# ASSESSMENT OF PERFORMANCE OF THE COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT
## 2009 Year End

Chair: Harry B. Sondheim
Staff Contact: Randall Difuntorum (415) 538-2161

**Summary of Accomplishments**

The Commission for the Revision of the Rules of Professional Conduct ("Commission") is assigned to study and draft comprehensive proposed amendments to the rules. This report presents an assessment of the Commission's 2009 activities and accomplishments.

1. Conducted sixteen days of meetings, including a meeting at the 2009 State Bar Annual Meeting in San Diego and at these meetings, considered 86 rule amendment matters that included: 53 rules approved for submission to the Board for adoption; and 33 rules approved for submission to the Board Committee on Regulation and Admissions for public comment authorization.

2. Transmitted over 32,482 messages via the Commission's E-List, an e-mail distribution group used by the Commission members, liaisons, and other subscribers with a total of 109 subscribers; 23 added in 2009.

3. Held two public hearings: a hearing in San Diego on September 12, 2009 to receive testimony on the Batch 4 rules; and a hearing in San Francisco on November 10, 2009 to receive testimony on the Batch 5 rules.

4. In response to the request for public comment on Batch 4 rules, received 64 written public comments from 21 commentators. In response to the request for public comment on Batch 5 rules, received 143 written public comments from 88 commentators and public hearing testimony from 3 speakers.

5. As part of the 2009 State Bar Annual Ethics Symposium, presented an educational program on selected proposed rules under consideration by the Commission.

**Performance Indicators and Actual Performance**

1. **[*Annual Performance Indicator*] To continue the comprehensive study set forth in the Commission's charge, eleven meeting days are planned for FY 2009. At these meetings, the Commission will conduct the deliberative process component of its study and will develop and revise rule amendment proposals, including addition of new rules and deletion of existing rules. Between meetings, the Commission's members, its staff, and its consultant will perform legal research, information gathering, and other analytical activities to support the rule study process. At each scheduled meeting, the Commission will address approximately 4-6 individual rules.**

[*2009 Actual Performance*] In 2009, the Commission conducted sixteen days of meetings. (A copy of the Commission's 2009 – 2010 meeting schedule is provided as Attachment 1.) Ten of these meetings were conducted in-person at the State Bar's office in Los Angeles or San Francisco. Six of these meetings were conducted by video-conference. To facilitate attendance by members of the public, members of the Board of Governors, local bar representatives and other interested persons or visitors, telephone conference access to the meetings was made available for all of the meetings. In September, the Commission held a meeting at the 2009 State Bar Annual Meeting in San Diego.

At its meetings, the Commission continued its work to carry out the Board's charge to conduct a comprehensive study of the rules of professional conduct and to develop recommendations of proposed amendments. The performance indicator for the Commission's meeting activity anticipated that the Commission would conduct eleven meeting days and would consider four to six individual rules at each of those days. This productivity goal was achieved by the Commission conducting sixteen meeting days and considering an average of 5.4 proposed rules on each of those meeting days. Regarding specific deliverables, the Commission approved the following proposed rules for submission to the Board for adoption.

Batch 1 Proposed Rules:

1.0 Purpose of the Rules [1-100]
1.1 Competence [3-110]
1.4 Communication [3-500, 3-510]
1.5.1 Financial Arrangements Among Lawyers [2-200]
1.8.8 Limiting Liability to Client [3-400]
1.8.10 Sexual Relations With Client [3-120]
2.4 Lawyer as Third-Party Neutral
2.4.1 Lawyer as Temporary Judge [1-710]
3.1 Meritorious Claims [3-200]
3.2 Expediting Litigation (Note: the Commission recommended that Model Rule 3.2 not be adopted.)
5.1 Responsibilities of Partners
5.2 Responsibilities of a Subordinate Lawyer
5.3 Responsibilities Regarding Nonlawyer Assistants
5.3.1 Employment of Disbarred Member [1-311]
5.5 Unauthorized Practice of Law; MJP [1-300]
5.6 Restrictions on Right to Practice [1-500]
7.1 Communications Concerning Availability of Services [1-400]
7.2 Advertising [1-400]
7.3 Direct Contact with Prospective Clients [1-400]
7.4 Fields of Practice and Specialization [1-400]
7.5 Firm Names and Letterheads [1-400]
8.1 Application for Admission to Practice [1-200]
8.1.1 Compliance with Conditions of Discipline [1-110]
8.3 Reporting Misconduct [1-500(B)]
8.4 Misconduct [1-120]

Batch 2 Proposed Rules:

1.8.3 Gifts from Client [4-400]
1.8.5 Payment of Expenses for a Client [4-210]
1.8.11 Relationship with Other Party's Lawyer [3-320] (Note: this rule was combined with Rule 1.7.)
1.8.12 Purchasing Property at a Foreclosure Sale [4-300]
8.4.1 Prohibited Discrimination in Law Practice [2-400]

Batch 3 Proposed Rules:

1.5 Fees for Legal Services [4-200]
1.7 Conflicts of Interests: Current Clients [3-310]
1.8.1 Business Transactions and Adverse Interests [3-300]
1.13 Organization as Client [3-600]
1.16 Terminating Representation [3-700]
3.4 Fairness to Opposing Party/Counsel [5-200(E)][ 5-220][5-310]
3.5 Impartiality of the Tribunal [5-300, 5-320]
3.10 Threatening Charges [5-100]
4.2 Communication with a Represented Person [2-100]
4.3 Dealing with Unrepresented Person
5.4 Professional Independence [1-310][1-320][1-600]

The Commission also approved the following proposed rules for submission to the Board Committee on Regulation and Admissions for public comment authorization.

Batch 4 Proposed Rules:

1.8.6 Third Party Payors [3-310(F)]
1.8.7 Aggregate Settlements [3-310(D)]
1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]
3.3 Candor Toward the Tribunal [5-200]
3.6 Trial Publicity [5-120]
3.7 Lawyer as Witness [5-210]
6.3 Membership in Legal Services Organization [n/a]
6.4 Law Reform Activities Affecting Client Interests [n/a]

Batch 5 Proposed Rules:

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

In response to the request for public comment on Batch 4 rules, the Commission received 64 written public comments from 21 commentators. In response to the request for public comment on Batch 5 rules, the Commission received 143 written public comments from 88 commentators and public hearing testimony from 3 speakers. (Provided as Attachment 2 are logs listing the written public comments received on the Batch 4 and Batch 5 proposed rules, and also copies of the public hearing notices.) In addition, visitors were present at each of the Commission's open session meetings and members of the Board also attended some of the meetings.

**2. [*Annual Performance Indicator*] Periodic reports on the Commission's Work will be provided to an appropriate oversight Board Committee.**

[*2009 Actual Performance*] Throughout 2009, a summary of the Commission's activities was regularly reported as part of the Office of Professional Competence status reports presented at each meeting of the Board Committee on Regulation and Admissions (or the predecessor Board Committee on Regulation, Admissions and Discipline).

In connection with the Board's consideration of Commission agenda items, Commission representatives attended the July, September, and November Board Committee and/or Board meetings. At the July 16, 2009 meeting of the Board Committee on Regulation, Admissions and Discipline, Commission representatives participated in the Board Committee's consideration of the Commission's request to authorize public comment on the Batch 4 proposed rules. (A copy of the Commission's Batch 4 Discussion Draft is provided as Attachment 3.)

At the September 10, 2009 meeting of the Board Committee on Regulation and Admissions, Commission representatives participated in the Board Committee's consideration of the Commission's request to authorize public comment on the Batch 5 proposed rules. (A copy of the Commission's Batch 5 Discussion Draft is provided as Attachment 4.)

At the November 12, 2009 meeting of the Board Committee on Regulation and Admissions, Commission representatives participated in the Board Committee's consideration of the Commission's request to adopt the Batch 1, 2 and 3 proposed rules, subject to a subsequent planned distribution of the entire proposed rules as a Final Report and Recommendation. (A copy of the Batch 1 – 3 new and amended rules adopted by the Board is provided as Attachment 5.)

**3. [*Annual Planned Activity*] The Commission is expected to continue its outreach to liaisons, local bar associations, and other interested persons, through its open session meetings, special presentations, consideration of informal written comments and use of e-mail/website communication tools.**

[*2009 Activity Report*]

VISITORS AT OPEN SESSION MEETINGS:

The Commission had stakeholder visitors in attendance at all of its open session meetings. These visitors included representatives of: California Public Defenders Association (Gary Windom); Office of the United States Attorney for the Central District of California (George Cardona); Business Law Section Executive Committee (Marie Hogan); Doug Hendricks, John Steele and Ronald Ryland (on behalf of Morrison & Foerster and other law firms); as well as Richard Zitrin (former COPRAC Chair). In addition, liaisons who regularly attended Commission open session meetings included: Toby Rothschild (Access to Justice Commission & LACBA); Jonathan Arons (Bar Association of San Francisco); Diane Karpman (Beverly Hills Bar Association); Cydney Batchelor, Allen Blumenthal, Donald Steedman, Russell Weiner (Office of the Chief Trial Counsel); Meg Lodise (Trust & Estates Section Executive Committee); Mary Yen (Office of General Counsel); and Carole Buckner, Diane Jackson McLean, Wendy Patrick, Robert Stalker, Jeffrey Tidus, and Neil Wertlieb (COPRAC).

