐ Some material additions to ABA Model Rule ☐ Some material deletions from ABA Model Rule ☐ No ABA Model Rule counterpart

Primary Factors Considered

☒ Existing California Law

Rule

RPC 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

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

Montana Rule 7.4(a). See language added to proposed Rule 7.4(a).

☐ 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 9
Opposed Rule as Recommended for Adoption 1
Abstain 1

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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 7.4* Communication of Fields of Practice and Specialization

October 2009

(Draft rule following initial round of public comment.)

INTRODUCTION:

The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. **Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization.** Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads. The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.4, Draft 7 (5/31/09).

INTRODUCTION (Continued):

Proposed Rule 7.4 includes the basic concepts contained in Model Rule 7.4, with minor revisions: a provision permitting the communication of a lawyer's field of practice, (paragraph (a)); provisions permitting patent and admiralty lawyers to communicate the fact that they practice in those areas, (paragraphs (b) and (c)); and a provision limiting a claim of specialization, (paragraph (d)). The latter provision has been substantially revised to conform to the specifics of the California regulatory landscape.

The Commission does not recommend the adoption of the comments to Model Rule 7.4 because the provisions of proposed Rule 7.4 are self-explanatory and do not require comment to clarify them further.

Variation in Other Jurisdictions. There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape.

<u>ABA Model Rule</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Commission's Proposed Rule*</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.	(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. <u>A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, subject to the requirements of Rule 7.1.</u>	<u>Paragraph (a)</u> is based on Model Rule 7.4(a), which provides that a lawyer may communicate that the lawyer does or does not practice in particular fields of law. A sentence has been added that provides a lawyer may engage in a common practice among lawyers who market their availability – communicating that the lawyer's practice is limited to or concentrated in a particular field of law – so long as the communication does not imply an expertise in the field so as to be false or misleading under Rule 7.1.
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.	(b) A lawyer ~~admitted~~<u>registered</u> to ~~engage in patent~~ practice <u>patent law</u> before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.	<u>Paragraph (b)</u> is based on Model Rule 7.4(b). The language has been modified to reflect accurately that a lawyer who is authorized to practice patent law before the Patent and Trademark Office is "registered to practice patent law" there, and is not "admitted" to practice there.
(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.	(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.	<u>Paragraph (c)</u> is identical to Model Rule 7.4(c), which recognizes a long historical tradition of maritime law in federal courts and permits a lawyer to communicate that the lawyer is engaged in Admiralty practice.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has	(d) A lawyer shall not state or imply that ~~a~~<u>the</u> lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer ~~has been~~<u>is</u> certified as a specialist by ~~an organization that has~~	<u>Paragraph (d)</u> is based on Model Rule 7.4(c), but subparagraph (d)(1) has been revised to state the specific regulatory framework for specialization in California. Similar language may be found in current rule 1-400(D)(6). The language of the Model Rule was never intended as "model language" to be adopted by all jurisdictions, but simply as a template. The Model Rule language

* Proposed Rule, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Commission's Proposed Rule*</u> Rule 7.4 Communication of Fields of Practice and Specialization	<u>Explanation of Changes to the ABA Model Rule</u>
been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.	~~been approved by an appropriate state authority~~<u>the Board of Legal Specialization, or that has been any other entity</u> accredited by the ~~American Bar Association~~<u>State Bar Association to designate specialists pursuant to standards adopted by the Board of Governors</u>; and (2) the name of the certifying organization is clearly identified in the communication.	recognizes that some jurisdictions' specialization "authority" resides with a state supreme court entity, while other jurisdictions' specialization "authority" is delegated to that jurisdiction's bar or an independent specialization body. The revision in the introductory paragraph of paragraph (d) – changing "a lawyer" to "the lawyer," – is intended to clarify that a lawyer may not state that he or she is certified as a specialist and is in keeping with rule drafting style. No change in substance is intended. <i>Minority.</i> A minority of the Commission disagrees with the substitution of language specific to the California regulatory framework in paragraph (d)(1), arguing that Proposed paragraph (d)(1) is unduly restrictive. The minority takes the position that a lawyer who truthfully states on his or her letterhead that he or she has been accredited as a specialist in another state, or by a bona fide accrediting organization that may not be designated as such by the State Bar, is not guilty of any deception. Such conduct should not be prohibited.

<u>ABA Model Rule</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Commission's Proposed Rule*</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.	~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services~~	The Commission determined that the provisions of Rule 7.4 are self-explanatory and do not require comment to clarify them further. Accordingly, the Commission does not recommend adoption of the comments to Model Rule 7.4.
[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.	~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~	See Explanation of Changes, Comment [1].

* Proposed Rule 7.4, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Commission's Proposed Rule*</u> Rule 7.4 ~~Direct~~ Communication of Fields of Practice and Specialization Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.	~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~	See Explanation of Changes, Comment [1].

Rule 7.4 Communication of Fields of Practice and Specialization
(Commission's Proposed Rule – Clean Version)

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

Rule 7.4: Communication of Fields of Practice and Specialization

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: The equivalent to Rule 7.4(d) permits lawyers to state or imply that they are specialists only if they are “certified by the Arizona Board of Legal Specialization” or by a “national entity” that the Board has recognized as having standards substantially the same as the Board’s standards.

California has no rule comparable to ABA Model Rule 7.4 in the California Rules of Professional Conduct, but California has developed an extensive program of specialty certification. To be eligible for certification, an attorney must be a member of the California State Bar in good standing and must (1) have spent at least 25 percent of his or her occupational time during the previous five years working in the area of law in which certification is sought, (2) pass a written exam tailored to the particular specialty field, (3) demonstrate a high level of experience in the specialty field by meeting specific task and experience requirements, (4) complete at least 45 hours of continuing legal education in the specialty field, and (5) be favorably evaluated by other attorneys and judges familiar with the attorney’s work. California offers specialty certification in eight areas of practice, including Appellate Law, Bankruptcy Law (both Personal and Small Business), Criminal Law, Estate Planning, Trust and Probate Law, Family Law, Immigration and Nationality Law, Taxation Law, and Workers’ Compensation Law. Each field has its own particular

requirement. For more information, including links to the Rules Governing the State Bar of California Program for Certifying Legal Specialists (most recently amended effective November 1, 2003) and the requirements for each specialty field, visit the California State Bar’s web site at www.calbar.org and enter “Legal Specialization” in the site’s search box.

Connecticut: Rule 7.4A(d) describes in some detail 27 different fields of law in which lawyers may be certified as specialists. Rule 7.4B concerns the appointment, powers, and duties of a Legal Specialization Screening Committee that evaluates certifying entities, and Rule 7.4C concerns applications for approval as a certifying entity.

District of Columbia omits ABA Model Rule 7.4.

Florida: Rule 4-7.2(c)(6) divides the rules regulating claims and disclaimers for specialty certification into three categories, depending on whether a lawyer is certified as a specialist by (A) the Florida Bar, (B) another state bar, or (C) an entity not connected with any state bar.

Georgia tracks the first sentence of ABA Model Rule 7.4 verbatim, but eliminates the rest of the ABA rule and instead states the following: “A lawyer who is a specialist in a particular field of law by experience, specialized training or

education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.”

Illinois: Rule 7.4 requires that if a lawyer’s advertisement uses the terms “certified” “specialist,” or “expert,” then the terms (1) must be “truthful and verifiable and may not be misleading,” and (2) must state that “the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.”

Iowa: Rule 7.4 contains a list of 71 distinct fields of practice that a lawyer may identify or describe in communications.

Louisiana: In the rules effective December 1, 2008, Louisiana addresses this issue in Rule 7.2(c)(5) and specifies that lawyers generally cannot state or imply that they are specialists or experts unless they fit within certain narrow exceptions identified in the rule.

Massachusetts: Rule 7.4(a) permits lawyers to hold themselves out as “specialists” if the holding out does not include a false or misleading communication. The rule defines “holding out” to include “(1) a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law, (2) directory listings, including electronic, computer-accessed or other similar types of directory listings, by particular service, field, or area of law, and (3) any other association of the lawyers name with a particular service, field, or area of law.” Comment 3A to Rule 7.2 provides, in part, as follows:

Depending upon the topic or purpose of the newsgroup, bulletin board, or chat group, the posting might also constitute an association of the lawyer or law firm’s name with a particular service, field, or area of law amounting to a claim of specialization under Rule 7.4 and would therefore be subject to the restrictions of that rule.

Michigan: Rule 7.4 stops after the first sentence of ABA Model Rule 7.4.

Missouri: Rule 7.4 provides that a lawyer other than an admiralty or patent attorney shall not state or imply that the lawyer is a specialist “unless the communication contains a disclaimer that neither the Supreme Court of Missouri nor The Missouri Bar reviews or approves certifying organizations or specialist designations.”

