

ATTACHMENT 1

Dashboard Cover Sheet, Introduction, Model Rule Comparison Table, Clean Rule Draft, Public Comment Synopsis Table and State Variation Excerpts for the Batch 5 Proposed Rules and the Previously Submitted Rules in Batches 3 & 4 Returned to the Commission for Further Consideration

Proposed Rule 1.2 [n/a]

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

(Draft #5, 2/5/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

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

Statute

Bus. & Prof. Code § 6104; Penal Code § 1018

Case law

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

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 9
Opposed Rule as Recommended for Adoption 0
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.2* Scope of Representation and Allocation of Authority Between Client and Lawyer

February 2010

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.2 largely tracks Model Rule 1.2. There are only two differences between the black letter of the Model Rule and the proposed Rule. First, a clause has been added to paragraph (a) in recognition that in certain situations, a lawyer's consent to a guilty plea is required. Second, paragraph (d) has been divided into two subparagraphs for clarity, with subparagraph (d)(1) stating the general prohibition and subparagraph (d)(2) clarifying what a lawyer is permitted to do in providing counsel to the client.

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

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

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

* Proposed Rule 1.2, Draft 5 (2/5/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer	<u>Commission's Proposed Rule*</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer	<u>Explanation of Changes to the ABA Model Rule</u>
(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.	(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. ~~It~~ <u>Except as otherwise provided by law</u> <u>in</u> 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.	Paragraph (a) is substantially similar to Model Rule 1.2(a), except the last sentence has been revised to recognize that, at least in California, there are certain situations under which a lawyer's consent to a guilty plea is required. See Penal Code § 1018. See also Comment [1]. <u>Minority.</u> A minority of the Commission objects to the Rule on the ground that, although it might be appropriate as a statement of hortatory principles, it is wrong as a disciplinary rule and will conflict with lawyers' duties to their clients, both constitutional and statutory. The minority identifies a fundamental problem in that there is no clear distinction between the "objectives" and the "means" of representation. For example, in a criminal case, the accused has a constitutional right to have the complaining witness cross-examined. If we characterize the decision about whether to cross-examine that witness as "means" and therefore within the dominion of the lawyer, we deprive the accused of a fundamental Constitutional right. Denial of cross-examination of a witness without a waiver by the client is ". . . a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." <i>Brookhart v. Janis</i>, 384 U.S. 1, 3 (1966). A rule of professional conduct should not deprive a client of a Constitutional right. The majority notes that the rule does not countenance such conduct by the lawyer. As explained in Comment [1], decisions concerning a client's "substantial rights" are within the province of the client. The rule does not require a lawyer to ignore the client's interests in making decisions about how to conduct a case; rather, it emphasizes that the lawyer must be sensitive to the client's rights and interests.

* Proposed Rule 1.2, Draft 5 (2/5/10). Redline/strikeout showing changes to the ABA Model Rule

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

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

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.	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. <u>See e.g. Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. <i>Blanton v. Womancare, Inc.</i> (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156]. Accordingly, ~~the~~ the decisions specified in paragraph (a), such as whether to settle a civil matter <u>or waive a jury trial in a civil matter</u>, must also be made by the client. See Rule 1.4(ac)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, <u>provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.</u></u>	Comment [1] is based on Model Rule 1.2, cmt. [1] but makes five changes to conform the comment to California law. First, as a specific example of "limits imposed by law and the lawyer's professional obligations," the comment includes a reference to Penal Code § 1018, which provides: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." Second, it adds language and a citation to well-settled California authority, <i>Blanton v. Womancare, Inc.</i>, concerning the allocation of authority between lawyer and client. Third, it recognizes that in California, the authority under the California Constitution to waive a jury trial in a civil matter resides in the client. Fourth, it substitutes a cross-reference to proposed Rule 1.4(c), which expressly sets forth a lawyer's communication duties concerning settlement offers. Rule 1.4(c) carries forward current rule 3-510, which itself conforms to legislative policy in Bus. & Prof. Code § 6103.5.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
		Finally, Comment [1] clarifies that acting with the client's implied authority does not include implied authority to disclose client confidential information protected by Bus. & Prof. Code section 6068(e) or rule 1.6 of these rules. By clarifying that implied authorization does not include implied disclosure of confidential information, this provides greater protection to consumers of legal services and conforms the rule to current California law and proposed Rule 1.6.
[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	[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	Comment [2] is identical to Model Rule 1.2, cmt. [2], except that the specific reference to Model Rule 1.16(b)(4) has been deleted because the Commission recommends not adopting that subparagraph. Model Rule 1.16(b)(4) permits a lawyer to withdraw from representing a client if: "(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively." The Commission's recommended drafting of Rule 1.16 increases client protection by narrowing a lawyer's right to withdraw from a representation. Consequently, the Comment now generally points the lawyer to proposed Rule 1.16(b), which governs permissive withdrawal from the representation.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).	fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).	
[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.	[3] At the outset of, <u>or during</u> a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.	Comment [3] is identical to MR 1.2, cmt. [3], except that it clarifies that a client may authorize the lawyer to take specific action at any time during the representation.
[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.	[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.	Comment [4] is identical to MR 1.2, cmt. [3].
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.	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.	Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. & Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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 repugnant or imprudent.	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 ~~repugnant or~~ imprudent.	Comment [6] is nearly identical to Model Rule 1.2, cmt. [6], the only change being the deletion of “repugnant,” a term found in Model Rule 1.16(b)(4), a provision the Commission recommends not adopting. See Explanation of Changes, Comment [2], above.
[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	[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	Comment [7] is nearly identical to Model Rule 1.2, cmt. [7]. However, a sentence has been added at the end of the comment to alert lawyers that they may be obligated to inform clients of legal problems that fall outside the scope of representation. See, e.g., <u>Nichols v. Keller</u> (1993) 19 Cal.Rptr.2d 601.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	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. <u>Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.</u>	
[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.	[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. <u>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).</u>	Comment [8] is based on Model Rule 1.2, cmt. [8] and is identical, except that references to the California Rules of Court on limited scope representation have been added to apprise lawyers of these important provisions for access to justice.
Criminal, Fraudulent and Prohibited Transactions [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the	Criminal, Fraudulent and Prohibited Transactions [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. ~~This prohibition or to violate any rule, however law, or ruling of a tribunal. However, this Rule does not preclude the prohibit a~~ lawyer from giving ~~an honest a good faith~~ opinion about the ~~actual foreseeable~~ consequences ~~that appear likely to result from of~~ a client's ~~proposed~~ conduct. Nor	Comment [9] is based on Model Rule 1.2, cmt. [9], but adds language primarily to conform to and explain the added scope of proposed paragraph (d). Sentence 1 adds the language of the expanded scope of proposed paragraph (d) by adding "or to violate any rule, law or ruling of a tribunal."