INFORMAL COMMENT LETTERS & E-MAIL MESSAGES:

The Commission's E-List, an e-mail distribution group used by the Commission members, liaisons, and other subscribers, had the following activity: 298 postings to 109 subscribers for a total of over 32,482 messages. These messages included meeting notices and materials, as

well as information on recent developments in legal ethics, and informal comments and discussions about the Commission's draft rules. Of the 109 total subscribers, 23 were added in 2009. In addition to the e-mail messages, three informal comment letters were received from interested persons.

COMMISSION WEBSITE:

The Commission continued its practice of posting meeting notices, agendas, agenda materials, and draft rules to the Commission's area of the State Bar website. In particular, the Commission's "Draft Rules" page was updated to include: (1) the full text of the thirty-five Batch 1 – 3 rules adopted by the Board at its November meeting; (2) the public comment Discussion Draft for the Batch 4 rules; and (3) the public comment Discussion Draft for the Batch 5 rules. The practice of using the State Bar website for posting agenda materials and rule drafts permits stakeholders to monitor the work of the Commission by viewing and retrieving only those materials that are of interest to the particular individual or group. Staff's experience is that stakeholders often are not interested in the entire universe of issues under consideration by the Commission. Instead, they value the option to selectively monitor the Commission's work. This practice also saves copying and postage costs that otherwise would be incurred in the distribution of complete hard-copy materials to interested persons.

In addition, to facilitate the public comment process on the Batch 4 and 5 proposed rules, the Commission utilized its web-based, online form for completing and submitting written comments. The Commission also posted online the public hearing notices and registration forms for the September 12, 2009 and November 10, 2009 public hearings.

EDUCATIONAL PRESENTATIONS:

As part of the 2009 State Bar Annual Ethics Symposium held on May 2, 2009 at the University of San Diego, the Commission presented an educational program on several key rule amendment issues under consideration including: fees for legal services; confidentiality; imputation of conflicts of interest; candor to a tribunal; and special responsibilities of prosecutors. The program evaluation forms submitted by attendees gave the Commission's panel good marks in the survey categories. (A summary of the evaluation forms is provided as Attachment 6.) In addition, individual members of the Commission participated in various legal education activities, such as the Practising Law Institute's 2009 MCLE Legal Ethics Marathon and a presentation to the Criminal Law Committee of the Los Angeles County Bar Association, that addressed many of the Commission's proposed rule amendments.

OTHER OUTREACH ACTIVITIES/PUBLICITY:

The following articles reported on the Commission's work: (1) "California Bar Approves First Set of Updates to Professional Conduct Rules," by Joan C. Rogers, *ABA BNA* Volume 25, Number 24 (November 25, 2009); (2) "State Bar Set to Vote on Advance Conflict Waivers," *Callaw* (November 12, 2009 at www.law.com); and (3) "Proposed Rules of Conduct to Get Fine-tuning," Callaw (November 17, 2009 at www.law.com).

In consultation with the State Bar's Executive Director's Office and the State Bar Office of Governmental Affairs, letters were prepared and sent to the California Governor and to the respective chairs of the Assembly and Senate Judiciary Committees to provide them with an update on the work of the State Bar to revise the rules, specifically the distribution of the Batch 4 and 5 proposed rules for public comment. (Copies of these letters are provided as Attachment 7.)

**4. [*Annual Planned Activity*] The Commission will undertake other Board projects as needed and as assigned.**

[*2009 Activity Report*] As requested, the Commission assisted the Board in drafting a new California Rule 1-650 (Limited Legal Services Programs) based on Model Rule 6.5. The rule was considered by the Board on an expedited basis to respond to the growing need legal services, in part, due to the residential foreclosure crisis. The rule was adopted by the Board on May 15, 2009 and made operative by the Supreme Court of California on August 28, 2009.

ATTACHMENT 1

**COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT**

**SCHEDULE OF MEETINGS**
**2009**

| **MEETING DATES** |
|---|
| **January 16, 2009**<br>Los Angeles State Bar Office |
| **February 20, 2009**<br>Los Angeles State Bar Office |
| **March 27, 2009**<br>San Francisco State Bar Office |
| **May 8-9, 2009**<br>Los Angeles State Bar Office |
| **July 24-25, 2009**<br>San Francisco State Bar Office |
| **August 28-29, 2009**<br>San Francisco State Bar Office |
| **September 11, 2009**<br>State Bar Annual Meeting - San Diego |
| **October 16-17, 2009**<br>San Francisco State Bar Office |
| **November 6-7, 2009**<br>Los Angeles State Bar Office |
| **December 11-12, 2009**<br>San Francisco State Bar Office |

<u>Board of Governors Meeting Dates</u>
January 8-10, 2009 (Palm Springs-Planning Meeting)
March 5-6, 2009 (SF)
May 14-15, 2009 (SF)
July 16-17, 2009 (LA)
September 10-12, 2009 (San Diego-Annual Meeting)
Nov. 12-13, 2009 (LA)

<u>COPRAC Meeting Dates</u>
January 9, 2009 (SF)
February 27, 2009 (LA)
April 3, 2009 (SF)
May 1, 2009 (So. Cal.)
June 5, 2009 (SF)
July 10, 2009 (LA)
September 10, 2009 (San Diego)
November 6 & 7, 2009 (TBD)

<u>Section Education Institute & California Solo and Small Firm Summit (Berkeley)</u>
January 16 - 18, 2009

<u>ABA Midyear Meeting (Boston)</u>
February 11 - 17, 2009

<u>Ethics Symposium (So. Cal.)</u>
May 2, 2009

<u>ABA National Conference on Professional Responsibility (Chicago, IL)</u>
May 27 - 30, 2009

<u>ABA Annual Meeting (Chicago)</u>
July 30 - August 4, 2009

<u>State Bar Annual Meeting (San Diego)</u>
September 10 - 13, 2009

# ATTACHMENT 2

## Public Comments Received in Response to Fourth Group of Proposed Amendments Circulated for Comment in July 2009 (Batch D)

| NO. | DATE | SIGNATORY | ORGANIZATION | RULES(S) | ATTACHMENTS |
|---|---|---|---|---|---|
| D-2009-262 | August 13, 2009 | Prof. William Wesley Patton | Whittier Law School | 1.86, 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.3, 6.4, Batch 4 Discussion Draft (all rules) | Yes |
| D-2009-263 | August 26, 2009 | James A. Bach | | 1.86, 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.3, 6.4, Batch 4 Discussion Draft (all rules) | Yes |
| D-2009-264 | September 10, 2009 | Suzanne Mellard | COPRAC | 1.8.6 | No |
| D-2009-265 | September 10, 2009 | Suzanne Mellard | COPRAC | 1.8.7 | No |
| D-2009-266 | September 10, 2009 | Suzanne Mellard | COPRAC | 1.15 | No |
| D-2009-267 | September 10, 2009 | Suzanne Mellard | COPRAC | 3.3 | No |
| D-2009-268 | September 10, 2009 | Suzanne Mellard | COPRAC | 3.6 | No |
| D-2009-269 | September 10, 2009 | Suzanne Mellard | COPRAC | 6.3 | No |
| D-2009-271 | September 26, 2009 | Gerald H. Genard | | 1.86, 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.3, 6.4, Batch 4 Discussion Draft (all rules) | No |
| D-2009-272 | September 29, 2009 | Michael J. Medina | | 1.15 | No |
| D-2009-273 | October 13, 2009 | Robert Scofield | | 3.3 | Yes |
| D-2009-274 | October 20, 2009 | Paul W. Smith | | 1.15 | Yes |
| D-2009-275 | October 20, 2009 | Russell G. Weiner | State Bar Office of the Chief Trial Counsel Enforcement | 1.86, 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.4, | No |
| D-2009-276 | October 21, 2009 | Various | San Diego County Bar Association Legal Ethics Committee | 1.86, 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.3, 6.4, Batch 4 Discussion Draft (all rules) | No |
| D-2009-277 | October 23, 2009 | Barton S. Sheela | California Public Defenders Association | 1.86, 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.3, 6.4, Batch 4 Discussion Draft (all rules) | Yes |
| D-2009-278 | October 22, 2009 | Hon. Steven K. Austin, Co-Chair | California Commission on Access to Justice | 1.8.6, 1.8.7, 6.3, 6.4 | No |
| D-2009-279 | October 20, 2009 | Michael P. Judge, Public Defender | Los Angeles County Public Defender | 3.3 | No |
| D-2009-280 | October 22, 2009 | Julia R. Wilson | Legal Aid Association of California | 1.8.6, 1.8.7, 6.3, 6.4 | No |
| D-2009-281 | October 22, 2009 | Robert K. Sall | The Sall Law Firm | 1.8.6 | No |