Nevada: Rule 7.4(d)(2)(iii) requires that any lawyer claiming to be a specialist “shall carry a minimum of \$500,000 in professional liability insurance, with the exception of lawyers who practice exclusively in public law.” Nevada also adds a Rule 7.4A to establish procedures for the State Bar Board of Governors to approve organizations that certify lawyers as specialists.

New Jersey: Rule 7.4(d) permits a lawyer to communicate that the lawyer has been certified as a specialist only if the lawyer states (among other things) that “the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association.” If the certification has been granted by an organization that has not been approved, or has been denied approval, by either the Supreme Court of New Jersey or the American Bar Association, “the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.”

New York: DR 2-105 covers the same subject matter as ABA Model Rule 7.4, but DR 2-105(C)(1) provides that a lawyer who is “certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association” may advertise the certification only if the lawyer identifies the certifying organization and “prominently” makes the following disclaimer: “The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.” If the lawyer is certified as a specialist by an “authority having jurisdiction over specialization under the laws of another state” (rather than by an ABA-approved private organization), DR 2-105(C)(2) requires a slightly different disclaimer.

North Carolina relegates the substance of ABA Model Rule 7.4(b) (regarding patent and trademark practice) to a Comment and deletes Rule 7.4(c) (regarding admiralty practice).

Ohio: Rule 7.4(a) expressly adds that a lawyer may state that the lawyer “limits his or her practice to or concentrates in particular fields of law.” Rule 7.4(c) provides that a lawyer engaged in “trademark practice” may use the designation “Trademarks,” “Trademark Attorney,” or a substantially similar designation. “Ohio’s equivalent to ABA Model Rule 704(d)(1) applies if the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists.”

Pennsylvania: Rule 7.4 permits lawyers to advertise that they are certified by organizations approved by the Supreme Court. The Supreme Court may approve an organization

upon recommendation of the State Bar Association if the court finds that advertising certification by the organization “will provide meaningful information, which is not false, misleading or deceptive, for use of the public in selecting or retaining a lawyer.” Certification must be available to all lawyers “who meet objective and consistently applied standards relevant to practice in the area of law to which the certification relates.”

Texas: Rule 7.04(b)(2) permits lawyers to advertise that they have been certified as specialists by the Texas Board of Legal Specialization or by an organization that has been:

accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar....

Virginia: Rule 7.4(d) permits a lawyer to communicate that the lawyer has been certified as a specialist by a particular organization if the communication “clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.”

Proposed Rule 7.5 [RPC 1-400]

“Firm Names and Letterheads”

(Draft #7, 5/31/09)

Summary: Proposed Rule 7.5 is the fifth of five proposed rules regulating lawyer marketing that track the Model Rule structure. Rule 7.5 sets out basic rules governing the use of firm names and letterheads.

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 1-400.

Statute

Bus. & Prof. Code §§ 6157 et seq.

Case law

People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, [86 Cal.Rptr.2d 816]

☐ 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 11

Opposed Rule as Recommended for Adoption 0

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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed* Rule 7.5 Firm Names and Letterheads

October 2009

(Draft rule to following first round of public comment)

INTRODUCTION:

The Commission has determined that the ability of California lawyers and lawyers from other states to analyze issues concerning legal advertising and solicitation in this state would be enhanced by restating what is currently a single rule, California Rule 1-400, as five separate rules, numbered 7.1 through 7.5, that follow the organization of their ABA Model Rule counterparts. Nationally, there is marked variation among the jurisdictions in this area of lawyer regulation. The Commission believes that advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where greater national uniformity would be helpful to the public, practicing lawyers, and the courts in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. However, the Commission has recommended departures from the Model Rules, in part to address Constitutional concerns.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication, and typically involves communications directed at the general public. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. **Rule 7.5 does the same as rule 7.4 for the use of firm names and letterheads.** The Commission, however, declines at this time to recommend Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge. The Commission is still studying the feasibility of a rule analogous to Model Rule 7.6.

* Proposed Rule 7.3, Draft 7 (5/31/09).

INTRODUCTION (Continued):

Proposed Rule 7.5 is identical to Model Rule 7.5 except that paragraph (d) has been revised to provide specific reference to the current regulatory framework in California.

The Model Rule comment has been revised to remove expository language and to add specific language the California Supreme Court has adopted in the Discussion to current rule 1-400.

Variation in Other Jurisdictions. There is a wide range of variation among jurisdictions in their approach to regulating lawyer advertising and solicitation. States that have diverged widely from the Model Rules include smaller jurisdictions such as the District of Columbia, Kentucky, Mississippi and Iowa, and larger states, such as Florida, New York, and Texas. Unlike these states that have either eliminated or added to marketing restrictions in the Model Rules, the Commission recommends keeping the same basic concepts found in the Model Rules, revised only to clarify or to address unique aspects of the California statutory and regulatory landscape.

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.	(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.	<u>Paragraph (a)</u> is identical to Model Rule 7.5(a). The closest counterpart to this provision in the current California Rules is Standard (6) to current rule 1-400, which provides that the following is a presumed violation of rule 1-400: "(6) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization."
(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.	(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.	<u>Paragraph (b)</u> is identical to Model Rule 7.5(b). Currently, there is no similar provision in California.
(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.	(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.	<u>Paragraph (c)</u> is identical to Model Rule 7.5(c). Currently, there is no similar provision in California.

* Proposed Rule 7.5, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads	<u>Explanation of Changes to the ABA Model Rule</u>
(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.	(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.	<u>Paragraph (d)</u> is identical to Model Rule 7.5(d).

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.	[1] A firm may be designated by the names of all or some of its ~~members~~<u>lawyers</u>, by the names of deceased ~~members~~<u>or retired lawyers</u> where there has been a continuing succession in the firm's identity, <u>by a distinctive website address</u>, or by a trade name such as the "ABC Legal Clinic." ~~A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use~~ <u>Use</u> of such names in law practice is acceptable so long as it is not misleading <u>in violation of Rule 7.1</u>. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," ~~an express disclaimer~~<u>the firm may have to expressly disclaim</u> that it is a public legal aid agency ~~may be required~~ to avoid a misleading implication. ~~It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it~~ is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.	Comment [1] is based on Model Rule 7.5, cmt. [1]. Comment [1] elaborates upon the general prohibition in paragraph (a) of the Rule, and gives examples of firm names that violate or do not violate proposed Rule 7.1's proscription against false or misleading communications. The Model Rule language in what is now the next-to-last sentence was revised in response to public comment that the Model Rule syntax was confusing. See 12/1/2006 OCBA Memo to Commission. The two next-to-last sentences in Model Rule 7.5, cmt. [1], were deleted as unnecessary exposition.

* Proposed Rule 7.5, Draft 7 (5/31/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Commission's Proposed Rule*</u> Rule 7.5 Firm Names and Letterheads Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm..	[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. <u>A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.</u>	The first sentence of comment [2] is identical to Model Rule 7.5, cmt. [2]. The second sentence of comment [2] has no counterpart in the Model Rule but is instead derived from Standard (8) to current rule 1-400. The "close, personal, continuous, and regular" standard has been adopted by the California Supreme Court in the conflicts of interest context. See, e.g., <i>People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.</i> (1999) 20 Cal.4th 1135, 1139-40, 86 Cal.Rptr.2d 816.

Rule 7.5 Firm Names and Letterheads
(Commission's Proposed Rule – Clean Version)

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

COMMENT

- [1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased or retired lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," the firm may have to expressly disclaim that it is a public legal aid agency to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.
- [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

Rule 7.5: Firm Names and Letterheads

STATE VARIATIONS

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

Alaska adds the following paragraph (e): “The term ‘of counsel’ shall be used only to refer to a lawyer who has a close continuing relationship with the firm.”

Arizona deletes the qualification in the second sentence of subparagraph (a) beginning, if it does not imply a connection with a government agency....”

California: Compare Standards 6 through 9 following Rule 1-400. In addition, §16952 of the California Corporations Law, entitled “Requirements for Name,” provides that the name of a registered limited liability partnership must contain the words “Registered Limited Liability Partnership” or “Limited Liability Partnership” or one of the abbreviations “L.L.P.,” “LLP,” “R.L.L.P.,” or “RLLP” as the last words or letters of its name.

Florida: Rule 4-7.9(b) permits a lawyer to practice under a trade name if the name is “not deceptive” and “does not imply that the firm is something other than a private law firm.” The same rule permits a lawyer to use the term “legal clinic” or “legal services” in conjunction with the lawyer’s own name “if the lawyer’s practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the community for those services.”