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	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.	Sentence 2 substitutes “prohibit” for “preclude” to clarify that the prohibition is mandatory. It substitutes “good faith” for “honest” to change from the subjective standard to an objective standard. The words “forseeable consequences of a client’s proposed conduct” have been substituted for “actual consequences that appear likely to result from a client’s conduct” for the sake of clarification, brevity and to create an objective rather than subjective standard.
[10]When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.	[10]~~When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate.~~<u>The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. The lawyer is required to avoid assisting the client, for example, by drafting a lawyer may not draft or delivering deliver documents that the lawyer knows are fraudulent or by suggesting; nor may the lawyer counsel</u> how the wrongdoing might be concealed. ~~A~~ <u>The</u> lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposed~~<u>believed</u> was legally proper but ~~then~~<u>later</u> discovers is criminal ~~or~~<u>,</u> fraudulent. ~~The lawyer must, therefore, withdraw from or the representation~~<u>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</u>	Although the concepts contained in Model Rule 1.2, cmt. [10] have been retained, the comment has been redrafted to remove ambiguity and to create a brighter line for lawyer guidance and public protection. Sentence 1 of the Model Rule comment has been stricken because it provides no guidance (i.e., telling a lawyer that a situation is delicate provides no guidance concerning conduct). Substituted sentence 1 provides guidance by clarifying that a lawyer must comply with subparagraph (d)(1) regardless of the temporal status of the client’s conduct. Sentence 2 strikes language creating ambiguity and clarifies that a lawyer may not engage in the conduct described. Sentence 3 substitutes “believed” for “supposed” and “later” for “then” to removed ambiguity and to conform with the proposed black letter rule. Sentence 4 has been added to conform the Comment to statutory duties of confidentiality.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>the best lawful interest</u> of the client ~~in, including counseling the matter. See Rule 1.16(a) client about possible corrective or remedial action.~~ In some cases, ~~withdrawal alone might be insufficient. It may be necessary for the lawyer~~ <u>lawyer's response is limited to give notice of the fact of withdrawal lawyer's right and, where appropriate, duty to disaffirm any opinion, document, affirmation resign or the like. See withdraw in accordance with Rule 4.1.1.16.</u>	Sentence 5 has been added to clarify that the lawyer's duties are consistent with California law. Sentence 6 retains the Model Rule Comment concept of withdrawal but clarifies that the option may be mandatory or permissive, depending upon the circumstances. The last sentence of the Model Rule Comment concerning disaffirmation of "any opinion, document, affirmation or the like," has been deleted to conform to California policies of confidentiality, which do not permit "noisy" withdrawals.
[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.	~~[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.~~	Model Rule 1.2, cmt. [11] has been stricken because it is ambiguous and may imply a relationship with beneficiaries that is not consistent with California law. For example, a lawyer representing a trustee generally has no duties or special obligations to the beneficiaries of a trust.
[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental	~~[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal counsel or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking assist a criminal defense incident client to make a general retainer for legal services good faith effort to a lawful enterprise. The last clause of paragraph (d) recognizes that determining determine the validity, scope, meaning or interpretation application of a statute law, rule or regulation ruling of a tribunal. Determining the~~	Although Comment [11] retains the concepts contained in Model Rule 1.2, cmt. [12], the Model Rule comment has been substantially revised to provide better guidance to lawyers, and thus better protection to client's, concerning the scope of subparagraph (d)(2)'s permitted conduct. In particular, in the last two sentences the revised comment expands on the last clause of subparagraph (d)(2), providing guidance to lawyers whose clients intend to engage in civil disobedience.

<u>ABA Model Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Commission's Proposed Rule</u> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer Comment	<u>Explanation of Changes to the ABA Model Rule</u>
authorities.	<u>validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith</u> may require a course of action involving disobedience of the ~~statute~~<u>law, rule, or regulation</u>~~ruling of a tribunal~~, or of the ~~interpretation~~<u>meaning</u> placed upon it by governmental authorities. <u>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.</u>	
[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).	~~[13]~~<u>[12]</u> If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by ~~the~~<u>these</u> Rules ~~of Professional Conduct~~ or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(~~5~~<u>6</u>).	Comment [12] is based on Model Rule 1.2, cmt. [13]. The only changes are to conform to California rules style and to correct a cross-reference.

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

(Commission's Proposed Rule – Clean Version)

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law 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. See e.g. Penal Code section 1018. 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 or waive a jury trial in 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 Rule 1.6 or Business and Professions Code section 6068(e).
- [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. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.

- [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 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 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice ("CACJ")	M		1.2(a)	Our proposed modification would be to add the following language to paragraph (a) at the end/following sentence: A lawyer shall abide by a client's decision whether to settle a matter, "to the extent it is not in conflict with statutory or constitutional law."	The Commission agreed in principle and modified the last sentence of paragraph (a) as follows: <u>Except as otherwise provided by law</u> 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. The Commission also added a reference to Penal Code § 1018 in Comment [1].
2	California Public Defenders Association ("CPDA")	M		Cmt. [2]	CPDA's primary concern is with the Proposed Rule as developed in Proposed Comment [2]. CPDA proposes that to avoid a potential conflict with established legal practice, the second and third sentence in Comment [2] should be deleted. (Proposed deletion: "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.")	The Commission disagrees with the deletion of the two sentences in Comment [2], both of which are accurate.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					As noted in the Comment, the rich existing record of decisional law clearly defines the responsibility that lawyers have to know and practice legal obligations while respecting the client's goals. To this end, CPDA believes that it would be helpful if the Comment included references to the most common guidelines provided by established case law. CPDA believes that inclusion of these fundamental decisional references, along with deletion of the two sentences identified above, will clarify the existing ambiguities in the Proposed Rule and Comment.	The Commission also disagrees that the Comment to the Rule should be a compendium of the law as developed in the case law. It would be impossible to capture every possible variation.
3	COPRAC	M		1.2(a)	As to paragraph (a), COPRAC agrees with the minority of the Commission and believes that it is difficult to differentiate between means and objectives. COPRAC also agrees with the minority that the language of section (a) of the rule might be read to conflict with a client's Constitutional and statutory duties to the lawyer's clients. COPRAC also notes that the last sentence of paragraph (a) raises the issue whether the lawyer can waive a jury trial on behalf of a client in a civil case.	The Commission disagrees with COPRAC's comment concerning means and objectives. The typical meaning understood is that objectives are achieved through the means utilized. Comments [1] and [2] provide guidance on this issue.
				1.2(d)	As to paragraph (d), COPRAC objects to the inclusion in paragraph (d)(1) of the proposed rule (modifying paragraph (d) of the	The Commission, however, agrees with COPRAC's concern with the last sentence and has revised it accordingly. See Response to CACJ, above.
						The Commission disagrees. The language cited is carried forward from current rule 3-210.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [9]	corresponding ABA Model Rule) of the phrase referring to “a violation of any law, rule, or ruling of a tribunal.” We believe that such language may subject lawyers to an inappropriate and unnecessarily harsh disciplinary standard. Absent fraud or criminal conduct, COPRAC does not believe such assistance should subject lawyers to possible discipline. Should the above phrase be included in the rule, we recommend a modification to Comment [9] to conform the references to this phrase. The phrase including the added scope is included in the first sentence of Comment [9]. A corresponding reference to the added scope should be included in the second sentence of Comment [9].	The Commission does not understand how adding the phrase, “to violate any rule, law, or ruling of a tribunal,” would clarify the second sentence.
4	Judge, Michael P. Los Angeles County Public Defender	D		1.2(a)	We agree with the concern of the minority of the Commission regarding the intersection of the proposed rule and the provisions of Penal Code Section 1018.	The Commission agrees and has revised the last sentence of paragraph (a). See Response to CACJ, above.
5	Los Angeles County Bar Association (“LACBA”), Professional Responsibility and Ethics Committee	D			We oppose Proposed Rule 1.2 in its entirety because the committee believes that it is not appropriate as a disciplinary rule. Failure to follow the client's objectives may result in a malpractice action or fee dispute, but should not lead to discipline.	The Commission disagrees with LACBA's position. The rule not only provides understandable disciplinary standards in paragraphs (a) and (d), the latter of which simply carries forward current rule 3-210, but also provides important guidance to lawyers in their relationships with clients.