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|---|---|---|---|---|---|
| D-2009-282 | October 23, 2009 | Suzanne V. Chamberlain | | 1.8.7 | Yes |
| D-2009-283 | October 23, 2009 | Trudy Levindofske | Orange County Bar Association | 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.3, 6.4 | Yes |
| D-2009-284 | October 23, 2009 | Jeffrey Jaech | State Bar Trusts & Estates Section Executive Committee | 6.4 | Yes |
| D-2009-285 | October 23, 2009 | Ted W. Cassman | California Attorneys for Criminal Justice | 1.8.6, 1.8.7, 6.4 | Yes |
| D-2009-286 | October 23, 2009 | James I. Ham, Chair | Los Angeles County Bar Association, Professional Responsibility and Ethics Committee | 1.8.7, 1.15, 3.3, 3.6, 6.7 | Yes |
| D-2009-287 a-h | November 2, 2009 | Jill Dalesandro | Santa Clara County Bar Association | 1.8.6, 1.8.7, 1.15, 3.3, 3.6, 3.7, 6.3, 6.4 | Yes |
| D-2009-288 | November 4, 2009 | Paul Pascuzzi | Business Law Section | 6.4 | |

# ATTACHMENT 2

## Public Comments Received in Response to Fifth Group of Proposed Amendments Circulated for Comment in September 2009 (Batch E)

| NO. | DATE RECEIVED | SIGNATORY | ORGANIZATION | RULES(S) | ATTACHMENTS |
|---|---|---|---|---|---|
| E-2009-289 | October 20, 2009 | Gregory Totten | County of Ventura/District Attorney | 3.8 | No |
| E-2009-290 | October 22, 2009 | Robert K. Sall | The Sall Firm | 1.10 | No |
| E-2009-291 a-b | November 3, 2009 | Janice Fukai<br>Michael Judge | Los Angeles Public Defenders | 1.2, 1.6 | No |
| E-2009-292 a-g | November 6, 2009 | Trudy Levindofske | Orange County Bar Association | 1.2, 1.6, 1.8.2, 1.8.13, 1.9, 1.10, 1.14 | No |
| E-2009-293 a-i | November 4, 2009 | Russell G. Weiner | State Bar Office of the Chief Trial Counsel | 1.2, 1.6, 1.8.2, 1.9, 1.10, 1.14, 2.1, 3.8, 8.5 | No |
| E-2009-294 | November 3, 2009 | Patricia Uro-May | Attorney | 1.14 | No |
| E-2009-295 | November 10, 2009 | John Foster | Attorney | 1.14 | No |
| E-2009-296 | November 10, 2009 | Scott Ross | Attorney | 1.14 | No |
| E-2009-297 | November 10, 2009 | Allan Hikoyeda | Attorney | 1.14 | No |
| E-2009-298 | November 10, 2009 | Philip Lindsley | Attorney | 1.14 | Yes |
| E-2009-299 | November 10, 2009 | Robert Temmerman, Jr. | Attorney | 1.14 | No |
| E-2009-300 | November 10, 2009 | Paul Hoffman | Attorney | 1.14 | Yes |
| E-2009-301 | November 9, 2009 | Bob Lee | County of Santa Cruz/District Attorney | 3.8 | No |
| E-2009-302 | November 9, 2009 | Kent C. Thompson | Attorney | 1.14 | No |
| E-2009-303 | November 9, 2009 | Michelle E. Anderson | Attorney | 1.14 | No |
| E-2009-304 | November 9, 2009 | Diem Thinh Pham | Attorney | 1.14 | No |
| E-2009-305 | November 9, 2009 | Victoria Tran Sood | Attorney | 1.14 | Yes |
| E-2009-306 | November 9, 2009 | Julianne Sylva | Attorney | 3.8 | Yes |
| E-2009-307 | November 10, 2009 | Laurie C. Rigg | Attorney | 1.14 | No |
| E-2009-308 a-b | November 10, 2009 | Various U.S. Attorneys | Department of Justice | 3.8, 8.5 | Yes |
| E-2009-309 | November 11, 2009 | David W. Paulson | County of Solano/District Attorney | 3.8 | No |
| E-2009-310 a-i | November 9, 2009 | Carole J. Buckner/ Shawn Harpen | COPRAC | 1.2, 1.6, 1.8.2, 1.9, 1.10, 1.14, 2.1, 8.5 | No |
| E-2009-311 | November 13, 2009 | Robert K. Sall | The Sall Law Firm | 1.6 | No |
| E-2009-312 | November 11, 2009 | Roger Gambatese | Attorney | 1.14 | Yes |
| E-2009-313 | November 12, 2009 | Peter S. Stern | Attorney | 1.14 | Yes |
| E-2009-314 | November 12, 2009 | Jean C. McEvoy | Attorney | 1.14 | No |
| E-2009-315 | November 12, 2009 | John H. Lejnieks | Attorney | 1.14 | No |

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|---|---|---|---|---|---|
| E-2009-316 | November 12, 2009 | Ronald Mullin | Attorney | 1.14 | No |
| E-2009-317 | November 12, 2009 | Rebekah Jackson Sapirstein | Attorney | 1.14 | No |
| E-2009-318 | November 12, 2009 | Linda C. Roodhouse | Vice Chair, Trusts and Estates Sections | 1.14 | No |
| E-2009-319 | November 12, 2009 | John Grier | Attorney | 1.14 | No |
| E-2009-320 | November 12, 2009 | Edward J. Watson | Attorney | 1.14 | Yes |
| E-2009-321 | November 12, 2009 | Herbert Lee Chavers | Attorney | 1.14 | No |
| E-2009-322 | November 12, 2009 | Gary Jander | Attorney | 1.14 | No |
| E-2009-323 | November 12, 2009 | James G. Boyd | Attorney | 1.14 | No |
| E-2009-324 | November 12, 2009 | R. Frederick Caspersen | Attorney | 1.14 | No |
| E-2009-325 | November 12, 2009 | Elizabeth Miller Angevine | Attorney | 1.14 | Yes |
| E-2009-326 | November 13, 2009 | Richard W. S. Pershing | Attorney | 1.14 | No |
| E-2009-327 | November 13, 2009 | Joan A. LeBlanc | Attorney | 1.14 | No |
| E-2009-328 | November 13, 2009 | Joseph a. Lumsdaine | Attorney | 1.14 | No |
| E-2009-329 | November 13, 2009 | Lon a. Hunt | Attorney | 1.14 | No |
| E-2009-330 | November 13, 2009 | Steven Penrose | Attorney | 1.14 | No |
| E-2009-331 | November 13, 2009 | Beverly M. Hoey | Attorney | 1.14 | Yes |
| E-2009-332 | November 13, 2009 | Dara Goldsmith | Attorney | 1.14 | No |
| E-2009-333 | November 13, 2009 | Shirleymae Davis | Attorney | 1.14 | No |
| E-2009-334 | November 13, 2009 | Connie Yi | Attorney | 1.14 | No |
| E-2009-335 | November 13, 2009 | Robert D. Prior | Attorney | 1.14 | No |
| E-2009-336 | November 13, 2009 | William J. Hoehler | Attorney | 1.14 | No |
| E-2009-337 | November 13, 2009 | Kathleen Courts | Attorney | 1.14 | Yes |
| E-2009-338 | November 13, 2009 | Gregory Wilcox | Attorney | 1.14 | Yes |
| E-2009-339 | November 13, 2009 | Maureen C. McGowan | Attorney | 1.14 | No |
| E-2009-340 | November 13, 2009 | David G. Smedley | Attorney | 1.14 | No |
| E-2009-341 | November 13, 2009 | Thomas A. Craven | Attorney | 1.14 | Yes |
| E-2009-342 | November 13, 2009 | Sondra J. Alllphin | Attorney | 1.14 | No |
| E-2009-343 | November 13, 2009 | Linda Alden Swanson | Attorney | 1.14 | Yes |
| E-2009-344 | November 13, 2009 | Cristian R. Amieta | Attorney | 1.14 | No |
| E-2009-345 | November 13, 2009 | Stephen A. Bond | Attorney | 1.14 | No |
| E-2009-346 | November 13, 2009 | Scott A. Thompson | Attorney | 1.14 | No |
| E-2009-347 | November 13, 2009 | Janis A. Carney | Attorney | 1.14 | No |
| E-2009-348 | November 13, 2009 | Kenneth Fishbach | Attorney | 1.14 | No |
| E-2009-349 | November 13, 2009 | Richard V. Day | Attorney | 1.14 | No |