Under Rule 4-7.9(c) a lawyer may not advertise under a trade or fictitious name “unless the same name is the law firm name that appears on the lawyer’s letterhead, business cards, office sign, and fee contracts, and appears with the lawyer’s signature on pleadings and other legal documents.” The Comment to Rule 4-7.9 notes that a lawyer may not advertise under “a nonsense name designed to obtain an advantageous position for the lawyer in alphabetical directory listings unless the lawyer actually practices under that nonsense name.”

Georgia adds Rule 7.5(e)(1), which permits a lawyer in private practice to use a trade name if it “includes the name of at least one of the lawyers practicing under said name. A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm.”

Illinois: Rule 7.5(a) retains the language of DR 2-102(B) of the ABA Model Code of Professional Responsibility relating to lawyers who assume a “Judicial, legislative, or public executive or administrative post or office.”

Iowa: Rule 7.5 provides in paragraph (f) that a “lawyer who is engaged both in the practice of law and in another profession or business shall not so indicate on the lawyer’s letterhead, office sign, or professional card, and shall not be

identified as a lawyer in any publication in connection with the lawyer's other profession or business."

Massachusetts adds to ABA Comment 2 that the term "associates" implies practice in either a partnership or sale proprietorship form and "may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility."

Nevada: Rule 7.5(b) provides that a law firm with offices in more than one jurisdiction "that has registered with the State Bar of Nevada under Rule 7.5A" may use the same name in each jurisdiction. Rule 7.5A(a) provides: "All law firms having an office in Nevada and in one or more other jurisdictions shall register with the State Bar of Nevada and shall pay an annual fee of \$500 for such registration." The remainder of the rule sets out lengthy, detailed disclosure requirements such as: "(1) The names and addresses of all lawyers employed by the firm, the jurisdictions in which each lawyer is licensed, and verification that each lawyer is in good standing in the jurisdictions in which each lawyer is licensed; (2) Any pending disciplinary action or investigation against a lawyer employed by the firm;" and (5) a certification that:

(i) The firm will maintain a permanent office in Nevada with a resident member of the firm who is also an active member in good standing of the State Bar of Nevada at all times the firm is practicing in Nevada... [and]

(ii) The firm agrees to disclose in writing to its Nevada clients whether all of its lawyers are licensed to practice in Nevada and, if any of its lawyers are not so licensed, to disclose what legal work will be performed by lawyers not admitted to practice in this state. Upon

request of the State Bar of Nevada, the firm shall provide documentation evidencing its compliance with these disclosure requirements....

New Jersey: Rule 7.5(b) permits a law firm with offices in more than one jurisdiction to use the same name in each jurisdiction, but all advertisements, letterheads or "anywhere else that the firm name is used," must indicate the jurisdictional limitations on those not licensed to practice in New Jersey. If a firm name includes the name of any lawyer not licensed in New Jersey, then any advertisement, letterhead or other communication containing the firm name "must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof...." Rule 7.5(d) permits lawyers to state or imply that they practice in a partnership "only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services." Rule 7.5(e) provides as follows:

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

New York: DR 2-102(A) sets forth detailed regulations regarding "internet websites, professional cards, professional announcements, office signs, letterheads or similar professional notices or devices." DR 2-102(B) provides as follows:

A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that... a firm may use as, or continue to include in its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.... A lawyer or law firm may not include the name of a nonlawyer in its firm name....

(The last sentence of DR 2-102(B) is equivalent to ABA Model Rule 7.5(c).) DR 2-102(C), equivalent to ABA Model Rule 7.5(d), provides that a lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers "unless they are in fact partners." DR 2-102(E) and (F) address domain names and firm names as follows:

(E) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate a disciplinary rule.

(F) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname,

moniker or motto that does not otherwise violate a disciplinary rule.

North Carolina: Rule 7.5(a) adds the following: "Every trade name used by a law firm shall be registered with the North Carolina State Bar for a determination of whether the name is misleading." Rule 7.5(d) ends with the words "whether or not the lawyer is precluded from practicing law."

Ohio: Rule 7.5(a) expressly provides that a lawyer in private practice "shall not practice under a trade name," and generally permits a law firm to "use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession." Rule 7.5(b) provides that a law firm with offices in more than one jurisdiction that lists attorneys associated with the firm shall indicate the jurisdictional limitations on those not licensed to practice in Ohio."

Oregon: Rule 7.5(d) forbids a lawyer to "permit his or her name to remain in the name of a law firm or to be used by the firm during the time the lawyer is not actively and regularly practicing law as a member of the firm" and forbids members of the firm to use the lawyer's name. The rule does not apply for absences of one year or less during which the lawyer is not actively practicing law if the lawyer plans to return to the firm. The rule also does not apply to the names of retiring, deceased, or retired members of the firm or a predecessor law firm in a continuing line of succession."

Virginia: The first sentence of Rule 7.5(a) permits a lawyer or law firm to use "a professional card, professional announcement, card, office sign, letterheads, telephone directory listing, law list, legal directory listing, website, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or

deceptive.” Rule 7.5(b) prohibits lawyers licensed in different jurisdictions from forming or continuing a law firm “unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations of those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.”

Proposed Rule 8.1 [RPC 1-200]

“False Statement Regarding Application for Admission to Practice of Law”

(Draft # 4.1, 10/16/09)

Summary: Proposed Rule 8.1, which prohibits certain conduct in applying to be admitted to practice law in California, substantially follows Model Rule 8.1, with three principal departures. 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

Rule

RPC 1-200; Cal. Rules of Court, Rules 9.40 to 9.46.

Statute

Bus. & Prof. Code §§ 6062, 6068(c),(d),(e); Code Civ. Pro. § 1282.4

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 9
Opposed Rule as Recommended for Adoption 1
Abstain 2

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:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.1* False Statement Regarding Application for Admission to Practice Law

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION: Proposed Rule 8.1 substantially follows ABA Model Rule 8.1 with three principal departures: (1) proposed Rule 8.1 addresses statements made in connection with applications for “admission to practice law”, whereas Model Rule 8.1 more narrowly addresses statements made in connection with applications for “admission to the bar” (a difference that is explained in paragraph (d) of the proposed Rule); (2) unlike Model Rule 8.1, proposed Rule 8.1 does not address statements made in connection with disciplinary proceedings; and (3) proposed Rule 8.1 imposes a more stringent standard on applicants with respect to their own applications for admission (prohibiting both false statements of material fact *and* failure to disclose a material fact) than on members with respect to *other* persons’ applications for admission (prohibiting false statements of material fact). However, similar to the Model Rule paragraph (c) of the proposed Rule states that both applicants and lawyers in connection with an application for admission must not fail to correct a material misapprehension in matter. Paragraph (d) and Comment [4] to Proposed Rule also provide illustrations of the various proceedings that constitute “applications for admission to practice law” in California and pertinent related authority.

Conduct in relation to a disciplinary proceeding is not addressed in this rule because the Commission considers the State Bar Court to be a “tribunal” within the meaning of proposed Rule 3.3. A lawyer’s conduct before a tribunal, including statements made to a tribunal, is covered in Rule 3.3 rather than in this rule.

* Proposed Rule 8.1, Draft 4.1 (10/16/07).

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters	<u>Commission's Proposed Rule*</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law	<u>Explanation of Changes to the ABA Model Rule</u>
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:	~~An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:~~	The title of proposed Rule 8.1 has been revised from Model Rule 8.1 to emphasize that the rule prohibits (1) the making of a false statements (2) in connection with applications for "admission to practice law" and not solely (as in Model Rule 8.1) to applications for "admission to the bar," and provides examples of the broader concept of "admission to practice law" in paragraph (c) and Comment [2]. The expanded scope of the proposed Rule is intended to provide greater public protection. The proposed Rule does not address statements made by a member in connection with disciplinary matters.
	<u>(a) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.</u>	Unlike the Model Rule, the proposed Rule creates a two-tier standard, (1) prohibiting an applicant for admission from knowingly making a false statement <u>or</u> knowingly failing to disclose a material fact in connection with the applicant's own application for admission (paragraph (a)) and (2) prohibiting a lawyer from knowingly making a false statement in connection with another's application for admission (paragraph (b)).
(a) knowingly make a false statement of material fact; or	~~(a)~~ <u>(b) A lawyer shall not</u> knowingly make a false statement of material fact; ~~or~~ <u>in connection with another person's application for admission to practice law.</u>	See Explanation of Changes for paragraph (a), above.