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - DFT4.1 (02-05-10)DS-KEM-LM.doc

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.2(a)	If Rule is adopted, here are suggested amendments: Last sentence of paragraph (a) should state: <i>"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, whether the client will testify, and whether to file an appeal."</i>	The Commission did not make the suggested change. The language used is taken from the Model Rule and addresses client's substantial rights that are universally recognized as constitutionally based.
				1.2(d)	We suggest the following changes to 1.2(d): <i>"A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."</i>	The Commission did not make the suggested change. First, the Commission determined it was appropriate to carry forward the phrase, "or a violation of any law, rule, or ruling of a tribunal," from current rule 3-210. Second, the Commission concluded that dividing what is currently two sentences in rule 3-210, one stating the general rule and the other the exception, into separate subparagraphs would make the provision clearer.
				Cmt. [1]	We suggest that the following sentence be added to Comment [1]: <i>"Paragraph (a) does not override the rules concerning mandatory or permissive withdrawal."</i>	The Commission did not make suggested change. References to Rule 1.16 (Termination of the Representation) concerning permissive and mandatory withdrawal are already found in Comments [2] and [10], respectively.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.2(d)	4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep	example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given. Requiring written consent would operate as an impediment to access to justice. It places a burden on legal services attorneys and attorneys who might be willing to undertake a discrete task for a small fee, if they must also create a writing in every such matter as well. This would have a chilling effect and deter attorneys who may be making little or no money. Public protection will not be compromised since attorneys will have the burden of demonstrating that they have obtained "informed consent" - they may choose the obvious method of a writing - but it should not be subject to discipline if they do not. Other jurisdictions have not included such a requirement. 4. The Commission disagrees. Paragraph (d)(2) uses the Model Rule language and provides in part that a lawyer "may counsel or assist a client to make a <i>good faith</i> effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal." (emphasis added). Whether it is the lawyer who make "takes appropriate steps in good faith" to test the validity of any law, etc., or it is the

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmts. [1], [2]	that defense, OCTC believes that it should be in the rule and not in a comment. 5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.	lawyer who "counsel[s] or assist[s] the client to make a good faith effort" is immaterial. They mean precisely the same thing. If anything, the Model Rule language better reflects that the lawyer may take such steps only with the knowledge and consent of the client. 5. The Commission disagrees. See Response to COPRAC, above. In addition, the Commission has included a cross-reference to Rule 1.4(a)(2), which requires that a lawyer "<i>reasonably</i> consult with the client about the means by which to accomplish the client's objectives in the representation." The lawyer does not have to consult with the client about every matter related to the representation.
				Cmt. [8]	6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law.	6. See Response #2, above.

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - DFT4.1 (02-05-10)DS-KEM-LM.doc

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [7]	OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See <i>Janik v. Rudy, Exelrod, & Zieff</i> (2004) 119 Cal.App.4 th 930, 940.)	The Commission has included the following statement at the end of Comment [7]: Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. The foregoing should address OCTC's concern.
7	Orange County Bar Association	D		1.2(d)	The OCBA opposes the Commission's proposed Rule 1.2 and supports the adoption of ABA Model Rule 1.2.	The Commission disagrees. The proposed Rule is substantially similar to the Model Rule except for paragraph (d). As explained in the Response to LACBA, above, the Commission revised MR 1.2(d) for two reasons: First, the Commission determined it was appropriate to carry forward the phrase, "or a violation of any law, rule, or ruling of a tribunal," from current rule 3-210. Second, the Commission concluded that dividing what is currently two sentences in rule 3-210, one stating the general rule and the other the exception, into separate subparagraphs would make the provision clearer.
				Comment [5]	The OCBA recommends that Comment [5] be stricken in its entirety.	The Commission disagrees. Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. & Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
8	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response necessary.
9	Santa Clara County Bar Association	A		1.2(c)	Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."	The Commission disagrees. The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given. Requiring written consent would operate as an impediment to access to justice. It places a burden on legal services attorneys and attorneys who might be willing to undertake a discrete task for a small fee, if they must also create a writing in every such matter as well. This would have a chilling effect and deter attorneys who may be making little or no money. Public protection will not be compromised since attorneys will have the burden of demonstrating that they have obtained "informed consent" - they may choose the obvious method of a writing - but it should not be discipline if they do not. Other jurisdictions have not included such a requirement.

Rule 1.2 Scope of Representation. [Sorted by Commenter]						TOTAL = 9 Agree = 2 Disagree = 3 Modify = 3 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [8]	Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. Seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: “A government lawyer’s authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections 825; 995; 996.” This language is the same as that used by the District of Columbia in modifying the ABA Model Rule version.	The Commission did not make the requested change. The Commission has revised the Model Rule language from which proposed Comment [8] is derived to add reference to generally-applicable Rules of Court concerning limited scope representation. Moreover, that comment already states that “[a]ll agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct and other law,” which would include the referenced Government Code sections.

Rule 1.2: Scope of Representation

STATE VARIATIONS

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

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

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

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

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

Subject to revocation by the client and to the terms of the contract, a client's decision to settle a matter shall be implied where the lawyer is retained to represent the client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss, and the third party elects to settle a matter without contribution by the client.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

North Carolina: Rule 1.2(a)(2) and (3) add language taken from DR 7-101(A)(1) and DR 7-101(B)(1) of the ABA Model Code of Professional Responsibility, and Rule 1.2(c) omits the ABA requirement that the client give informed consent.

Ohio: Rule 1.2(c) provides:

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

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

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

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

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

(ALT3, Draft #12, 2/28/10)

Summary: This amended rule refers to the duty of confidentiality encompassed by B&P §6068(e) and identifies limited exceptions, such as the permissive exception for revealing information to prevent a criminal act likely to result in death or substantial bodily harm. Following public comment, the Commission implemented a change in rule language to address concerns raised by several public commenters. See Introduction, paragraph 4.