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|---|---|---|---|---|---|
| E-2009-350 ab | November 13, 2009 | Barton Sheela | California Public Defenders Association | 1.9 | Yes |
| E-2009-351 a-k | November 11, 2009 | Jerrilyn T. Malana | San Diego County Bar Association | 1.2, 1.6, 1.8.2, 1.8.13, 1.9, 1.10, 1.12, 1.14, 2.1, 3.8, 8.5 | Yes |
| E-2009-352 | November 4, 2009 | Ann Marshall Robbeloth | Attorney | 1.14 | No |
| E-2009-353 | November 13, 2009 | Gary Lieberstein | California District Attorneys Association | 3.8 | No |
| E-2009-354 | November 13, 2009 | Rod Pacheco | County of Riverside/District Attorney | 3.8 | No |
| E-2009-355 | November 18, 2009 | Stephen E. Webber | Mental Health Attorney | 1.14 | Yes |
| E-2009-356 | November 16, 2009 | Linda c. Kramer | Attorney | 1.14 | No |
| E-2009-357 | November 16, 2009 | John T. Rogers, Jr. | Attorney | 1.14 | No |
| E-2009-358 a-k | November 16, 2009 | Jil Dalesandro | Santa Clara County Bar Association | 1.2, 1.6, 1.8.2, 1.8.13, 1.9, 1.10, 1.12, 1.14, 2.1, 3.8, 8.5 | Yes |
| E-2009-359 | November 16, 2009 | Doreen Erenea | Attorney | 1.14 | No |
| E-2009-360 | November 16, 2009 | Caroline K. Hinshaw | Attorney | 1.14 | No |
| E-2009-361 | November 16, 2009 | Jeffrey Jeach | Attorney | 1.6 | No |
| E-2009-362 | November 16, 2009 | Jack Anderson | Attorney | 1.14 | No |
| E-2009-363 | November 16, 2009 | J. Frederick Clarke, Jr. | Attorney | 1.14 | No |
| E-2009-364 | November 16, 2009 | Shelly Conley | Attorney | 1.14 | No |
| E-2009-365 | November 13, 2009 | Dara L. Schur | Disability Rights California | 1.14 | No |
| E-2009-366 | November 16, 2009 | Ian M. Sammis | Attorney | 1.14 | No |
| E-2009-367 | November 16, 2009 | Edward Daniels | Attorney | 1.14 | No |
| E-2009-368 a-c | November 16, 2009 | Robert Sanger | California Attorneys for Criminal Justice | 1.2, 1.6, 1.8.2 | No |
| E-2009-369 | November 12, 2009 | Peter Pettler | Attorney | 1.14 | No |
| E-2009-370 a-d | November 12, 2009 | James I. Ham | Los Angeles County Bar Association | 1.2, 1.6, 1.8.2, 1.9 | No |
| E-2009-371 | December 4, 2009 | James R. Madison | State Bar/Committee on ADR | 1.12 | No |
| E-2009-372 | November 16, 2009 | John K. Spillane | Los Angeles County/District Attorney | 3.8 | No |
| E-2009-373 | November 30, 2009 | Phillip J. Cline | Office of DA/County of Tulare | 3.8 | No |
| E-2009-374 | November 30, 2009 | Ronald L. Calhoun | Office of DA/County of Kings | 3.8 | No |
| E-2009-375 | December 2, 2009 | Tony Rackauckas | Orange County DA | 3.8 | Yes |

ATTACHMENT 2

# STATE BAR OF CALIFORNIA

# CALIFORNIA RULES OF PROFESSIONAL CONDUCT

## NOTICE OF PUBLIC HEARING

Saturday, September 12, 2009
State Bar Annual Meeting
Manchester Grand Hyatt, San Diego
Gibbons Room
9:30 am - 12:30 pm

The State Bar of California's Commission for the Revision of the Rules of Professional Conduct will hold a public hearing to receive testimony on eight (8) proposed new or amended Rules of Professional Conduct of the State Bar of California ("California Rules") currently circulating for a public comment period ending on October 23, 2009. The California Rules are rules approved by the Supreme Court, the violation of which will subject an attorney to discipline (see Bus. & Prof. Code, § 6076, § 6077). The Commission has been assigned to evaluate the existing California Rules, in light of developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989.

This hearing is the fourth of several planned over the course of this multi-year rule revision project. It will be held during the State Bar's Annual Meeting at the San Diego Grand Hyatt Hotel – Gibbons Room on Saturday, September 12th, from 9:30 am – 12:30 pm. Please complete and submit the attached registration form if you wish to testify. Speakers are encouraged to submit written comments in advance of the hearing, and no later than the hearing date. The time to testify may be limited based on the number of requests received. All efforts will be made to accommodate all requests to testify. Please be prepared to take questions from representatives of the Commission. Please note that the hearing will run until all speakers have had an opportunity to speak, or until 12:30 pm, whichever occurs first. Generally the order of speakers will be based upon the order in which registrations are received.

Those who intend to testify and/or present written materials should contact: Audrey Hollins, (415) 538-2167, 180 Howard Street, San Francisco, CA 94105, audrey.hollins@calbar.ca.gov, no later than Friday, September 4, 2009. A copy of the Discussion Draft providing the rule proposals is available from the State Bar's website at www.calbar.ca.gov (from the Public Comment link).

Comments on the following 8 rules or issues related to these rules are the focus of this fourth hearing. Rule amendment issues not raised by the 8 identified rules may be the subject of future hearings.

| | |
|---|---|
| Rule 1.8.6 | Third Party Payors [3-310(F)] |
| Rule 1.8.7 | Aggregate Settlements [3-310(D)] |
| Rule 1.15 | Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100] |
| Rule 3.3 | Candor Toward the Tribunal [5-200] |
| Rule 3.6 | Trial Publicity [5-120] |
| Rule 3.7 | Lawyer as Witness [5-210] |
| Rule 6.3 | Membership in Legal Services Organization [n/a] |
| Rule 6.4 | Law Reform Activities Affecting Client Interests [n/a] |

ATTACHMENT 2

# STATE BAR OF CALIFORNIA

# CALIFORNIA RULES OF PROFESSIONAL CONDUCT

## NOTICE OF PUBLIC HEARING

Tuesday, November 10, 2009
State Bar of California – San Francisco Office
180 Howard Street, San Francisco, CA 94105
10:30 am - 1:30 pm

The State Bar of California's Commission for the Revision of the Rules of Professional Conduct will hold a public hearing to receive testimony on eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California ("California Rules") which are currently circulating for a public comment and ending on November 13, 2009. The California Rules are rules approved by the Supreme Court, the violation of which will subject an attorney to discipline (see Bus. & Prof. Code, § 6076, § 6077). The Commission has been assigned to evaluate the existing California Rules, in light of developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989.

This hearing is the fifth of several planned over the course of this multi-year rule revision project. It will be held at the State Bar of California's San Francisco Office on Tuesday, November 10th, from 10:30 am – 1:30 pm. Please complete and submit the attached registration form if you wish to testify. Speakers are encouraged to submit written comments in advance of the hearing, and no later than the hearing date. The time to testify may be limited based on the number of requests received. All efforts will be made to accommodate all requests to testify. Please be prepared to take questions from representatives of the Commission. Please note that the hearing will run until all speakers have had an opportunity to speak, or until 1:30 pm, whichever occurs first. Generally the order of speakers will be based upon the order in which registrations are received.

Those who plan on testifying and/or presenting written materials should contact: Audrey Hollins, (415) 538-2167, 180 Howard Street, San Francisco, CA 94105, audrey.hollins@calbar.ca.gov, no later than Friday, November 6, 2009. A copy of the Discussion Draft providing the rule proposals is available from the State Bar's website at www.calbar.ca.gov (from the Public Comment link).

Comments on the following 11 rules or issues related to these rules are the focus of this fifth hearing. Rule amendment issues not raised by the 11 identified rules may be the subject of future hearings, or past public hearings previously held.

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

ATTACHMENT 3

DISCUSSION DRAFT

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

Commission for the Revision of the
Rules of Professional Conduct

State Bar of California

July, 2009

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

ATTACHMENT 3

**HOW TO COMMENT:**

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

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

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

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

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

*/ The url for the online comment form is: **http://fs16.formsite.com/SB_RRC/Batch4/index.html**

ATTACHMENT 3

## SUMMARY OF PUBLIC COMMENT PROPOSAL

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

**SUBJECT:** Eight proposed new or amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

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

In 2006, the Commission completed work on a group of twenty-seven proposed rules and those rules were distributed for a public comment period, which ended on October 16, 2006. In 2007, the Commission completed work on a group of five proposed rules and those rules were distributed for a public comment period, which ended on October 26, 2007. In 2008, the Commission completed work on a group of thirteen proposed rules and those rules were distributed for a public comment period, which ended on June 6, 2008. Public hearings were conducted in connection with each of these public comment distributions.

The Commission has now completed work on eight more proposed rules that are the subject of this present request for public comment. As was the case with the Commission's prior proposals, a public hearing is planned and this hearing is scheduled to be held during the 2009 State Bar Annual Meeting in San Diego on September 12, 2009 from 9:30 am to 12:30 pm (Manchester Grand Hyatt in room Annie A).

**PROPOSAL:** The eight proposed amended rules are listed below by proposed new rule number. Where applicable, the rule number of the comparable current California rule is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.



A clean version of each proposed rule is provided together with an American Bar Association Model Rule comparison table. The comparison table format has three columns. The first column presents the clean version of an American Bar Association Model Rule counterpart, if any. The second column presents a redline draft of the proposed rule that shows changes to the Model Rule counterpart. The third column presents the Rule Revision Commission's explanation of each deviation from the Model Rule language, if any. In addition, at the end of each table is a summary of selected state variations. This format is intended to simplify the consideration of any changes to the Model Rules and to make plain the Rules Revision Commission's rationale for such changes.