* Proposed Rule 8.1, Draft 4.1 (10/16/07). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters	<u>Commission's Proposed Rule*</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law	<u>Explanation of Changes to the ABA Model Rule</u>
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.	~~(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.~~	The proposed Rule does not impose an affirmative obligation to respond to a lawful demand for information, because the Commission did not believe that the omissions described should be the basis for discipline. See below for that part of Model Rule paragraph (b) that addresses disclosures to correct misapprehensions.
	(c) <u>An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information otherwise protected by Rule 1.6.</u>	The part of paragraph (b) of the Model Rule requiring an applicant and a lawyer (in connection with application for admission) to disclose a fact necessary to correct a known misapprehension in the matter is adapted in proposed paragraph (c). The Commission believes that this affirmative obligation is an appropriate basis for discipline.
	(d) <u>As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.</u>	Proposed Rule 8.1 provides illustrations of some of the diverse proceedings encompassed by the term, "admission to practice law," in new paragraph (d) for guidance, and Comment [4] to the proposed Rule lists additional examples.

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment	<u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.	[1] <u>A person who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person has been admitted.</u> ~~The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.~~	The proposed Comment states the first part of Model Rule Comment [1] in a more concise manner, stating that an applicant for admission who makes a material false statement in connection with that application may be subject to subsequent discipline if admitted. The proposed Rule omits the second part of Model Rule Comment [1] noting that the duty imposed by the rule applies both to a member's statements both with respect to his or her own application for admission and with respect to another person's application for admission because it merely repeats the rule as revised. However, like Proposed Rule 8.1, Comment [1] to the Proposed Rule omits any reference to statements made in connection with disciplinary proceedings.

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment	<u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.	[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions.~~A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.~~	This is the first sentence of Model Rule Comment [2]. It is included because the Commission agrees with substantive point and omitting it may engender unnecessary questions.
[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.	[3] A lawyer representing an applicant for admission ~~to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3~~ <u>to practice law is governed by the rules applicable to the lawyer client relationship, including Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.</u>	Comment [3] to Proposed Rule 8.1 substantially tracks Comment [3] to the Model Rule, except that it uses terminology that is more appropriate for California (i.e., substitutes “admission to practice law” for “admission to the bar” and substitutes “disciplinary proceeding” for “disciplinary inquiry”). That part of the Model Rule comment addressing a lawyer who represents an applicant is covered by proposed Comment [5].

<u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment	<u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] The examples in paragraph (c) are illustrative. As used in paragraph (c), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.	See Explanation of Changes for paragraph (d), above.
	[5] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule 3.3.	The comment adapts that part of Model Rule Comment [3] that addresses a lawyer who represents an applicant. See above explanation of changes to Comment [3].

Rule 8.1 False Statement Regarding Application for Admission to Practice Law
(Commission's Proposed Rule – Clean Version)

- (a) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.
- (b) A lawyer shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.
- (c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this Rule does not authorize disclosure of information otherwise protected by Rule 1.6.
- (d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.

Comment

- [1] A person who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this Rule after that person has been admitted.
- [2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of applicable state constitutions.
- [3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the client lawyer relationship, including Rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this Rule but is subject to the requirements of Rule 3.3.
- [4] The examples in paragraph (d) are illustrative. As used in paragraph (d), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an

application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.

- [5] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule 3.3.

Rule 8.1: False Statement Regarding Application for Admission to Practice

STATE VARIATIONS

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

California: Rule 1-200 provides as follows:

(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.

(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.

(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.

Colorado: Rule 8.1(a) also applies to “readmission” and “reinstatement.”

Georgia has adopted a Rule 9.3, entitled “Cooperation with Disciplinary Authority,” which provides as follows: “During the investigation of a grievance filed under these Rules, the lawyer complained against shall respond to disciplinary authorities in accordance with State Bar Rules.” Comment 2 to this provision states: “Nothing in this Rule prohibits a lawyer from responding by making a Fifth Amendment objection, if appropriate. However, disciplinary

proceedings are civil in nature and the use of a Fifth Amendment objection will give rise to a presumption against the lawyer.”

Illinois: Rule 8.1(b) provides that a lawyer “shall not further the application for admission to the bar of another person known by the lawyer to be unqualified in respect to character, education, or any other relevant attribute.”

Michigan adds the following new language to its version of ABA Model Rule 8.1:

(b) An applicant for admission to the bar

(1) shall not engage in the unauthorized practice of law (this does not apply to . activities permitted under MCR 8.120), and

(2) has a continuing obligation, until the date of admission, to inform the standing committee on character and fitness, in writing, if any answers in the applicant's affidavit of personal history change or cease to be true.

New York: DR 1-101(A) makes a lawyer subject to discipline if the lawyer “has made a materially false statement in, or has deliberately failed to disclose a material

fact requested in connection with, the lawyer's application for admission to the bar." Rule 1-101(B) provides as follows: "A lawyer shall not further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute."

Ohio: Rule 8.1 (a) deletes the opening phrase "[a]n applicant for admission to the bar." According to the Ohio Supreme Court's note, Rule 8.1(b) clarifies the "unwieldy" language of the ABA Model Rule but does not lower the standard of candor expected of a lawyer in bar admission or disciplinary matters.

Virginia: Rule 8.1 adds language to cover certifications required to be filed as a condition of maintaining or renewing a law license. Virginia also moves the second clause of Rule 8.1(b) to separate subparagraph (c), and adds Rule 8.1(d), which makes separate violation to obstruct a lawful investigation by an admissions or disciplinary authority."

Proposed Rule 8.1.1[RPC 1-110]

“Compliance with Conditions of Discipline and Agreements in Lieu of Discipline.”

(Draft #2, 7/3/07)

Summary: Proposed Rule 8.1.1 amends current rule 1-110 and continues the requirement that a lawyer comply with the terms and conditions attached to agreement made in lieu of discipline, probation or reproof. No substantive changes are recommended to the current rule. The Commission's recommended revisions are intended for brevity and clarity.

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 Rule 1-110

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 _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

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:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.1.1* Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 8.1.1 amends current rule 1-110 and continues the requirement that a lawyer comply with the terms and conditions attached to agreement made in lieu of discipline, probation or reproof. No substantive changes are recommended to the current rule. The Commission's recommended revisions are intended for brevity and clarity.

There is no corresponding ABA Model Rule. However, there is a comparable rule in the ABA Model Rules of Disciplinary Enforcement. Rule 10(B) of the Model Rules of Disciplinary Enforcement states, "Conditions. Written conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent." Proposed Rule 8.1.1 is more specific to the California disciplinary process.

* Proposed Rule 8.1.1, Draft 2 (7/3/07).

<u>California Rule of Professional Conduct</u> Rule 1-110 Disciplinary Authority of the State Bar	<u>Commission's Proposed Rule*</u> Rule 8.1.1 Disciplinary Authority of the State Bar Compliance with Conditions of Discipline and Agreements in Lieu of Discipline	<u>Explanation of Changes to the California Rule of Professional Conduct</u>
A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.	A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovls. ~~or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court~~ <i>(Comparison continued in Comment below.)</i>	The rule has been renamed to better describe the conduct the rule addresses. The phrase "the terms and" has been added to "conditions" to more accurately describe the scope of the member's duty to comply under the rule. The clause "any agreement made in lieu of discipline, disciplinary probation, and" has been added to "public or private reprovls" to identify with more particularity the kinds of arrangements in which terms and conditions may be imposed on the member. Reference to the sections of the Business & Professions Code and Court Rules under which sanctions may be imposed on members has been deleted. The Commission regarded the references as surplusage and potentially confusing because the references focus on the source of the authority for the imposition of conditions rather than identifying the circumstances where conditions are imposed.

* No comparable ABA Model Rule. Redline/strikeout showing changes to California Rule 1-110

<u>California Rule of Professional Conduct</u> Rule 1-110 Disciplinary Authority of the State Bar Comment	<u>Commission's Proposed Rule*</u> Rule 8.1.1 Compliance with Conditions of Discipline Comment	<u>Explanation of Changes to the California</u> <u>Rule of Professional Conduct</u>
	[1] Other provisions also require a lawyer to comply with conditions of discipline. (See, e.g., Business and Professions Code sections ~~6077 and 6078~~ <u>6068, subdivisions (k) & (l)</u> and ~~rule 956~~, California Rules of Court, <u>Rule 9.19.</u>)	The Comment was added to alert lawyers to other law (e.g., Bus. & Prof. Code §§ 6068(k), (l), and Cal. Rule of Court 956), under which terms and conditions of compliance may be imposed.

* No comparable ABA Model Rule. Redline/strikeout showing changes to California Rule 1-110

**Rule 8.1.1 Compliance with Conditions of Discipline
and Agreements in Lieu of Discipline**
(Commission's Proposed Rule – Clean Version)

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

Comment

[1] Other provisions also require a lawyer to comply with conditions of discipline. (See, e.g., Business and Professions Code section 6068, subdivisions (k) & (l) and California Rules of Court, Rule 9.19.)