Comparison with ABA Counterpart

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

Primary Factors Considered

☒ Existing California Law

Rule	RPC 3-100
Statute	Bus. & Prof. Code § 6068(e); Evid. Code §§950 et seq.
Case law	

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

☒ Other Primary Factor(s)

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

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☒ Very Controversial – Explanation:

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

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.6* Confidentiality of Information

March 2010

(Draft rule following consideration of public comment)

INTRODUCTION:

1. Proposed Rule 1.6 is derived primarily from current California rule 3-100 and is only loosely based on Model Rule 1.6 for two principal reasons: First, there are inherent limitations on a Rule of Professional Conduct that addresses confidentiality because in California, the lawyer's duty of confidentiality is based on Business & Professions Code section 6068(e)(1). Rule 3-100 did not come into existence until July 2004, when the Legislature, as part of an enactment to create the first express exception to the statutory duty of confidentiality, engaged the Supreme Court and State Bar to draft and promulgate a rule of professional conduct to assist in the implementation of the amendment. Second, Model Rule 1.6 and its numerous exceptions are based on policy decisions that are inimical to California's traditional emphasis on client protection.
2. Accordingly, although proposed Rule 1.6 follows the basic Model Rule framework, the Commission recommends a Rule that more closely adheres to current rule 3-100, a rule that affords clients substantially more notice and protection than the Model Rule. To the extent the Rule includes exceptions not currently found in rule 3-100, they are exceptions already recognized in well-settled California law. What follows is a roadmap for consideration of the proposed Rule.
3. *Genesis of current California rule 3-100 and its continuation in proposed Rule 1.6.* In 2003, the Legislature passed and the Governor signed into law Assembly Bill 1101, which amended Bus. & Prof. Code § 6068(e) to provide for an exception that permits but does not require a lawyer to reveal confidential information to prevent a criminal act likely to result in death or

* Proposed Rule 1.6, ALT3, Draft 12 (2/28/10)

RRC - 3-100 [1-6] - Compare - Introduction - DFT3 (03-01-10)-ML

substantial bodily harm. AB1101 also provided in Section 3 of the Act for the appointment of a task force by the State Bar President in consultation with the Supreme Court “to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.” The Legislature also identified in Section 3 a series of issues for the Task Force to address, including whether a lawyer must inform a client or a prospective client about the attorney's ability to reveal the client's or prospective client's confidential information to prevent a criminal act likely to result in death or substantial bodily harm, and whether the lawyer must take steps to dissuade a client from committing a criminal act before revealing the client's confidential information. In conformance with its statutory mandate, the Task Force drafted and proposed rule 3-100, which was adopted by the State Bar and approved by the Supreme Court, effective July 1, 2004. Current rule 3-100 is thus limited in scope to providing guidance to lawyers seeking to conform their conduct to sections 6068(e)(1) and (2). With one major exception, (see item #4, below), the Commission has, for the most part, retained the black letter and discussion paragraphs of rule 3-100. See paragraphs (a), (b)(1), (c), (d) and (e) of the black letter rule, and Comments [2]-[6], and [9]-[18], and the Explanation of Changes for each.

4. *Proposed change to language in public comment version of the Rule following public comment.* The Commission recommends a material change from the public comment draft of the Rule: the deletion of the second sentence of paragraph (a) in that draft. The second sentence had been added because of an apparent disjunction in language between the subdivisions of Bus. & Prof. Code § 6068(e), from which current rule 3-100 is derived, California being the only jurisdiction in which a lawyer's duty of confidentiality is set forth in a statute. Section 6068(e)(1) provides that it is the duty of every lawyer: “(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” However, subdivision (2) of section 6068(e) provides an exception to the duty of confidentiality that permits a lawyer to “reveal *confidential information relating to the representation* of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.” (Emphasis added). The Commission added a sentence to paragraph (a) of the public comment version of the Rule to link the concepts of “confidence” and “secret” in subdivision (e)(1) to the concept of “confidential information relating to the representation” in subdivision (e)(2), which it understood to be coterminous with the language in subdivision (e)(1).

However, both a minority of the Commission and a number of public commenters argued that the term “confidential information relating to the representation” is narrower than the very broad protection provided client confidential information in subdivision (e)(1) and, as a result, continued use of the term “confidential information relating to the representation” in proposed Rule 1.6 would have the effect of lessening protection for client confidential information. The minority, armed with the public comment that had expressed concerns with the continued importation of subdivision (e)(2)’s language into proposed Rule 1.6, convinced a majority of the Commission that the concerns were well-placed. That newly-created majority then voted to reject the public comment version and instead recommend that rule 3-100, revised to conform to new Rules format and style, be carried forward.

Subsequently, however, the drafters proposed an alternative to simply carrying forward current rule 3-100. This alternative involved deleting the second sentence of paragraph (a) of the public comment version and replacing the defined term, “information relating to the representation of a client” with “information protected by Business and Professions Code section 6068(e)(1).” By using the latter term, the breadth of protection provided by proposed Rule 1.6 is coterminous with the breadth of protection provided under section 6068(e)(1), which should assuage the concerns of the public commenters who communicated their concerns with using the phrase, “information relating to the representation of a client.” As to the concern that Rule 1.6 will now conflict with the statute, specifically the language of section 6068(e)(2), the Commission has concluded that there is nothing in the legislative history of either AB 1101 or the deliberations of the AB 1101 Task Force that would indicate that the Legislature intended to provide a scope of protection in subdivision (e)(2) that is different from the scope of protection in subdivision (e)(1). With that fact expressly recognized in proposed Rule 1.6, the Rule will give effect to the legislative intent and confusion and concern with the scope of protection provided under the Rule will be obviated.

5. *Model Rule exceptions to confidentiality are inimical to California’s strong policy favoring confidentiality.* Soon after the financial debacles involving Enron, Global Crossing and WorldCom early this decade, the ABA adopted by a close margin controversial exceptions to confidentiality that permit a lawyer to reveal a client’s confidential information to prevent or rectify a criminal act reasonably certain to result in financial injury or property loss to a third party. These provisions run

counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law. In addition, the Model Rule incorporates the concept of "implied authority," a dangerous catchall that threatens to swallow the duty of confidentiality. Accordingly, the Commission recommends rejection of Model Rule 1.6(b)(2) and (3), as well as the Model Rule's concept that the lawyer has "implied authority" to disclose and use confidential client information, even without the client's consent.

6. *Minority.* A minority of the Commission objects to several provisions of the proposed Rule. See Explanation of Changes for paragraphs (b)(3), (b)(4) and (b)(5).
7. *Variation in Other Jurisdictions.* Model Rule 1.6 has arguably been subject to more variation among the jurisdictions that have adopted it (or perhaps more accurately, have adapted it) than any other Model Rule, ranging from states that prohibit disclosures of any information except to prevent death or substantial bodily harm, to those that *permit* disclosure to prevent financial injury, or even some states that mandate disclosure to prevent death or substantial bodily harm, or even to prevent a criminal act likely to result in financial injury. See "Selected State Variations," Model Rule 1.6, from Gillers, Simon & Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2009), attached.