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

**NOTE:** *Comments on the above proposals may be sent in writing to our office or submitted online:*

**http://fs16.formsite.com/SB_RRC/Batch4/index.html**

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

**COMMENT DEADLINE:** 5 p.m., October 23, 2009

**Rule 1.8.6 Payments Not From Client**

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

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

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

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

**Comment**

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

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

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under this Rule when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [37].

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

**Rule 1.8.7 Aggregate Settlements**

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

**Comment**

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) funds reasonably sufficient to pay bank charges;

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

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

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

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

(g) Duties when lawyer's entitlement to funds become fixed or the lawyer's entitlement is disputed. In the case of funds held in a trust account that belong in part to a client or other person and in part to a lawyer, the lawyer shall withdraw the portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:

(1) the client or other person may still dispute that the lawyer has earned the funds;

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

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

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

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

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

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

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

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

(2) identify and label securities and properties of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, and notify the client or other person of the location of the property;

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

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

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

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

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

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

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

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

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

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

**Comment**

*Definitions*

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

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

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

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

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

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

*Application of Rule*

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

*Paragraph (a) – Application to true retainer fees*

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

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

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

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

*Paragraph (e) – Duty to hold funds inviolate*

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

*Paragraphs (g) – (i) – Disputed fees*

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

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

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

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

[15] A lawyer who receives client funds in which 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 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

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

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

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

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

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

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

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

**Comment**

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

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

*Representations by a Lawyer*

[3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. (Bryan v. Bank of America (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].) There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. (Di Sabatino v. State Bar (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].) The obligation prescribed in Rule [1.2.1] not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule [1.2.1], see the Comment to that Rule. See also the Comment to Rule 8.4(b).

*Legal Argument*

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

*Offering Evidence*

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

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.

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

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

*Remedial Measures*

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

[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2.1, 1.4, 1.16 and 8.4; Business and Professions Code Sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an

organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).

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

*Preserving Integrity of Adjudicative Process*

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

*Duration of Obligation*

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

*Withdrawal*

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

**Rule 3.6 Trial Publicity**

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), and to the extent permitted by [Rule 1.6], a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

**Comment**

[1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[2] Paragraph (a) applies to statements made by or on behalf of the lawyer.

[3] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an

exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[4] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or [Rule 3.3]; and (3) the timing of the statement.

[5] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[6] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.

[7] See Rule [3.8(f)] for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

**Rule 3.7 Lawyer as a Witness**

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

(1) the testimony relates to an uncontested matter;

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

(3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by [Rule 1.7] or [Rule 1.9].

**Comment**

[1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by [Rule 1.7] or [Rule 1.9] from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by [Rule 1.10] unless the client gives informed consent under the conditions stated in [Rule 1.7].

[2] This Rule is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body.

**Rule 6.3 Membership in Legal Services Organization**

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

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 or Business and Professions Code § 6068(e)(1); or

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

**Comment**

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

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

**Rule 6.4 Law Reform Activities Affecting Client Interests**

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

**Comment**

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

ATTACHMENT 4

# DISCUSSION DRAFT

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

Commission for the Revision of the
Rules of Professional Conduct

State Bar of California

September, 2009

* This version of the Discussion Draft provides only the clean text of the proposed rules. More information on the proposed rules is available at the State Bar website (www.calbar.ca.gov). Under the heading "**Ethics**," which is located on the right navigation bar, there is a link to "**Proposed Rules of Professional Conduct**" which takes you to the State Bar's public comment information page.

ATTACHMENT 4

**HOW TO COMMENT:**

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

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

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

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

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

**FORMAT OF THE DISCUSSION DRAFT:**

The version of the Discussion Draft that you have is an abbreviated version which only provides a clean version of each proposed rule. A more complete version is available and presents each proposed rule in an American Bar Association Model Rule comparison table. The comparison table format has three columns. The first column presents the clean version of an American Bar Association Model Rule counterpart, if any. The second column presents a redline draft of the proposed rule that shows changes to the Model Rule counterpart. The third column presents

*/ The url for the online comment form is: **http://fs16.formsite.com/SB_RRC/Batch5/index.html**

the Rule Revision Commission's explanation of each deviation from the Model Rule language, if any. In addition, at the end of each table is a summary of selected state variations.

The comparison table format is intended to simplify the consideration of any changes to the Model Rules and to make plain the Rules Revision Commission's rationale for such changes. The electronic version of the complete Discussion Draft also includes the additional resource of word processing files for each of the proposed rules. If your comment will include recommended modifications of any of the proposed rules, then submitting a redraft of a rule will help the Rules Revision Commission understand your desired changes. To access an online version of the complete Discussion Draft, visit the State Bar's website at http://www.calbar.ca.gov. Under the heading "**Ethics**," which is located on the right navigation bar, there is a link to "**Proposed Rules of Professional Conduct**" which should bring you to the Public Comment page. To request a CD-ROM disk that includes the complete Discussion Draft and word processing files for the proposed rules, or to request a hard copy of the complete Discussion Draft, please call Audrey Hollins at (415) 538-2167.

ATTACHMENT 4

# SUMMARY OF PUBLIC COMMENT PROPOSAL

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

**SUBJECT:** Eleven proposed new or amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

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

In 2006, the Commission completed work on a group of twenty-seven proposed rules and those rules were distributed for a public comment period, which ended on October 16, 2006. In 2007, the Commission completed work on a group of five proposed rules and those rules were distributed for a public comment period, which ended on October 26, 2007. In 2008, the Commission completed work on a group of thirteen proposed rules and those rules were distributed for a public comment period, which ended on June 6, 2008. In July of 2009, the Commission distributed its fourth group of proposed rules and the public comment period on those proposed rules is scheduled to end on October 23, 2009. Public hearings have been conducted in connection with each of these public comment distributions.

The Commission has now completed work on eleven more proposed rules that are the subject of this present request for public comment.

**PROPOSAL:** The eleven proposed amended rules are listed below by proposed new rule number. Where applicable, the rule number of the comparable current California rule is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.



Each proposed rule is presented in a comparison table format preceded by a summary cover sheet and a general introduction. The comparison table format has three columns. The first column presents the clean version of an American Bar Association (ABA) Model Rule counterpart, if any. The second column presents a redline draft of the Commission's proposal that shows changes to the ABA Model Rule counterpart. The third column presents the Commission's explanation of each deviation from the ABA Model Rule language. In addition, at the end of each table is the clean version of the Commission's proposed rule and an excerpt that summarizes selected state variations. This format is intended to simplify the consideration of any changes to the ABA Model Rules and to make plain the Commission's rationale for such changes. In particular, the Commission asks that attention be directed at two specific requests for input raised by proposed Rules 1.8.2 and 1.10. Refer to the respective materials for those rules for the specific requests.

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

**NOTE:** *Comments on the above proposals may be sent in writing to the address below or submitted online:*

- **Public Comment Form**

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

**COMMENT DEADLINE:** 5 p.m., November 13, 2009

ATTACHMENT 4

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

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

### Comment

### Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156]. Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule [1.4(c)] for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.

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

[3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

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

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

**Agreements Limiting Scope of Representation**

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

**Criminal, Fraudulent and Prohibited Transactions**

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] The prohibition in paragraph (d)(1) applies whether or not the client’s conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer’s response is limited to the lawyer’s right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

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

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See [Rule 1.4(a)(6)].

## Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information relating to the representation" in this Rule.

(b) A lawyer may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the lawyer reasonably believes the disclosure is necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

(2) to secure legal advice about the lawyer's compliance with the lawyer's professional obligations;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;

(4) to comply with a court order; or

(5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).

(c) *Further obligations under paragraph (b)(1).* Before revealing confidential information relating to the representation in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:

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

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal confidential information relating to the representation as provided in paragraph (b)(1).

(d) In revealing confidential information relating to the representation as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or

defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the member at the time of the disclosure.

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

**Comment**

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

*Policies Furthered by the Duty of Confidentiality*

[2] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal confidential information protected by Business & Professions Code section 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

*Confidential Information Relating to the Representation.*

[3] As used in this Rule, "confidential information relating to the representation" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be

embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality is broader than lawyer-client privilege. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].).

*Scope of the Lawyer-Client Privilege*

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

*Scope of the Duty of Confidentiality*

[5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's confidential information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Confidential information relating to the representation is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. (See Rule 1.18.) Thus, a lawyer may not reveal confidential information relating to the representation except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

*Relationship of Confidentiality to Lawyer Work Product*

[6] Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. However, "confidential information relating to the representation" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

[7] Paragraph (a) prohibits a lawyer from revealing confidential information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

*Authorized Disclosure*

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

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

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

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

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

*No Duty to Reveal Confidential Information*

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

all the facts and circumstances, such as those discussed in comment [12] of this Rule.

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

[12] Disclosure permitted under paragraph (b)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing confidential information as permitted under paragraph (b)(1), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the lawyer believes the lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(6) the nature and extent of confidential information that must be disclosed to prevent the criminal act or threatened harm.

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

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

[13] Paragraph (c)(1) provides that, before a lawyer may reveal confidential information, the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal

act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action – such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused – the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b)(1) does not permit the lawyer to reveal confidential information, the lawyer nevertheless is permitted to counsel the client as to why it might be in the client's best interest to consent to the lawyer's disclosure of that information.