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 rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☒ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☐ 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:

* 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.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(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~~<u>felonious criminal act</u> 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~~<u>disciplinary</u> authority.	As discussed in detail in the Introduction, the Commission is recommending a balanced approach 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) <u>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.</u>	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)<u>c</u> A lawyer who knows that a judge <u>or other adjudicative officer</u> has committed a violation of applicable rules of judicial conduct that raises a substantial question as to ~~the judge's~~<u>that person's</u> fitness for office ~~shall inform~~<u>may, but is not required to, report the violation to</u> 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 7 (01/07/10). Redline/strikeout showing changes to the ABA Model Rule,
RRC - 1-120 & 1-500B [8-3] - Compare - Rule Comment Explanation - DFT6.1 (01-07-10)

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(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.	(~~e~~) 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 <u>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.</u>	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.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.
	<u>[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.</u>	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).

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[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.</u>	California is unique in the self-reporting requirement cited in this proposed Comment. Because of the relationship between proposed Rule 8.3 and the separate issue of self-reporting, the Commission believes it would be helpful to include this cross-reference. 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.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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.

<u>ABA Model Rule</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Commission's Proposed Rule*</u> Rule 8.3 Reporting Professional Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[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.
- 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.

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

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).

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

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....

[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:

(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

(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

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.

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.

(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.

(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

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.

Proposed Rule 8.4 [RPC 1-120]

“Misconduct”

(Draft #10.1, 10/17/09)

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

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☒ Some material additions to ABA Model Rule
- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
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- ☒ Some material deletions from ABA Model Rule
- ☐ No ABA Model Rule counterpart

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 1-120

Statute

Business and Professions Code §§6100 et seq.

Case law

See Comment chart, Comments [2A], [2B] and [2C].

- ☐ 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 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 (See Explanations for Paragraphs (b) and (d)).

Stakeholders and Level of Controversy

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

The continued references to moral turpitude when the ABA has essentially abandoned that concept in the Model Rules has been objected to by some, but the Commission believes it has continued viability and continues to be utilized by The State Bar Court for discipline.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.4* Misconduct

October 2009

(Draft rule following consideration of initial public comment)

INTRODUCTION:

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

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

* Proposed Rule, Draft 10.1 (10/17/09).

INTRODUCTION (Continued):

Minority. A minority of the Commission objects to Comment [3], which states that manifestations by words or conduct of certain types of bias or prejudice can be a violation of paragraph (d). This is a category of speech that inherently has implications under the First Amendment and the California Constitution. The minority believes a legal professional should respect the right of all citizens, including lawyers, to express their opinions, even if they are disgusting or repugnant. The legal profession should not condone chilling speech by a rule that would call out a category of speech as a potential ground for discipline. The minority contends the focus of paragraph (d) should be on conduct in connection with the practice of law that is prejudicial to the administration of justice and not on categories of speech.

Variations in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 8.4. District of Columbia Rule 8.4(d) prohibits conduct that “seriously interferes with the administration of justice.” Several jurisdictions, including Georgia, Virginia and Wisconsin, omit Model Rule 8.4(d). Other jurisdictions, e.g., Florida, expand Model Rule 8.4 (d), to prohibit conduct intended to “disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis,” including on account of race, ethnicity, etc. Some jurisdictions have added provisions to address such conduct specifically, e.g., Colorado, Illinois, Maryland (words or conduct), Texas (same), Ohio. See State Variations, below.

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;	It is professional misconduct for a lawyer to: ~~(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;~~ (a) <u>knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;</u>	There are two principal changes in paragraph (a). First, paragraph (a) removes "... violate ... the Rules of Professional Conduct" The reason for this change is that any conduct that violates any Rule already is subject to discipline, so the quoted Model Rule language has no consequence except to create the risk that lawyers will be charged twice for every alleged Rule violation. Second, paragraph (a) eliminates an "attempt" to violate a Rule as a general disciplinary offense. It was the consensus of the Commission during the drafting process that it should address on a rule-by-rule basis whether an attempted violation should be a basis for professional discipline. As a result, the Commission decided not to include attempts to violate as a general rule of discipline.
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;	(b) commit a criminal act <u>that involves moral turpitude or</u> that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer ~~in other respects;~~	The Commission added moral turpitude to the Model rule to maintain conformity with the broader public protection afforded by the Business and Professions Code, specifically, section 6106. The Model Rules deleted moral turpitude as a basis for discipline that had been in the ABA Model Code. See Explanation of Changes for Model Rule 8.4, Cmt. [2], below. Some states have retained that standard, or have interpreted the rest of section (b) as being the equivalent of moral turpitude. However, the long and evolving history of case law in California interpreting moral turpitude has expanded the scope of public protection beyond the factors set forth in Model Rule 8.4(b). For these reasons, the Commission recommends adding "moral turpitude" to the proposed rule.

* Proposed Rule 8.4, Draft 10.1 (10/17/09). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
		In addition, there is a long history in California of discipline referrals of attorneys who have been convicted in criminal matters to the State Bar for discipline pursuant to Business and Professions Code sections 6101 and 6102. Moral turpitude is a critical component of those referrals for interim suspension or summary disbarment upon proof of conviction. A minority of the Commission believes that California should not continue using moral turpitude as a standard when the ABA has essentially abandoned that concept in the Model Rules. The Commission also recommends deletion of the phrase "in other respects" as surplusage.
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;	(c) engage in conduct involving dishonesty, fraud, deceit, or <u>intentional</u> misrepresentation;	The addition of "intentional" is intended to clarify that negligent misrepresentation is not regarded as dishonesty that triggers this Rule. The Commission believes this clarification is consistent with the intended scope of the ABA's rule and with the interpretation in disciplinary proceedings in states that have adopted the Model Rule. (See, e.g., <i>State ex rel. Oklahoma Bar Ass'n v. Besly</i> (Okla., 2006) 136 P.3d 590 [2006 OK 18] and <i>In re Clark</i> (Ariz., 2004) 207 Ariz. 414 [87 P.3d 827].

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(d) engage in conduct that is prejudicial to the administration of justice;	(d) engage in conduct <u>in connection with the practice of law, including when acting in propria persona</u>, that is prejudicial to the administration of justice;	The addition of “in connection with the practice of law” was added because of concern that the vagueness of the language might not overcome facial Constitutional challenges under the First Amendment. The Commission sought to delimit the scope of conduct proscribed under paragraph (d) by clarifying in advance that the specific conduct that might be at issue in connection with a charge of prejudice to the administration of justice must be connected to the practice of law. A minority of the Commission disagrees with the language limiting the paragraph’s scope to conduct “in connection with the practice of law” because a lawyer’s fitness to practice law is called into question by conduct prejudicial to the administration of justice in whatever capacity the lawyer acts. Finally, the Commission has added the phrase “including when acting in propria persona,” to clarify that a lawyer appearing in propria persona is engaging in the practice of law and therefore not immune from this provision.
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or	(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate ~~the~~<u>these</u> Rules ~~of Professional Conduct~~ or other law; or	Paragraph (e) is substantively identical to Model Rule 8.4(e). The Commission has adopted the convention of referring to the Rules of Professional Conduct as “these Rules.” Curiously, the ABA mostly refers to the Model Rules collectively as “these Rules” in its blackletter and comment, only occasionally (as here) referring to them as “the Rules of Professional Conduct.” An inquiry to the Model Rules drafters (reporters) confirmed that no substantive meaning should be attached to the varied usages.

<u>ABA Model Rule</u> Rule 8.4 Misconduct	<u>Commission's Proposed Rule*</u> Rule 8.4 Misconduct	<u>Explanation of Changes to the ABA Model Rule</u>
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.	(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.	Paragraph (f) is identical to Model Rule 8.4(f).