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).	(a) A lawyer shall not reveal information ~~relating to the representation of a client~~ <u>protected from disclosure by Business and Professions Code section 6068(e)(1)</u> unless the client gives informed consent, ~~the disclosure is impliedly authorized in order to carry out the representation~~ or the disclosure is permitted by paragraph (b).	<u>COMPARISON TO MODEL RULE 1.6</u> Paragraph (a) is based on both Model Rule 1.0(a) and Cal. rule 3-100(A). The first sentence is taken from Cal. rule 3-100(A), revised to conform to the syntax and structure of the Model Rule. The Model Rule's concept of "implied authorization" has been stricken. The Commission recommends its rejection because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality. The Commission also recommends a material change from the public comment draft of the Rule: the deletion of the second sentence of paragraph (a) in that draft. The second sentence had been added because of an apparent disjunction in language between the subdivisions of Bus. & Prof. Code § 6068(e), from which rule 3-100 is derived, California being the only jurisdiction in which a lawyer's duty of confidentiality is set forth in a statute. Section 6068(e)(1) provides that it is the duty of every lawyer: "(e)(1) To maintain inviolate the <i>confidence</i>, and at every peril to himself or herself to preserve the <i>secrets</i>, of his or her client." However, subdivision (2) of section 6068(e) provides an exception to the duty of confidentiality that permits a lawyer to "reveal <i>confidential information relating to the representation</i> of a client to the extent that the attorney reasonably believes the disclosure is

* Proposed Rule 1.6, ALT3, Draft 12 (2/28/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
		necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.” (Emphasis added). The Commission added a sentence to paragraph (a) of the Rule to link the concepts of confidence and secret in subdivision (e)(1) to “confidential information relating to the representation” in subdivision (e)(2), which it understood to be coterminous. However, as explained in the Introduction, the public comment suggested this approach created confusion and concern among the public commenters, so the Commission instead revised paragraph (b) of the Rule and deleted the second sentence of paragraph (a).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:	(b) A lawyer may, <u>but is not required to</u>, reveal information ~~relating to the representation of a client protected by Business and Professions Code section 6068(e)(1)~~ to the extent <u>that</u> the lawyer reasonably believes <u>the disclosure is</u> necessary:	COMPARISON TO MODEL RULE 1.6 The introductory clause of paragraph (b) is also based on both the introductory clause of Model Rule 1.6(b) and the first part of current rule 3-100(B). The language of current rule 3-100(B) restates section 6068(e)(2) verbatim. However, as explained in the Introduction, the Commission recommends substituting the term “information protected by Business and Professions Code section 6068(e)(1)” for “confidential information relating to the representation of a client” as is provided in current rule 3-100(B). The remainder of current rule 3-100(B) is found in subparagraph (b)(1).
(1) to prevent reasonably certain death or substantial bodily harm;	(1) to prevent <u>a criminal act that the lawyer reasonably</u> ~~certain~~<u>believes is likely to result in death of, or</u> substantial bodily harm <u>to, an individual, as provided in paragraph (c);</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of Changes, introductory clause of proposed Rule 1.6(b), above. The language included in subparagraph (1) is taken verbatim from current rule 3-100, with the only change being the substitution of “lawyer” for “member.”

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

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

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

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
		<u>Minority.</u> A minority of the Commission objects to proposed Rule 1.14, and thus to the inclusion of subparagraph (b)(5) in the Rule.
	<u>(c) Further obligations under paragraph (b)(1). Before revealing information protected by Business and Professions Code section 6068(e)(1) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:</u>	COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(c) carries forward current rule 3-100(C). In addition to the substitution of the term “information protected by Business and Professions Code section 6068(e)(1)” for “confidential information,” see Explanation of Changes to paragraphs (a) and (b), the only changes made conform the rule to California rule style and substitute “lawyer” for “member.”
	<u>(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</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).
	<u>(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b)(1).</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).

<u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information	<u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>(d) In revealing information protected by Business and Professions Code section 6068(e)(1) 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.</u>	COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(d) carries forward current rule 3-100(D). In addition to including within paragraph (d)'s scope the additional exceptions in the proposed Rule (i.e., subparagraphs (b)(2), (b)(3) and (b)(4)), the only changes made are the substitution of the defined term, "information protected by Business and Professions Code section 6068(e)(1)," changes to conform the rule to California rule style, and the substitution of "lawyer" for "member."
	<u>(e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b) does not violate this Rule.</u>	COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.	[1] This Rule governs the disclosure by a lawyer of information ~~relating to the representation of a client~~ <u>protected by Business and Professions Code section 6068(e)(1)</u> during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules ~~1.8(b)~~ <u>1.8.2</u> and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [1] is based on MR 1.6, cmt. [2]. As explained in the Introduction and the Explanation to paragraphs (a) and (b) of the Rule, the term "information protected by Business & Professions Code section 6068(e)(1) has been substituted for "information relating to the representation of a client." The only other change is to substitute "1.8.2" for "1.8(b)," which conforms the cross-reference to the Commission's numbering convention for the 1.8 series of rules.
[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby	<u>Policies Furthered by the Duty of Confidentiality</u> [2] ~~A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0a~~ <u>Paragraph (a) relates to the lawyer's obligations</u>	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [2] is based on current California rule 3-100, Discussion ¶. 1, which in turn is based on Model Rule 1.6, cmt. [1]. The changes made during the original drafting of rule 3-100 were intended to emphasize California's strong policy of protecting client confidentiality.

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

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

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

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.	under Business and Professions Code section 6068(e) for the definition(1), which provides it is a duty of informed consent lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.~~This~~ A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (<i>In re Jordan</i> (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the ~~client-lawyer-client~~ relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally damaging subject matter~~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 information protected by Business and Professions Code section 6068(e)(1). (See, e.g., <i>Commercial Standard Title Co. v. Superior Court</i> (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)	In addition, the Commission has substituted "lawyer-client" for "client-lawyer" throughout the proposed Rules to conform the term to the usage in the Business & Professions and Evidence Codes. The substitution of "detrimental subjects" for "legally damaging subject matter" conforms the language in this Comment to the definition of "information protected by Business and Professions Code section 6068(e)(1)" that appears in Comment [3], which in turn is based on long-standing California authority concerning the scope of the terms "confidence" and "secrets" in Bus. & Prof. Code § 6068(e). See also Explanation of Changes for paragraphs (a) and (b), which explain the Commission's recommended use of the defined term, "information protected by Business and Professions Code section 6068(e)(1)."

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

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	Professions Code section 6068(e)(1). (See, e.g., <i>Commercial Standard Title Co. v. Superior Court</i> (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)	
[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.	~~[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.~~	<u>COMPARISON TO MODEL RULE 1.6</u> The Commission has substituted new proposed Comments [3] to [6] to define the term, "information protected by Business and Professions Code section 6068(e)(1)." These comments use as their starting point California rule 3-100, Discussion ¶. 2, which in turn is based on Model Rule 1.6, cmt. [3]. See Explanation of Changes for Comment [3], below.
[2] <i>Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.</i> The	Information protected by Business and Professions Code section 6068(e)(1). ~~[23] <i>Client-lawyer confidentiality encompasses the attorney-client privilege</i>As used in this Rule, the <i>work-product doctrine and ethical standards of</i>~~	<u>COMPARISON TO CAL. RULE 3-100</u> As noted, the Commission recommends substitution of new proposed Comments [3] to [6], using as their starting point California rule 3-100, Discussion ¶. 2, which in turn is based

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principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.	~~confidentiality. The principle of client-lawyer confidentiality applies to~~ information relating to ~~protected by Business and Professions Code section 6068(e)(1)" consists of information gained by virtue of the representation of a client,~~ whatever its source, ~~and encompasses matters communicated in confidence by the client, and therefore~~ <u>that (a) is protected by the attorney-lawyer-client privilege, matters protected by (b) is likely to be embarrassing or detrimental to the work-product doctrine client if disclosed, and matters protected under ethical standards or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality, ~~all as established~~ <u>defined in law, rule</u> ~~Business and policy~~ <u>Professions Code section 6068(e) is broader than lawyer-client privilege.</u> (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal. App.3d 614, 621 [120 Cal. Rptr. 253].) ~~The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.~~</u>	loosely on Model Rule 1.6, cmt. [3]. The purpose of Comments [3] to [6] is to delimit the scope of a lawyer's duty of confidentiality, as well as provide a definition for "information protected by Business and Professions Code section 6068(e)(1)". Because of California's strong policy of protecting client confidentiality and the apparent disjunction in language between subdivisions (1) and (2) of Bus. & Prof. Code § 6068(e), (see Explanation of Changes for proposed paragraphs (a) and (b)), the Commission views the expansion of rule 3-100, Discussion ¶. 2, as critical to providing guidance to lawyers in this important area and protection to clients.