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

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4; Business and Professions Code, section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal confidential information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal confidential information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See comment [16].) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the lawyer's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (b)(1);

(6) the lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

(7) the lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

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

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

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

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

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

[17] When a lawyer has revealed confidential information under paragraph (b)(1), in all but extraordinary cases the relationship between lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation (see Rule 1.16 [3-700]), unless the client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. [See Rule 1.16].

*Other Consequences of the Lawyer's Disclosure*

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

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

[19] If a legal claim by a client or the client's representative alleges a breach by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving representation of the client, paragraph (b)(3) permits the lawyer to respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.

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

[21] A lawyer may be ordered to reveal confidential information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or

that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the confidential information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

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

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

[25] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

*Former Client*

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

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

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

### Comment

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

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

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

**Comment**

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

## Rule 1.9 Duties To Former Clients

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

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

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

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

unless the former client gives informed written consent.

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

(1) use information relating to the representation to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or

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

## Comment

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

[2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client

would result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has prosecuted an accused person could not represent the accused in a subsequent civil action against the government concerning the same matter.

[3] Paragraph (a) also addresses the second of the two duties owed to a former client. It applies when there is a substantial risk that information protected by Rule 1.6 that was obtained in the prior representation would be used or disclosed in a subsequent representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person ordinarily may not later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations that existed when the lawyer represented the client; however, paragraph (a) would not apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the zoning and eviction matters.

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

[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454) This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance

of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See *In re Complex Asbestos Litigation*, (1991) 232 Cal.App.3d at p. 592; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes might not be necessary because the lawyer can provide evidence concerning the information actually received in the prior representation.

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

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

*Lawyers Moving Between Firms*

[8] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general

access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

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

*Client Consent*

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

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

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of having a material adverse effect on the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same as or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.

(d) The imputation of a conflict of interest to lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

### Comment

*Definition of "Firm"*

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

*Principles of Imputed Conflicts of Interest*

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

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not have a material adverse effect on the representation by others in the firm, the firm should not be prohibited from further representation. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and the fact of that lawyer's ownership would have a material adverse effect on the representation of the firm's client by others in the firm because of loyalty to that lawyer, the personal prohibition of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules [1.0.1(k)] and 5.3. See also Comment [9].

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7, [Comments [27] – [28],] and that each affected client or former client has given informed written consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [33]. For a definition of informed consent, see Rule [1.0.1(e)].

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having

served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually prohibited lawyer.

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

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

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

(a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating, personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party, or with a lawyer or a law firm for a party in a matter in which the clerk is participating personally and substantially, but only with the approval of the judge or other adjudicative officer.

(c) Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.

(d) If a lawyer is disqualified by paragraph (a) because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal, no lawyer in a law firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

### Comment

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

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

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed written consent. [See Rule 1.0(e).] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm.

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

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

## Rule 1.14 Client with Diminished Capacity

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

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

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

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

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

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

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

## Comment

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

[2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal client-lawyer relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate his or her reasons for a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation.

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

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;

(3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;

(4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

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

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

[6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client's interests. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of minimizing intrusion into the client's decisionmaking autonomy, maximizing client capacities and respecting the client's family and social connections.

[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.

[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another party where the lawyer would not otherwise be permitted to do so under Rule 1.7 [3-310].

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

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

## Rule 2.1 Advisor

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

### Comment

*Scope of Advice*

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

## Rule 3.8 Special Responsibilities of a Prosecutor

A prosecutor in a criminal case shall:

(a) refrain from recommending, commencing, or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*;

(d) comply with all constitutional obligations, as defined by relevant case law regarding the timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;

(2) the evidence sought is reasonably necessary to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other reasonable alternative to obtain the information;

(f) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(A) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

**Comment**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations, or a systematic abuse of prosecutorial discretion, could constitute a violation of Rule 8.4.

[2] The term “prosecutor” in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor’s office who are responsible for the prosecution function.

[3] Paragraph (b) is not intended to expand upon the obligations imposed on prosecutors by applicable law. It also does not prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.

[4] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c), however, does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[5] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d)

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

[6] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[7] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

[8] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. This comment is not intended to restrict the statements which a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).

[9] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[10] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Comment [12] to Rule 3.3.

[11] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, and the conviction was obtained outside the prosecutor's jurisdiction, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation

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

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

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

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

## Rule 8.5 Disciplinary Authority; Choice Of Law

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

(b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and

(2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California and who is lawfully practicing in another jurisdiction, is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

### Comment

*Disciplinary Authority*

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

*Choice of Law*

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the

bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

[5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

ATTACHMENT 5

# BOARD AGENDA ITEM NOV 132

# PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA -- BATCHES 1, 2, & 3

(Adopted by the Board Committee on Regulation and Admissions on November 12, 2009.)*
(Adopted by the Board of Governors on November 14, 2009.)*



* The Board of Governor's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment distribution of the entire body of proposed rules.

ATTACHMENT 5

# 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 1.1 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 1.4 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.

ATTACHMENT 5

# Rule 1.5: Fees for Legal Services
**(Commission's Proposed Rule – Clean Version)**

(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.

**COMMENT**

*Unconscionability of Fee*

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

*Basis or Rate of Fee*

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

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

*Terms of Payment*

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

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

*Prohibited Contingent Fees*

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

*Payment of Fees in Advance of Services*

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

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

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

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

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

*Division of Fee*

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

# Rule 1.5.1: 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.

ATTACHMENT 5

# 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).

**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.

[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.

ATTACHMENT 5

## 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 1.8.12.

[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.

ATTACHMENT 5

# 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.

**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.

[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.)

ATTACHMENT 5

# Rule 1.8.12 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 [3-300] and 1.7 [3-310].

**COMMENT**

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

ATTACHMENT 5

# 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 1.16 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 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 2.4.1 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.

ATTACHMENT 5

## 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.

ATTACHMENT 5

# 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 3.5 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 3.10 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.

**Comment**

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

ATTACHMENT 5

# Rule 4.2: Communication With a Person Represented By Counsel

**(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.

ATTACHMENT 5

# 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 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).

ATTACHMENT 5

# 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.

**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 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.

ATTACHMENT 5

# 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.

ATTACHMENT 5

# 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.

# 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].)

ATTACHMENT 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.

**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 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.)

ATTACHMENT 5

# 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.

ATTACHMENT 5

# 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.

ATTACHMENT 5

# 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.

ATTACHMENT 5

# 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).

ATTACHMENT 5

# 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.

ATTACHMENT 5

# 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.

ATTACHMENT 5

## 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.

ATTACHMENT 5

## 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 reprovals.

**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.)

ATTACHMENT 5

# 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] [wilful 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 8.4.1 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).