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.	<u>Paragraph (a)</u> [1] ~~Lawyers are~~A lawyer is subject to discipline ~~when they violate or attempt to violate the Rules of Professional Conduct, for~~ knowingly ~~assist~~assisting or ~~induce~~inducing another to ~~do so~~violate these Rules or ~~the State Bar Act, or to~~ do so through the acts of another, as when ~~they request~~a lawyer requests or ~~instruct~~instructs an agent to do so on the lawyer's behalf. ~~Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.~~	Headings have been added to the Comment for clarity. The Model Rule language has been modified and attempted violations eliminated, to conform to the language of the black letter rule. See Explanation for paragraph (a), above. The substance of the deleted last sentence of the Model Rule comment is the subject of proposed Rule 1.2(d), the counterpart to current rule 3-210. See Comment [4], below.
[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a	<u>Paragraph (b)</u> [2] ~~Many kinds of illegal conduct reflect~~A lawyer may be disciplined under paragraph (b) for a criminal act ~~that reflects~~ adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some ~~kinds of~~ offenses carry no such implication. ~~Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law.~~	Comment [2] is based on Model Rule 8.4, cmt. [2]. The first sentence of the Model Rule comment was revised to track the actual language of paragraph (b). The second sentence was deleted as unnecessary because the Commission has retained "moral turpitude" in the Rule, for the reasons set out in the Explanation for paragraph (b), above. At one point during the drafting process for this Rule, the Commission crafted a statement, based on the stricken sentence, that was intended to clarify that "offenses concerning some matters of personal morality" were not within the scope of the Rule. However, as it was unclear that such conduct, e.g., adultery, remains a criminal offense in California, the sentence was deleted as potentially

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.	Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. ~~A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.~~	confusing. The Commission deleted the last sentence of the Model Rule comment because the proposition stated is unclear in the absence of a definition of what is considered a "minor" offense. This ambiguity could give rise to interpretations that grant less public protection than the existing protection afforded by California's standards of moral turpitude, discipline under Business and Professions Code section 6068(a), and conviction referrals under Business and Professions Code section 6101. A lawyer's conviction for a single misdemeanor charge could be construed as a "minor" offense under the Model Rule language; however, a pattern of that misconduct might not be a prerequisite for discipline under California's standards.
	[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., <i>In re Kelley</i> (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; <i>In re Rohan</i> (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; <i>In re Morales</i> (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)	This Comment was added because there is a substantial body of case law that has confirmed discipline for "other conduct warranting discipline," as set out in the Supreme Court cases cited.

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (<i>Gassman v. State Bar</i> (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; <i>Jackson v. State Bar</i> (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; <i>In the Matter of Myrdall</i> (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; <i>Grove v. State Bar</i> (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also <i>Martin v. State Bar</i> (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; <i>Selznick v. State Bar</i> (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; <i>In the Matter of Varakin</i> (Review Dept. 1994) 3 Cal State Bar Rptr 179 [pattern of misconduct]; <i>In re Calloway</i> (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; <i>In re Craig</i> (1938) 12 Cal.2d 93 [82 P.2d 442].)	This Comment is intended to alert lawyers to the expansive case law on moral turpitude.
	<u>Paragraph (d)</u> [2C] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. See, e.g., <i>Ramirez v. State Bar</i> (1980) 28 Cal 3d 402, 411 [169	The Commission concluded that it is important to stress the protection of constitutional rights in connection with discipline so that activities protected by the First Amendment do not become the subject of disciplinary proceedings. See also Explanation of Changes at paragraph (d), above.

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); <i>Matter of Anderson</i> (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); <i>Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman</i> (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).	
[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.	[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, ~~or sexual orientation~~ ~~or socioeconomic status~~, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of ~~this rule~~ paragraph (b).	Comment [3] is based on Model Rule 8.4, cmt. [3]. The comment clarifies the scope of paragraphs (a) and (d). The Ninth Circuit invalidated Business and Professions Code section 6068(f) relating to "offensive personality" on constitutional grounds, resulting in the subsequent legislative striking of that section. <i>United States v. Wunsch</i>, 84 F.3d 110 (9th Cir. 1996). However, the Ninth Circuit expressly approved of Model Rule 8.4(b).

<u>ABA Model Rule</u> Rule 8.4 Misconduct Comment	<u>Commission's Proposed Rule</u> Rule 8.4 Misconduct Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.	[4] ~~A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to~~ apply to challenges ~~of legal~~<u>regarding the</u> regulation of the practice of law.	Model Rule 8.4, cmt. [4], has been revised for brevity and clarity. This Comment is intended as a cross-reference to another rule that is applicable to related conduct. It is the second sentence to Model Rule 8.4, Comment [4], revised and split into two sentences for clarity. No change in meaning was intended. The first sentence ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.") was deleted because it was not for the protection of the public, inconsistent with Bus. & Prof. Code section 6068(a), and overly broad with respect to what a lawyer may do to challenge a law that he or she believes is invalid.
[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.	[5] ~~Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of~~ <u>lawyer or</u> abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, <u>can involve conduct prohibited by this Rule.</u>	Comment [5] is based on Model Rule 8.4, cmt. [5], but has been revised to make it more concise and also to clarify that the conduct described can violate the Rule. The Commission believes that the recommended clause – "can involve conduct prohibited by this Rule" – does not suffer the same vagueness of the Model Rule clause ("can suggest an inability to fulfill the professional role of lawyers.")
	[6] <u>Alternative bases for professional discipline may be found in Article 6 of the State Bar Act, (Bus. & Prof. Code, sections 6100 et seq.), and published California decisions interpreting the relevant sections of the State Bar Act. This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act.</u>	This Comment, which has no counterpart in the Model Rule, is intended as a clarification and to advise lawyers that there are bases for discipline for professional misconduct other than the Rules.

Rule 8.4 Misconduct

(Commission's Proposed Rule – Clean Version)

It is professional misconduct for a lawyer to:

- (a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation;
- (d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

Paragraph (a)

[1] A lawyer is subject to discipline for knowingly assisting or inducing another to violate these Rules or the State Bar Act, or to do so through the acts of another, as when a lawyer requests or instructs an agent to do so on the lawyer's behalf.

Paragraph (b)

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

[2A] A lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [willful failure to file a federal income tax return]; *In re Morales* (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)

[2B] In addition to being subject to discipline under paragraph (b), a lawyer may be disciplined under Business and Professions Code section 6106 for acts of moral turpitude that constitute gross negligence. (*Gassman v. State Bar* (1976) 18 Cal.3d 125 [132 Cal.Rptr. 675]; *Jackson v. State Bar* (1979) 23 Cal.3d 509 [153 Cal.Rptr. 24]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [habitual disregard of clients' interests]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [58 Cal.Rptr. 564]. See also *Martin v. State Bar* (1978) 20 Cal.3d 717 [144 Cal.Rptr. 214]; *Selznick v. State Bar* (1976) 16 Cal.3d 704 [129 Cal.Rptr. 108]; *In the Matter of Varakin* (Review Dept. 1994)

3 Cal State Bar Rptr 179 [pattern of misconduct]; *In re Calloway* (1977) 20 Cal.3d 165 [141 Cal.Rptr. 805 [act of baseness, vileness or depravity in the private and social duties which a man or woman owes to fellow human beings or to society in general, contrary to the accepted and customary rule of right and duty between human beings]; *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

Paragraph (d)

[2C] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal 3d 402, 411 [169 Cal. Rptr 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *Matter of Anderson* (Rev. Dept 1997) 3 State Bar Court Rptr 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (b).

[4] Testing the validity of any law, rule, or ruling of a tribunal is governed by Rule 1.2(d). Rule 1.2(d) is also intended to apply to challenges regarding the regulation of the practice of law.

[5] A lawyer's abuse of public office held by the lawyer or abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization, can involve conduct prohibited by this Rule.

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

Rule 8.4: 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.)

Alabama adds Rule 3.10, which provides that a lawyer “shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

Arizona adds Rule 8.4(g), which makes it professional misconduct for a lawyer to “file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay....”

California: Rule 2-400 provides, in part, as follows:

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this

rule unless and until a tribunal of competent jurisdiction, other than, a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

In addition, California Business & Professions Code §125.6 (Discrimination in the Performance of Licensed Activity) subjects a lawyer to professional discipline if, because of a prospective client’s “race, color, sex, religion, ancestry, disability, marital status, or national origin,” the lawyer “refuses to perform the licensed activity” (i.e., the practice of law) or “makes any discrimination or restriction in the performance of the licensed activity.”

Also, Business & Professions Code §490.5 permits the State to suspend a lawyer’s license if the lawyer “is not in compliance with a child support order or judgment.” Finally, Rule 290(a) of the Rules of Procedure of the California State

Bar provides that (unless otherwise ordered by the Supreme Court) a member of the bar “shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years.”

Colorado: In addition to Rule 8.4(g), which forbids bias in various forms, Colorado adds Rule 4.5, which addresses threats of “criminal, administrative or disciplinary charges” to gain a civil case advantage. See Selected State Variations under Rule 4.4.

District of Columbia: Rule 8.4(d) prohibits conduct that “seriously interferes with” the administration of justice. Rule 8.4(e) omits the ABA phrase “or to achieve results by means that violate the Rules of Professional Conduct or other law.” D.C. adds Rule 8.4(g), which makes it misconduct to “[s]eek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.”

In addition, D.C. adds Rule 9.1, which provides that a lawyer “shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.”

Florida expands Rule 8.4(d) to provide that a lawyer shall not:

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability,

marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Florida also adds Rule 8.4(g), which provides that a lawyer shall not “fail to respond, in writing, to any official inquiry by bar counselor a disciplinary agency... when bar counselor the agency is conducting an investigation into the lawyer’s conduct.”