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	<u>Scope of the Lawyer-Client Privilege</u> <u>[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.</u>	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [3].
	<u>Scope of the Duty of Confidentiality</u> <u>[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 protected 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. Information protected by Business and Professions Code section 6068(e)(1) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been</u>	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [3].

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	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 information protected by Business and Professions Code section 6068(e)(1) 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.	
	<u>Relationship of Confidentiality to Lawyer Work Product</u> [6] "Information protected by Business and Professions Code section 6068(e)(1)" 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. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [3].

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[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third 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.	[4] Paragraph (a) prohibits a lawyer from revealing information ~~relating to the representation of a client~~ <u>protected by Business and Professions Code section 6068(e)(1)</u>. 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 <u>client's</u> 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.	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [4] is identical to Model Rule 1.6, cmt. [4], except for the substitution of "information protected by Business and Professions Code section 6068(e)(1)," a defined term, for the Model Rule's "information relating to the representation," and the addition of "client's" to modify "representation" for clarification.
Authorized Disclosure [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.	Authorized Disclosure ~~[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.~~ Lawyers in a firm may, in the course of the firm's practice, disclose to each other information ~~relating~~ <u>protected by Business and Professions Code section 6068(e)(1) that is related</u> to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [8] is based on Model Rule 1.6, cmt. [5]. The first two sentences of the Model Rule comment have been deleted because the Commission has rejected the ABA's theory of implied authority with respect to confidentiality because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality. See Explanation of Changes for paragraph (a).

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Disclosure Adverse to Client [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.	Disclosure Adverse to Client <u>as Permitted by Paragraph (b)(1)</u> ~~[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.~~	<u>COMPARISON TO MODEL RULE 1.6</u> In place of Model Rule 1.6, cmt. [1], which is the Model Rule comment intended to provide guidance to lawyers with respect to Model Rule 1.6(b)(1), the Commission has substituted proposed Comments [9] to [18], which are carried over largely unchanged from current rule 3-100, Discussion ¶¶. 3 to 12. See Explanation of Changes for proposed Comment [9].
[3] <i>Narrow exception to duty of confidentiality under this Rule.</i> Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under	~~[39] <i>Narrow exception to duty of confidentiality under this Rule.</i> Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits <u>certain</u> disclosures otherwise prohibited~~	<u>COMPARISON TO CAL. RULE 3-100</u> As noted, the Commission has carried forward Discussion paragraphs 3 to 12 of current rule 3-100 largely unchanged. Assembly Bill 1101, which amended Bus. & Prof. Code § 6068(e)

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Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.	under Business & Professions Code section 6068(e), ~~subdivision (1). Paragraph (B)(1), which restates is based on~~ Business and Professions Code section 6068, ~~subdivision (e)(2), identifies which narrowly permits a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary~~ <u>lawyer to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual</u> <u>disclose information protected by Business and Professions Code section 6068(e)(1) even without client consent.</u> Evidence Code section 956.5, which relates to the evidentiary ~~attorney~~ <u>lawyer</u>-client privilege, sets forth a similar express exception. Although a ~~member~~ <u>lawyer</u> is not permitted to reveal ~~confidential~~ <u>protected</u> 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.	to provide for an exception that would permit a lawyer to reveal confidential information to prevent a criminal act likely to result in death or substantial bodily harm, also provided in Section 3 of the Bill for the appointment of a task force "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act." The legislature also identified in Section 3 a series of issues for the Task Force to address: "(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual. (2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized. (3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized. (4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act." After reviewing rule 3-100, Discussion ¶¶. 3-12, the Commission determined first, that the Model Rule comment inadequately

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		addressed the issues the Legislature had identified; (2) did not provide the guidance to lawyers found in the rule 3-100 Discussion; and (3) that few changes, other than those to conform to California rule style and numbering, were warranted. Consequently, the Discussion to current rule 3-100 remains largely intact. As previously noted, the Commission recommends the substitution of "information protected by Business and Professions Code section 6068(e)(1)" for "confidential information relating to the representation of a client," the term used in section 6068(e)(2). See Introduction and Explanation of Changes for paragraphs (a) and (b),
[4] <i>Member not subject to discipline for revealing confidential information as permitted under this Rule.</i> Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.	<u>Lawyer Not Subject to Discipline for Revealing Protected Information as Permitted Under Paragraph (b)(1)</u> ~~[410] Member not subject to discipline for revealing confidential information as permitted under this Rule. Rule 3-100, which restates Business and Professions Code section 6068, subdivision 1.6(eb)(21);~~ reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a ~~member~~<u>lawyer</u> reasonably believes is likely to result in death or substantial bodily harm to an individual. A ~~member~~<u>lawyer</u> who reveals <u>protected</u> information as permitted under ~~this rule~~<u>paragraph (b)(1)</u> is not subject to discipline.	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9].

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[5] <i>No duty to reveal confidential information.</i> Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.	<u>No Duty to Reveal Information protected by Business and Professions Code section 6068(e)(1)</u> ~~[511] No duty to reveal confidential information.~~ Neither Business and Professions Code section 6068, ~~subdivision~~ (e)(2) nor ~~this rule~~ <u>paragraph (b)(1)</u> imposes an affirmative obligation on a ~~member~~ <u>lawyer</u> to reveal information <u>protected by Business and Professions Code section 6068(e)(1)</u> in order to prevent harm. ~~(See rule 1-100(A).) A member~~ <u>lawyer</u> may decide not to reveal ~~confidential~~ <u>such</u> information. Whether a ~~member~~ <u>lawyer</u> chooses to reveal ~~confidential~~ <u>protected</u> information as permitted under this ~~rule~~ <u>Rule</u> is a matter for the individual ~~member~~ <u>lawyer</u> to decide, based on all the facts and circumstances, such as those discussed in ~~paragraph~~ <u>Comment [612]</u> of this ~~discussion~~ <u>Rule</u>.	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9].
[6] <i>Deciding to reveal confidential information as permitted under paragraph (B).</i> Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the	<u>Deciding to Reveal Protected Information as Permitted Under Paragraph (b)(1)</u> ~~[612] Deciding to reveal confidential information as permitted under paragraph (B).~~ Disclosure permitted under paragraph ~~(B)~~ <u>(b)(1)</u> is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing <u>protected</u> information as permitted under paragraph ~~(B)~~ <u>(b)(1)</u>, the ~~member~~ <u>lawyer</u> must, if reasonable	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9].