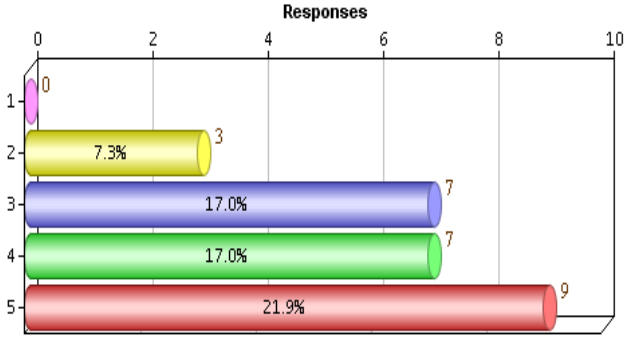
ATTACHMENT 5

# ATTACHMENT 6

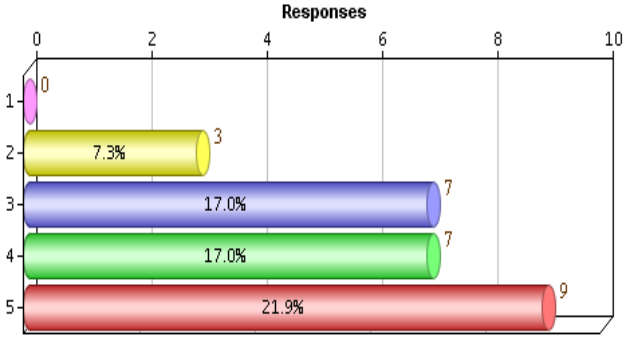
## PANEL 4 EVALUATIONS

**Panel Four: Re-Forming the California Rules of Professional Conduct(C. Buckner, R. Kehr, J. Sapiro, H. Sondheim)**

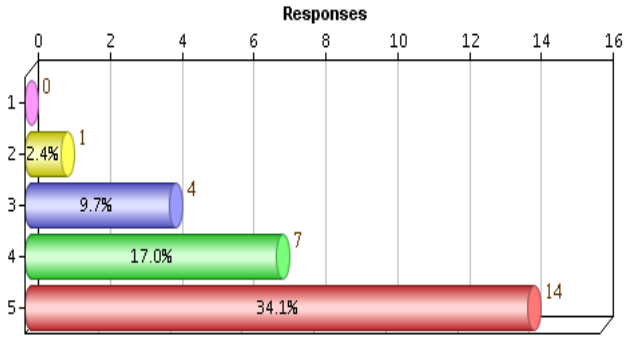
**Overall Teaching Effectiveness**




**Effectiveness of Teaching Methods**




**Significant Current Intellectual or Practical Content**




**Total Number of Responses for this Item: 26**

### Comments regarding particular speakers or the panel as a whole are welcome here:

- Too difficult to follow the text of Rules being reviewed.
- Too much internecine dispute, but not a bad discussion in all. Worth staying around for.
- Good topic. Lacks hypotheticals. This is what we are going to have to deal with. This topic needs more public seminars.
- Need more time for discussion; the problem comes from the desire to report what has been decided versus what the rules should be. In the future, I suggest the panel from the Commission take 1-2 issues, disseminate materials beforehand, and simply discuss the pluses and negatives of certain points covered by the proposed rules.
- I had to leave early and did not observe this panel.
- Good lecture.
- Felt honored to be observer and to have comment opportunity in this topic. Observed the difficult associated with just text wording, as " unconscionably' vs " unreasonable' Implications of selected words are future, profound.
- Very insightful to hear from "older/experienced" committee participants and to observe the difficult precision of wording for COPRAC Calif rules vs ABA rules. These words have profound effect and are being thoughtfully weighed: ex. "Unconscionable" vs "unreasonable"
- Won't comment because I was on that panel
- The speakers were knowledgeable and there was good audience interaction but there were too many topics handled in short amount of time.

**THE STATE BAR OF CALIFORNIA**

ATTACHMENT 7

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING, AND DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2116

August 20, 2009

The Hon. Arnold Schwarzenegger
Governor, State of California
State Capitol
Sacramento, CA 95814

**Subject:** *The State Bar of California's Special Commission for the Revision of the Rules of Professional Conduct*

Dear Governor Schwarzenegger:

For your information, this letter provides a discussion draft of proposed amendments to the Rules of Professional Conduct of the State Bar of California. Any informal input, questions or observations that you or your staff might have on the proposed amendments, or generally on the State Bar's rule amendment project, would be welcomed at any point during our process.

As you know, pursuant to statute the State Bar is charged with the responsibility of formulating and adopting amendments to the Rules of Professional Conduct (Bus. & Prof. Code §6076). The Rules of Professional Conduct are attorney disciplinary standards, the violation of which will subject an attorney to suspension or other discipline. Presently, the State Bar is conducting an exhaustive study of the rules for the purpose of developing comprehensive amendments. The last comprehensive revision of the rules occurred in 1987. As was the case in the 1980's, the State Bar has assigned its Rules Revision Commission to carry out the study under the oversight of the Board of Governors.

The State Bar's study follows the work of the American Bar Association in completely revising its Model Rules of Professional Conduct. Although no state is bound by the recent changes to the Model Rules, many states, including California, are studying the new Model Rules as part of an effort to update their state rules.

No amendments to the California rules become operative until they are adopted by the State Bar Board of Governors and approved by the Supreme Court of California. The project time line for the study anticipates presentation of a final report and recommendation to the Board of Governors in 2010.

This letter encloses a public comment discussion draft containing the fourth of six anticipated groups of proposed rule amendments. Consideration of public comment is an early step in the State Bar's procedures for developing rule amendments.

In 2006, the Commission completed initial work on twenty-seven proposed new and amended rules and these rules were the Commission's first public comment group. A copy of this first public comment proposal was provided in a letter from me dated October 23, 2006. This first group of rules addressed topics such as: lawyer advertising; competent representation; communication with clients; and lawyers acting as third-party neutrals.

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In 2007, the Commission distributed its second group of proposed rules. This second group had a public comment deadline of October 26, 2007 and addressed such topics as: prohibited discrimination in law practice operation; client gifts to lawyers; payment of a client's personal expenses by a lawyer; and lawyer purchase of property at a foreclosure sale. A copy of this second public comment proposal was provided in a letter from me dated August 23, 2007.

In 2008, the Commission distributed its third group of proposed rules. This third group had a public comment deadline of June 6, 2008 and addressed such topics as: sale of a law practice; business transactions with clients; and unconscionable fees for legal services. A copy of this third public comment proposal was provided in a letter from me dated May 27, 2008.

Much of the Commission's work involves preparing drafts for public comment and then studying the public comments received and drafting further modifications. All of the separate groups of proposals eventually will become a part of the Commission's final comprehensive report and recommendation and, at that time, all of the draft rules will be distributed for an additional public comment that permits commentators to assess the rules as an integrated whole.

The Commission's current public comment proposal includes eight proposed new and amended rules. The eight rules are:

| | |
|---|---|
| Rule 1.8.6 | Third Party Payors |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.15 | Safekeeping Property: Handling Funds and Property of Clients and Other Persons |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer as Witness |
| Rule 6.3 | Membership in Legal Services Organization |
| Rule 6.4 | Law Reform Activities Affecting Client Interests |

Although the enclosed public comment discussion draft indicates an October 23, 2009 comment deadline, your feedback would be welcomed at any point during our process. It is anticipated that this fourth group of proposed rules will be followed by a fifth and sixth group by the end of this year or early next year.

In addition to seeking written public comment, the State Bar process involves public hearings, an e-mail listserv, educational programs and outreach to stakeholder groups. In 2006, a public hearing was conducted on the first group of proposed rules. On September 29, 2007, a public hearing on the Commission's second group of proposed rules was held in Anaheim during the State Bar Annual Meeting. On May 22, 2008, a public hearing on the Commission's third group of proposed rules was in Sacramento. A public hearing on the current proposed rules is scheduled to be held during the State Bar Annual Meeting in San Diego on September 12, 2009.

Whether or not you have informal input, we would like to keep you informed as we continue with this multi-year project. As the subsequent groups of proposed amendments are issued for public comment, we will provide them to you for your information. In addition, representatives of your staff are welcomed to attend the meetings of the State Bar's Rules Revision Commission. These meetings are held largely in open session and are regularly attended by representatives of various stakeholder groups.

The State Bar is aware that there are some areas in the law governing lawyers where there are related or overlapping standards in the rules and in the codes. The State Bar's Rules Revision Commission has been assigned to concentrate on the substantive and technical deliberations and the matter of coordination with other laws including statutes, court rules, and other regulations both state and federal will be handled directly by State Bar legislative and executive staff. This aspect of the project is expected to involve consideration of relevant legislative initiatives and other conforming changes in the law. The State Bar recognizes that rule amendment issues that impact areas of state legislative regulation are matters that require close coordination and we look forward to working with you on those areas once we have the benefit of the substantive and technical work product of the Rules Revision Commission.

If you have any questions about the State Bar's rules revision project please feel free to contact me. I serve as the Rules Revision Commission's staff counsel and my direct dial telephone number is (415) 538-2161. Of course, both Anthony Williams and Saul Bercovitch, the State Bar's legislative representatives, are also available. In addition, a link to detailed information about the State Bar's Rules Revision Commission is found at www.calbar.ca.gov/ethics.

Very truly yours,

*// signature //*

Randall Difuntorum, Staff Counsel
The State Bar of California's Commission
for the Revision of the Rules of Professional
Conduct

Enclosure

/rd

c: Saul Bercovitch, Legislative Counsel, State Bar
Andrea Hoch, Legal Affairs Secretary, Office of the Governor
Judy Johnson, Executive Director, State Bar
Michael Prosio, Deputy Chief of Staff and Legislative Affairs Secretary, Office of the Governor
Anthony Williams, Legislative Representative, State Bar

**THE STATE BAR OF CALIFORNIA**

ATTACHMENT 7

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING, AND DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2116

August 20, 2009

Hon. Ellen Corbett
Chair, Senate Judiciary Committee
State Capitol, Room 3092
Sacramento, CA 95814

Hon. Mike Feuer
Chair, Assembly Judiciary Committee
State Capitol, Room 3146
Sacramento, CA 95814

Hon. Tom Harman
Vice Chair, Senate Judiciary Committee
State Capitol, Room 3070
Sacramento, CA 95814

Hon. Van Tran
Vice Chair, Assembly Judiciary Committee
State Capitol, Room 4130
Sacramento, CA 95814

**Subject:** *The State Bar of California's Special Commission for the Revision of the Rules of Professional Conduct*

Dear Senators Corbett and Harman and Assembly Members Feuer and Van Tran:

For your information, this letter provides a discussion draft of proposed amendments to the Rules of Professional Conduct of the State Bar of California. Any informal input, questions or observations that you, your committee members or staff might have on the proposed amendments or generally on the State Bar's rule amendment project would be welcomed at any point during our process.