In addition, Florida adds Rule 8.4(h) that makes it professional misconduct for a lawyer to “willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation.” The Comment explains that subparagraph (h) was added to make the treatment of lawyers who fail to pay child support consistent with the treatment of other professionals in Florida who fail to pay child support. Those other professionals are governed by §61.13015 of the Florida Statutes, which provides for the suspension or denial of a professional license due to delinquent child support payments after all other available remedies for the collection of child support have been exhausted.

Florida also adds Rule 4-8.4(i), which relates to sexual conduct with a client and provides that a lawyer shall not engage in sexual conduct with a client “or a representative of a client.” See the Selected Variations following Rule 1.8 for more detail.

Finally, the Florida Supreme Court has promulgated Rule 3-4.7, which provides:

Violation of the oath taken by an attorney to support the constitutions of the United States and the State of Florida is ground for disciplinary action. Membership in, alliance with, or support of any organization, group, or party advocating or dedicated to the overthrow of the government by violence or by any means in violation of

the Constitution of the United States or constitution of this state shall be a violation of the oath.

Georgia deletes ABA Model Rule 8.4(b) in favor of two subparagraphs making it a violation to be “convicted of a felony” or to be “convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer’s fitness to practice law.” Rule 8.4(a)(4)--Georgia’s equivalent to ABA Model Rule 8.4(c)--makes it improper to engage in “professional” conduct involving dishonesty, fraud, deceit or misrepresentation. Georgia adds a Rule 8.4(a)(5) that makes it improper for a lawyer to “fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him or her as a lawyer within ten (10) days after the time appointed in the order or judgment.” A Rule 8.4(d) provides that Rule 8.4(a)(1) “does not apply to Part Six of the Georgia Rules of Professional Conduct” (which covers pro bono work, court appointments, legal service organizations, and law reform organizations), Georgia deletes ABA Model Rules 8.4(d), (e), and (f).

For Georgia attorneys seeking guidance on their ethical conduct, Georgia Supreme Court Rule 4-401 authorizes the Georgia State Bar’s Office of General Counsel to “render Informal Advisory Opinions concerning the Office of the General Counsel’s interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts.” However, the rule cautions that an Informal Advisory Opinion is merely “the personal opinion of the issuing attorney of the Office of the General Counsel and is neither a defense to any complaint nor binding on the State Disciplinary Board, the Supreme Court of Georgia, or the State Bar of Georgia.” Rule 4-403 describes the procedures by which the Supreme Court of Georgia issues Formal Advisory Opinions and describes the weight to be given to Formal Advisory Opinions in various circumstances.

Illinois: Rule 8.4(a)(9)(A) provides that a lawyer shall not “violate a Federal, State or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer.” Rule 8.4(a)(5) prohibits “adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.”

Illinois Rule 8.4(a)(8) provides that a lawyer shall not “avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity.” Subparagraph (a)(8) does not prohibit a lawyer from discharging a student loan in a bankruptcy proceeding, but does provide that “the discharge shall not preclude a review of the attorney’s conduct to determine if it constitutes bad faith.”

Illinois Rule 8.4(b)(3) adds that a lawyer holding public office shall not “represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.”

Iowa: Rule 8.4(g) forbids lawyers to “engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer’s direction and control to do so.”

Louisiana: Among other variations, Louisiana adds a Rule 8.4(g), which makes it professional misconduct for a lawyer to “[t]hreaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.”

Maryland: Rule 8.4(e) provides that a lawyer may not “manifest by words or conduct” various kinds of bias or prejudice when such action is prejudicial to the administration of justice.

Massachusetts: Rule 8.4(h) forbids a lawyer to “engage in any other conduct that adversely reflects on his or her fitness to practice law.” Comment 5 states that such conduct is subject to discipline even if it “does not constitute a criminal, dishonest, or fraudulent or other act specifically described in the other paragraphs of this rule.”

Michigan: Rule 6.5, entitled “Professional Conduct,” provides as follows:

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person’s race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

(b) A lawyer serving as an adjudicative officer shall, without regard to a person’s race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer’s direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

In addition, the Michigan Court Rules include the following Rule 9.104:

(A) The following acts or omissions by an attorney, individually or in concert with another person, are

misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

(8) contempt of the board or a hearing panel; or

(9) violation of an order of discipline.

(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether

imposition of identical discipline in Michigan would be clearly inappropriate.

Minnesota adds Rules 8.4(g)-(h), which prohibits various kinds of harassment and discrimination.

Missouri: Rule 8.4(g) forbids a lawyer to “manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation.” However, the rule “does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues.”

New Jersey: Rule 8.4(g) makes it professional misconduct for a lawyer to “engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socio-economic status, or handicap, where the conduct is intended or likely to cause harm.” The Supreme Court’s comment states that the rule

would, for example, cover activities in the court house, such as a lawyer’s treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer’s office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered

unless it has resulted in either an agency or judicial determination of discriminatory conduct.

New York: DR 1-102 provides that a lawyer “or law firm” shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another....

(6) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

(7) Engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.

In addition, New York’s DR 9-101(C), which is comparable to ABA Model Rule 8.4(e), provides that a lawyer “shall not state or imply that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.”

North Carolina: Rule 8.4(e) omits the clause “or to achieve results by means that violate the Rules of Professional Conduct or other law,” and a Rule 8.4(g) makes it professional misconduct for a lawyer to “intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.” North Carolina also adds a Rule 6.6, which prohibits lawyers who hold “public office” from abusing their public positions.

Ohio adds Rules 8.4(g) and (h), which make it professional misconduct for a lawyer to:

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law, of constitutional or civil rights when authorized by law.”

Ohio also adds an unusual Comment 2A, which provides that Rule 8.4(c) “does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.”

Oregon: Rule 8.4(b) is the result of a decision of the Oregon Supreme Court, *In re Gatti*, 8 P.3d 966 (2000). It provides that, notwithstanding Rules 8.4(a)(1), (3), and (4) and Rule 3.3(a)(1), “it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights,” provided the lawyer’s conduct otherwise complies with the Rules of Professional Conduct. “Covert activity” is defined in Rule 8.4(b) to mean “an effort to obtain information on unlawful activity through

the use of misrepresentations or other subterfuge.” The rule permits covert activity to “be commenced by a lawyer or involve the lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.”

Rhode Island adds Rule 9.1, which establishes an ethics advisory panel to be appointed by the Supreme Court and provides that “[a]ny lawyer who acts in accordance with an opinion given by the panel shall be conclusively presumed to have abided by the Rules of Professional Conduct.”

Texas: Rule 5.08, entitled “Prohibited Discriminatory Activities,” provides as follows:

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.”

(b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and

(ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

Texas Rule 8.04(a)(9) forbids a lawyer to “engage in conduct that constitutes barratry as defined by the laws of this state.” Rule 8.04(a)(2) forbids a lawyer to “commit a serious crime or commit any other criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Rule 8.04(b) defines “serious crime” to include “barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.”

Virginia: Rule 8.4(b) applies to a criminal “or deliberately wrongful act,” and Rule 8.4(c) applies to conduct involving dishonesty, fraud, deceit or misrepresentation “which reflects adversely on the lawyer’s fitness to practice law.” Virginia omits Rule 8.4(d) (which forbids “conduct that is prejudicial to the administration of justice”), and retains the pre-2002 version of ABA Model Rule 8.4(e), which made it professional misconduct for a lawyer to “state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official,” without any reference to “means that violate the Rules of Professional Conduct or other law.”

Wisconsin: Among other variations, Wisconsin omits paragraph (d) and adds several additional paragraphs, including one relating to harassment.

Proposed Rule 8.4.1 [2-400]

“Prohibited Discrimination in Law Practice Management and Operation”

(Draft #8, 10/1/09)

Summary: Proposed Rule 8.4.1 is based on current rule 2-400 which prohibits unlawful discrimination in the management or operation of a law firm. There is no Model Rule counterpart (Model Rule 8.4 and proposed Rule 8.4(e) deal with discrimination by individual lawyers while representing a client).

Proposed Rule 8.4.1 expands the scope of present rule 2-400, which is limited to unlawful discrimination in employment and offering goods and services, while the proposed Rule includes any unlawful discrimination in the management and operation of a law practice. See Introduction.

Comparison with ABA Counterpart

Rule

Comment

- ☐ ABA Model Rule substantially adopted
- ☐ ABA Model Rule substantially rejected
- ☐ Some material additions to ABA Model Rule
- ☐ Some material deletions from ABA Model Rule
- ☒ No ABA Model Rule counterpart

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Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 2-400

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 3

Abstain 2

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 scope of enforcement of laws against discrimination is always somewhat controversial and this rule is no different. The commenters' views on policy ranged from having no rule at all (Santa Clara County Bar Association) to removing the prior adjudication requirement and to extending the scope of the rule to lawyer ancillary business services (Simmons Firm ALC).