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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 member 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 member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful; (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member; (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and	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~~<u>such</u> information are the following: (1) the amount of time that the ~~member~~<u>lawyer</u> 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 ~~member~~<u>lawyer</u> believes the ~~member's~~<u>lawyer's</u> efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful; (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the ~~member~~<u>lawyer</u>; (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the ~~member~~<u>lawyer</u>; and	

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(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm. A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.	(6) the nature and extent of <u>protected</u> information that must be disclosed to prevent the criminal act or threatened harm. A ~~member~~<u>lawyer</u> may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the ~~confidential~~<u>protected</u> information. However, the imminence of the harm is not a prerequisite to disclosure, and a ~~member~~<u>lawyer</u> may disclose the <u>protected</u> information without waiting until immediately before the harm is likely to occur.	
[7] <i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i> Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and	<u>Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm</u> ~~[7]~~<u>13</u> ~~<i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i>~~ Subparagraph~~(C)~~<u>Paragraph</u> (C)(1) provides that, before a ~~member~~<u>lawyer</u> may reveal ~~confidential~~—information <u>protected by Business and Professions Code section 6068(e)(1)</u>, the ~~member~~<u>lawyer</u> must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, <u>including persuading the client to take action to prevent a</u>	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9].

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

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
	the ~~member~~lawyer has concluded that paragraph (B)(1) does not permit the ~~member~~lawyer to reveal ~~confidential~~protected information, the ~~member~~lawyer nevertheless is permitted to counsel the client as to why it ~~may~~might be in the client's best interest to consent to the ~~attorney's~~lawyer's disclosure of that information.	
[9] <i>Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).</i> A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances.	<u>Requirement under Paragraph (c)(2) to Inform Client of Lawyer's Ability or Decision to Reveal Protected Information</u> ~~[9]14~~ <i>Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).</i> A ~~member~~lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule ~~3-500~~1.4; Business and Professions Code, section 6068, ~~subdivision~~(m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~protected 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 ~~member~~lawyer or the ~~member's~~lawyer's family or associates. Therefore, paragraph (C)(2) requires a ~~member~~lawyer to inform the client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~protected information as provided in	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9]. Note also that the Commission has recommended reversing the order of current rule 3-100, Discussion ¶¶. 8 and 9, to better track the order of the Rule paragraphs.

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are: (1) whether the client is an experienced user of legal services; (2) the frequency of the member's contact with the client; (3) the nature and length of the professional relationship with the client; (4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty; (5) the likelihood that the client's matter will involve information within paragraph (B); (6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and (7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.	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 ~~member~~<u>lawyer</u> to inform the client may vary depending upon the circumstances. ~~(See paragraphcomment [10]16 of this discussion.)~~ 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 ~~member's~~<u>lawyer's</u> contact with the client; (3) the nature and length of the professional relationship with the client; (4) whether the ~~member~~<u>lawyer</u> and client have discussed the ~~member's~~<u>lawyer's</u> 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 ~~member's~~<u>lawyer's</u> 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 ~~member's~~<u>lawyer's</u> belief, if	

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	applicable, that good faith efforts to persuade a client not to act on a threat have failed.	
[8] <i>Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.</i> Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.	<u>Disclosure of Protected Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act</u> ~~[815] Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.~~ Under Paragraph (d) requires that disclosure of ~~confidential~~ <u>protected</u> information <u>as permitted by paragraph (b)(1)</u>, 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~~ <u>protected</u> information to only those persons who the ~~member-lawyer~~ reasonably believes can act to prevent the harm. Under some circumstances, a ~~member-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 ~~member-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 ~~member-lawyer~~.	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comments [9] and [14].

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
[10] <i>Avoiding a chilling effect on the lawyer-client relationship.</i> The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.	<u>Avoiding a Chilling Effect on the Lawyer-Client Relationship</u> <del>[10]</del>~~16] <i>Avoiding a chilling effect on the lawyer-client relationship.</i>~~ The foregoing flexible approach to ~~the member's~~<u>a lawyer</u> informing a client of his or her ability or decision to reveal ~~confidential~~<u>protected</u> information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. ~~(See Discussion paragraph comment [12].)~~ To avoid that chilling effect, one ~~member~~<u>lawyer</u> may choose to inform the client of the ~~member's~~<u>lawyer's</u> ability to reveal <u>protected</u> information as early as the outset of the representation, while another ~~member~~<u>lawyer</u> may choose to inform a client only at a point when that client has imparted information that ~~may fall under~~<u>comes within</u> paragraph ~~(B)~~<u>(b)</u>(1), or even choose not to inform a client until ~~such time as~~ the ~~member~~<u>lawyer</u> attempts to counsel the client ~~as contemplated in Discussion paragraph~~<u>under Comment [7]</u>~~13].~~ In each situation, the ~~member~~<u>lawyer</u> will have ~~discharged properly~~<u>satisfied</u> the ~~requirement~~<u>lawyer's obligation</u> under ~~subparagraph~~<u>paragraph</u> ~~(C)~~<u>(c)</u>(2), and will not be subject to discipline.	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9].

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²	<u>Explanation of Changes to the ABA Model Rule</u>
[11] <i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i> When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.	<u>Informing Client that Disclosure Has Been Made: Termination of the Lawyer-Client Relationship</u> ~~[11]~~ ~~<i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i>~~ When a ~~member~~<u>lawyer</u> has revealed ~~confidential~~<u>protected</u> information under paragraph ~~(B)~~<u>(1)</u>, in all but extraordinary cases the relationship between ~~member~~<u>lawyer</u> and client ~~that~~<u>is based in mutual trust and confidence</u> will have deteriorated so as to make the ~~member's~~<u>lawyer's</u> representation of the client impossible. Therefore, ~~when~~<u>the member relationship has deteriorated because of the lawyer's disclosure, the lawyer</u> is required to seek to withdraw from the representation (~~see rule 3-700(B)~~)<u>Rule 1.16</u>, unless the ~~member is able to obtain the client's~~<u>client has given his or her</u> informed consent to the ~~member's~~<u>lawyer's</u> continued representation. The ~~member~~<u>lawyer</u> normally must inform the client of the fact of the ~~member's lawyer's~~<u>disclosure—unless, if</u> the ~~member lawyer~~<u>has a compelling interest in</u> ~~reason for~~<u>not informing the client, such as to protect the member lawyer, the member's lawyer's</u> family or a third person from the risk of death or substantial bodily harm, <u>the lawyer must withdraw from the representation. See Rule 1.16.</u>	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9].