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ATTACHMENT 7

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*// signature //*

Randall Difuntorum, Staff Counsel
The State Bar of California's Commission
for the Revision of the Rules of Professional
Conduct

Enclosure

/rd

c: Saul Bercovitch, Legislative Counsel, State Bar
Judy Johnson, Executive Director, State Bar
Saskia Kim, Chief Counsel, Senate Judiciary Committee
Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Mike Petersen, Consultant, Senate Republican Caucus
Mark Redmond, Consultant, Assembly Republican Caucus
Anthony Williams, Legislative Representative, State Bar

ATTACHMENT 7

**THE STATE BAR OF CALIFORNIA**

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING, AND DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2116

November 4, 2009

The Hon. Arnold Schwarzenegger
Governor, State of California
State Capitol
Sacramento, CA 95814

**Subject:** *The State Bar of California's Special Commission for the Revision of the Rules of Professional Conduct*

Dear Governor Schwarzenegger:

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This past July, the Commission distributed its fourth group of proposed rules. This fourth group had a public comment deadline of October 23, 2009 and addressed such topics as: third party payors of attorney fees; trial publicity; aggregate settlements; handling of client trust funds and property; and lawyers acting as witnesses. A copy of this fourth public comment proposal was provided in a letter from me dated August 20, 2009.

Much of the Commission's work involves preparing drafts for public comment and then studying the public comments received and drafting further modifications. All of the separate groups of proposals eventually will become a part of the Commission's final comprehensive report and recommendation and, at that time, all of the draft rules will be distributed for an additional public comment that permits commenters to assess the rules as an integrated whole.

The Commission's current public comment proposal includes eleven proposed new and amended rules. The eleven rules are:

| | |
|---|---|
| Rule 1.2 | Scope of Representation |
| Rule 1.6 | Confidentiality of Information |
| Rule 1.8.2 | Use of Confidential Information |
| Rule 1.8.13 | Imputation of Personal Conflicts |
| Rule 1.9 | Duties to Former Clients |
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Although the enclosed public comment discussion draft indicates an November 13, 2009 comment deadline, your feedback would be welcomed at any point during our process. It is anticipated that this fifth group of proposed rules will be followed by a sixth and final group early next year.

In addition to seeking written public comment, the State Bar process involves public hearings, an e-mail listserv, educational programs and outreach to stakeholder groups. In 2006, a public hearing was conducted on the first group of proposed rules. On September 29, 2007, a public hearing on the Commission's second group of proposed rules was held in Anaheim during the State Bar Annual Meeting. On May 22, 2008, a public hearing on the Commission's third group of proposed rules was held in Sacramento. On September 12, 2009, a public hearing on the

Commission's fourth group of proposed rules was held in San Diego. A public hearing on the current proposed rules is scheduled to be held on November 10, 2009 at the State Bar's San Francisco office.

Whether or not you have informal input, we would like to keep you informed as we continue with this multi-year project. As the subsequent groups of proposed amendments are issued for public comment, we will provide them to you for your information. In addition, representatives of your staff are welcomed to attend the meetings of the State Bar's Rules Revision Commission. These meetings are held largely in open session and are regularly attended by representatives of various stakeholder groups.

The State Bar is aware that there are some areas in the law governing lawyers where there are related or overlapping standards in the rules and in the codes. The State Bar's Rules Revision Commission has been assigned to concentrate on the substantive and technical deliberations and the matter of coordination with other laws including statutes, court rules, and other regulations both state and federal will be handled directly by State Bar legislative and executive staff. This aspect of the project is expected to involve consideration of relevant legislative initiatives and other possible conforming changes in the law. The State Bar recognizes that rule amendment issues that impact areas of state legislative regulation are matters that require close coordination and we look forward to working with you on those areas once we have the benefit of the substantive and technical work product of the Rules Revision Commission.

If you have any questions about the State Bar's rules revision project please feel free to contact me. I serve as the Rules Revision Commission's staff counsel and my direct dial telephone number is (415) 538-2161. Of course, both Anthony Williams and Saul Bercovitch, the State Bar's legislative representatives, are also available. In addition, a link to detailed information about the State Bar's Rules Revision Commission is found at www.calbar.ca.gov/ethics.

Very truly yours,

Randall Difuntorum, Staff Counsel
The State Bar of California's Commission
for the Revision of the Rules of Professional
Conduct

Enclosure

/rd

c: Saul Bercovitch, Legislative Counsel, State Bar
Andrea Hoch, Legal Affairs Secretary, Office of the Governor
Judy Johnson, Executive Director, State Bar
Howard Miller, President, State Bar
Michael Prosio, Deputy Chief of Staff and Legislative Affairs Secretary, Office of the Governor
Anthony Williams, Legislative Representative, State Bar

ATTACHMENT 7

**THE STATE BAR OF CALIFORNIA**

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING, AND DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2116

November 4, 2009

Hon. Ellen Corbett
Chair, Senate Judiciary Committee
State Capitol, Room 3092
Sacramento, CA 95814

Hon. Mike Feuer
Chair, Assembly Judiciary Committee
State Capitol, Room 3146
Sacramento, CA 95814

Hon. Tom Harman
Vice Chair, Senate Judiciary Committee
State Capitol, Room 3070
Sacramento, CA 95814

Hon. Van Tran
Vice Chair, Assembly Judiciary Committee
State Capitol, Room 4130
Sacramento, CA 95814

**Subject:** *The State Bar of California's Special Commission for the Revision of the Rules of Professional Conduct*

Dear Senators Corbett and Harman and Assembly Members Feuer and Tran:

As we have in the past, this letter provides a discussion draft of proposed amendments to the Rules of Professional Conduct of the State Bar of California. Any informal input, questions or observations that you, your committee members or staff might have on the proposed amendments or generally on the State Bar's rule amendment project would be welcomed at any point during our process.

As you know, pursuant to statute the State Bar is charged with the responsibility of formulating and adopting amendments to the Rules of Professional Conduct (Bus. & Prof. Code §6076). The Rules of Professional Conduct are attorney disciplinary standards, the violation of which will subject an attorney to suspension or other discipline. Presently, the State Bar is conducting an exhaustive study of the rules for the purpose of developing comprehensive amendments. The last comprehensive revision of the rules occurred in 1987. As was the case in the 1980's, the State Bar has assigned its Rules Revision Commission to carry out the study under the oversight of the Board of Governors.

The State Bar's study follows the work of the American Bar Association in completely revising its Model Rules of Professional Conduct. Although no state is bound by the recent changes to the Model Rules, many states, including California, are studying the new Model Rules as part of an effort to update their state rules.

No amendments to the California rules become operative until they are adopted by the State Bar Board of Governors and approved by the Supreme Court of California. The project time line for the study anticipates presentation of a final report and recommendation to the Board of Governors in 2010.

This letter encloses a public comment discussion draft containing the fifth of six anticipated groups of proposed rule amendments. Consideration of public comment is an early step in the State Bar's procedures for developing rule amendments.

In 2006, the Commission completed initial work on twenty-seven proposed new and amended rules and these rules were the Commission's first public comment group. A copy of this first public comment proposal was provided in a letter from me dated October 23, 2006. This first group of rules addressed topics such as: lawyer advertising; competent representation; communication with clients; and lawyers acting as third-party neutrals.

In 2007, the Commission distributed its second group of proposed rules. This second group had a public comment deadline of October 26, 2007 and addressed such topics as: prohibited discrimination in law practice operation; client gifts to lawyers; payment of a client's personal expenses by a lawyer; and lawyer purchase of property at a foreclosure sale. A copy of this second public comment proposal was provided in a letter from me dated August 23, 2007.

In 2008, the Commission distributed its third group of proposed rules. This third group had a public comment deadline of June 6, 2008 and addressed such topics as: sale of a law practice; business transactions with clients; and unconscionable fees for legal services. A copy of this third public comment proposal was provided in a letter from me dated May 27, 2008.

This past July, the Commission distributed its fourth group of proposed rules. This fourth group had a public comment deadline of October 23, 2009 and addressed such topics as: third party payors of attorney fees; trial publicity; aggregate settlements; handling of client trust funds and property; and lawyers acting as witnesses. A copy of this fourth public comment proposal was provided in a letter from me dated August 20, 2009.

Much of the Commission's work involves preparing drafts for public comment and then studying the public comments received and drafting further modifications. All of the separate groups of proposals eventually will become a part of the Commission's final comprehensive report and recommendation and, at that time, all of the draft rules will be distributed for an additional public comment that permits commenters to assess the rules as an integrated whole.

The Commission's current public comment proposal includes eleven proposed new and amended rules. The eleven rules are:

| | |
|---|---|
| Rule 1.2 | Scope of Representation |
| Rule 1.6 | Confidentiality of Information |
| Rule 1.8.2 | Use of Confidential Information |
| Rule 1.8.13 | Imputation of Personal Conflicts |
| Rule 1.9 | Duties to Former Clients |
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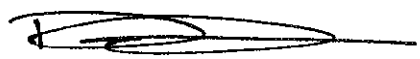
Very truly yours,



Randall Difuntorum, Staff Counsel
The State Bar of California's Commission
for the Revision of the Rules of Professional
Conduct

Enclosure

/rd

c: Saul Bercovitch, Legislative Counsel, State Bar
Judy Johnson, Executive Director, State Bar
Saskia Kim, Chief Counsel, Senate Judiciary Committee
Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Howard Miller, President, State Bar
Mike Petersen, Consultant, Senate Republican Caucus
Mark Redmond, Consultant, Assembly Republican Caucus
Anthony Williams, Legislative Representative, State Bar