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.4.1* Prohibited Discrimination in Law Practice Management and Operation

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 8.4.1 prohibits unlawful discrimination, based upon race, national origin, sex, gender, sexual orientation, religion, age or disability, in the management and operation of a law firm.

Proposed Rule 8.4.1 is based on current rule 2-400, which prohibits unlawful discrimination in the management or operation of a law firm. There is no Model Rule counterpart (although ABA Model Rule 8.4 and proposed rule 8.4(e) deal with discrimination by individual lawyers while representing a client).

Proposed Rule 8.4.1 expands and narrows the scope of rule 2-400:

- a. Expanded scope: The current rule is limited to unlawful discrimination in employment and offering goods and services; the proposed rule includes any unlawful discrimination in the management and operation of a law practice based upon race, national origin, sex, gender, sexual orientation, religion, age or disability.
- b. Narrowed scope: Based upon commenter suggestions, the proposed rule was narrowed to apply only to managerial and supervisory lawyers within the law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(e).

Minority. A minority of the Commission argues that the Rule provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct. See Explanation of Changes for paragraph (c). Another minority of the Commission believes that the rule, although well intended, is ambiguous as drafted and that certain provisions are inconsistent with the proposed Rule 5.1 on the responsibilities of partners, managers and supervisory lawyers. This minority also believes that the concerns raised by COPRAC have not been adequately addressed.

* Proposed Rule 8.4.1, Draft #8 (10/1/09).

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
	(Aa) For purposes of this ~~rule~~Rule: (1) ~~"law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~	This Rule carries forward current rule 2-400's prohibitions against unlawful discrimination in the operation or management of a law firm. While comment [3] to Model Rule 8.4 prohibits a lawyer from knowingly manifesting bias or prejudice by words or conduct, when such actions are prejudicial to the administration of justice and when representing a client, no Model Rule prohibits discrimination in the operation and management of a law firm. Amendments show the variations from current rule 2-400. Proposed paragraph (a) contains definitions which are applicable to this Rule only. Comment [2] clarifies that the definition of "law practice" means the same as "law firm," which is defined in proposed Rule 1.0.1. Therefore, no additional definition of "law practice" is necessary and the definition from current rule 2-400 has been deleted.
	(21) "knowingly permit" means a failure to advocate corrective action where the ~~member~~managerial or supervisory lawyer knows of a discriminatory policy or practice ~~which~~that results in the unlawful discrimination prohibited in paragraph (Bb); and	Subparagraph (a)(1) has been narrowed and clarified, at the suggestion of commenters (COPRAC, Simmons Firm ALC and Orange County Bar Association), so that culpability is limited to those lawyers who have the authority to change the discriminatory practice. (See also Public Commenter's Chart.)

* Proposed Rule 8.4.1, Draft 8 (10/1/09). Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
	(32) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes ~~or decisions making unlawful~~ <u>prohibiting</u> discrimination ~~in employment and in offering goods and services to~~ <u>on the public basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.</u>	Subparagraph (a)(2) definitions have been streamlined and clarified. The words “decisions making unlawful” were stricken for imprecision since court decisions do not inherently make conduct unlawful, but rather interpret the meaning of the words of a statute concerning the affected conduct. Accordingly, the words “as interpreted by case law” were substituted to clarify the definition. Also, because administrative bodies are often empowered to develop administrative regulations to enforce and regulate discriminatory conduct, the words “or administrative regulations” was added to clarify the definition. The scope of the Rule has been expanded beyond employment and offering goods and services. (See paragraph (b).) Therefore the words “in employment and in offering goods and services to” were stricken and the words “basis of race, national origin, sex, gender, sexual orientation, religion, age or disability” were added consistent with the expansion of the subject matter of prohibited conduct. See Explanation of Changes for paragraph (b).

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
	(B) In the management or operation of a law practice , a ~~member~~lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, <u>gender</u>, sexual orientation, religion, age or disability~~in~~. (1) ~~hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~ (2) ~~accepting or terminating representation of any client.~~	Paragraph (b)'s scope has been expanded from unlawful discrimination in employment and in selling goods and services to any unlawful discrimination in the operation and management of a law practice on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability. The expanded scope includes for example, unlawful conduct in leasing, violations of the Americans with Disabilities Act, or sexual harassment. The word "gender" was added at the suggestion of the Bar Association of San Francisco to conform to the wording of discrimination statutes. Consistent with the expanded scope of the Rule, and as requested by the Santa Clara County Bar Association, the limitations of subparagraphs (b)(1) and (b)(2) have been deleted.

<u>ABA Model Rule</u> No Comparable ABA Model Rule	<u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation	<u>Explanation of Changes to the California Rule 2-400</u>
	(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this ~~rule~~<u>Rule</u> unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this ~~rule~~<u>Rule</u>. In order for discipline to be imposed under this ~~rule~~<u>Rule</u>, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.	Paragraph (c) has not been changed except ~~to~~for minor style changes. Paragraph (c) continues to prohibit any disciplinary investigation unless and until there is an appropriate adjudication that unlawful discriminatory misconduct has occurred. This policy recognizes that the State Bar disciplinary process has limited resources to investigate and prosecute all alleged unprofessional conduct and that a State Bar disciplinary process should not be the initial or primary remedy for complaints about law practice discrimination when the law provides other specialized administrative agencies to enforce and regulate all alleged discriminatory conduct and provides for specialized remedies. <i>Minority Position.</i> A minority of the Commission has dissented from this provision on the ground that its inclusion renders the Rule unenforceable because it provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation Comment	<u>Explanation of Changes to the California Rule 2-400</u>
	<u>[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.</u>	The comparison is to current rule 2-400, Discussion. Comment [1] is new and explains the policy supporting this Rule.
	<u>[2] This Rule applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (See Rule 5.1. But see also Rule 8.4(g).) "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Business and Professions Code section 6068(a).)</u>	Comment [2] is new and explains the changed scope of the Rule: 1. The scope of the rule is limited to managerial or supervisory lawyers. (See explanation under paragraph (a)(2) above.) 2 "Law practice" means the same as law firm and includes sole practices. (See Explanation for subparagraph (a)(1), above.) 3. The scope of the Rule does not include non-legal services not connected to or related to the law practice. The Commission did not adopt this because the State Bar has no authority to regulate ancillary businesses, which may be managed or operated by non-lawyer personnel, where the non-legal businesses are not engaged in the practice of law. While a lawyer engaged in ancillary business activities may be disciplined for some conduct, as defined by case law, <u>not</u> all ancillary business conduct, unconnected with the provision of legal services, is the subject of discipline if- it is authorized- by other law.

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation Comment	<u>Explanation of Changes to the California Rule 2-400</u>
	[3] In order for discriminatory conduct to be ~~actionable~~ <u>sanctionable</u> under this ~~rule~~<u>Rule</u>, it ~~must~~ first <u>must</u> be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this ~~rule~~<u>Rule</u>.	Comment [3] is the same as rule 2-400 Discussion, paragraph 1, with stylistic editorial changes only.
	[4] A complaint of misconduct based on this ~~rule~~<u>Rule</u> may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding ~~is~~ thereafter <u>is</u> appealed.	Comment [4] is the same as rule 2-400 Discussion, paragraph 2, with stylistic editorial changes only.
	~~A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)~~	Rule 2-400 Discussion, paragraph 3, was deleted as unnecessary. The proposed Rule does not otherwise limit the State Bar's prosecutorial authority to investigate and prosecute alleged attorney misconduct coming within the ambit of California Business and Professions Code sections 6106 or 6068 where the conduct may arguably be a violation of this rule. Nor does the promulgation of this Rule pursuant to Business and Professions Code section 6007 limit in any way the California Supreme Court's inherent authority to impose discipline or another disciplinary standard. (Bus. & Prof. C., §6087.)
	[5] <u>This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(g).</u>	Comment [5] is new and provides a cross reference to rule 8.4(g) concerning lawyer's discriminatory conduct while representing clients.

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation
(Commission's Proposed Rule – Clean Version)

(a) For purposes of this Rule:

- (1) “knowingly permit” means a failure to advocate corrective action where the managerial or supervisory lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and
- (2) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice , a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

COMMENT

- [1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.
- [2] This Rule applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (See Rule 5.1. But see also Rule 8.4(g).) “Law practice” in this Rule means “law firm,” as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Business and Professions Code section 6068(a).)
- [3] In order for discriminatory conduct to be sanctionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.
- [4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.
- [5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(g).