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
[12] <i>Other consequences of the member's disclosure.</i> Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).	<u>Other Consequences of the Lawyer's Disclosure</u> ~~[1218] Other consequences of the member's disclosure.~~ Depending ~~upon~~ <u>on</u> the circumstances of a ~~member's~~ <u>lawyer's</u> disclosure of ~~confidential~~ <u>protected</u> information <u>as permitted by this Rule</u>, there may be other important issues that a ~~member~~ <u>lawyer</u> must address. For example, ~~if a member will be called as a witness~~ <u>lawyer who is likely to testify</u> in ~~the client's~~ <u>a</u> matter, ~~then rule 5-210 should be considered~~ <u>involving the client must comply with Rule 3.7</u>. Similarly, the ~~member should~~ <u>lawyer must also</u> consider ~~his or her duties~~ <u>the lawyer's duty</u> of ~~loyalty~~ <u>competence</u> (Rule ~~1.1~~ <u>1.1</u>) and ~~competency~~ <u>whether the lawyer has a conflict of interest in continuing to represent the client</u> (~~rule 3-110~~ <u>Rule 1.7</u>).	<u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [9].
[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such	~~[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such~~	<u>COMPARISON TO MODEL RULE 1.6</u> Because the Commission has recommended that Model Rule 1.6(b)(2) be stricken because it is inimical to California's strong policy on lawyer-client confidentiality, the Commission also recommends deletion of Model Rule 1.6, cmt. [7]. See Explanation of Changes for Model Rule 1.6(b)(2).

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.	~~disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.~~	
[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.	~~[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.~~	COMPARISON TO MODEL RULE 1.6 Because the Commission has recommended that Model Rule 1.6(b)(3) be stricken because it is inimical to California's strong policy on lawyer-client confidentiality, the Commission also recommends deletion of Model Rule 1.6, cmt. [8]. See Explanation of Changes for Model Rule 1.6(b)(2).

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.	<u>Disclosure as Permitted by Paragraphs (b)(2) through (b)(4).</u> ~~[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.~~	<u>COMPARISON TO MODEL RULE 1.6</u> The Commission recommends that Model Rule 1.6, cmt. [9], concerning implied authorization, be stricken for the same reasons it has recommended the deletion of the first two sentences of Model Rule 1.6, cmt. [5]. See Explanation of Changes for deleted Model Rule 1.6, Comment [5].
[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does	~~[10]~~ <u>Where</u>~~if~~ a legal claim <u>by a client</u> or ~~disciplinary charge~~<u>the client's representative</u> alleges ~~complicity~~<u>a breach of duty by</u> the lawyer ~~in a client's conduct~~<u>involving representation of the client</u> or ~~other~~<u>a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges</u> misconduct of the lawyer involving representation of the client, <u>paragraph (b)(3) permits</u> the lawyer ~~may~~<u>to</u> respond <u>only</u> to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving ~~the~~ conduct or representation of a former client. ~~Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a~~	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [19] is based on Model Rule 1.6, cmt. [10]. The Model Rule comment has been revised to conform the comment to the more limited scope of proposed paragraph (b)(3), which is based on the limited exception in Evidence Code § 958. See Explanation of Changes for proposed paragraph (b)(3).

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.	~~third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.~~	
[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.	~~[11]~~^[20] A lawyer entitled to a fee is permitted by paragraph (b)(~~5~~³) to prove the services rendered in an action to collect it. This aspect of the ~~rule~~^{Rule} expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [20] is identical to Model Rule 1.6, cmt. [11], except that “(b)(3)” has been substituted for the cross reference to “(b)(5),” and “Rule” substituted for “rule” to conform to California rule style.
[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.	~~[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.~~	<u>COMPARISON TO MODEL RULE 1.6</u> Because the Commission has recommended striking that part of Model Rule 1.6(b)(6) that permits disclosure if permitted by other law, see Explanation of Changes for paragraph (b)(6), it recommends the deletion of MR 1.6, cmt. [12].

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.	[13~~21~~] A lawyer may be ordered to reveal information ~~relating to the representation of a client~~<u>protected by Business and Professions Code section 6068(e)(1)</u> by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer ~~should~~<u>must</u> assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the ~~attorney~~<u>lawyer</u>-client privilege or other applicable law. <u>See, e.g., <i>People v. Kor</i> (1954) 129 Cal. App. 2d 436.</u> In the event of an adverse ruling, the lawyer must consult with the client ~~about the possibility of appeal~~ to the extent required by Rule 1.4 <u>about the possibility of appeal</u>. Unless review is sought, however, paragraph (b)(~~6~~<u>4</u>) permits the lawyer to comply with the court's order.	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [21] is based on Model Rule 1.6, cmt. [13]. The phrase "must" has been substituted for "should" to emphasize the lawyer's duty under this Rule to protect the client's confidential information. The citation to <i>People v. Kor</i>, a seminal California Court of Appeal case on the lawyer's duty of confidentiality to the client, has been added to provided guidance.
[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial	[14~~22~~] Paragraph (~~b~~<u>d</u>) permits disclosure <u>as permitted by paragraphs (b)(2) through (b)(5)</u> only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [22] is based on Model Rule 1.6, cmt. [14]. The clause, "as permitted by paragraphs (b)(2) through (b)(5)" has been added to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [15], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²	<u>Explanation of Changes to the ABA Model Rule</u>
proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.	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 <u>protected</u> information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.	
[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).	~~[15] [23] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation protected by Business and Professions Code section 6068(e)(1) to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).~~	COMPARISON TO MODEL RULE 1.6 Comment [23] is based on Model Rule 1.6, cmt. [15]. The phrase, "(b)(2) through (b)(5)" has been substituted for "(b)(1) through (b)(6)" to conform to the structure of the proposed Rule and to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [11], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph. The remainder of the Model Rule comment has been deleted because the points made are better presented in the Discussion paragraphs of current rule 3-100 that have been carried forward. See Comments [9]-[18] and Explanations thereto.

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment¹</u>	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment²</u>	<u>Explanation of Changes to the ABA Model Rule</u>
Acting Competently to Preserve Confidentiality [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.	Acting Competently to Preserve Confidentiality [~~16~~24] A lawyer must act competently to safeguard information ~~relating to the representation of a client protected by Business and Professions Code section 6068(e)(1)~~ 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.	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [24] is identical to Model Rule 1.6, cmt. [16], except for the substitution of the defined term, "information protected by Business and Professions Code section 6068(e)(1)". See Introduction and Explanation of Changes for paragraphs (a) and (b).
[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be	[~~17~~25] When transmitting a communication that includes information ~~relating to the representation of a client protected by Business and Professions Code section 6068(e)(1)~~, 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	<u>COMPARISON TO MODEL RULE 1.6</u> Comment [25] is identical to Model Rule 1.6, cmt. [17], except for the substitution of the defined term, "information protected by Business and Professions Code section 6068(e)(1)". See Introduction and Explanation of Changes for paragraphs (a) and (b).

<u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹	<u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²	<u>Explanation of Changes to the ABA Model Rule</u>
prohibited by this Rule.	Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.	
[13] <i>Other exceptions to confidentiality under California law.</i> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)	~~[13] <i>Other exceptions to confidentiality under California law.</i> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)~~	COMPARISON TO CAL. RULE 3-100 Discussion ¶. [13] to current rule 3-100 has been deleted as superfluous, as proposed Rule 1.6 is a comprehensive statement of the exceptions to confidentiality in California.
Former Client [18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.	Former Client ~~[18]~~^[26] The duty of confidentiality continues after the ~~client~~-lawyer-<u>client</u> relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.	COMPARISON TO MODEL RULE 1.6 Comment [26] is nearly identical to Model Rule 1.6, cmt. [18], the only change being to change “client-lawyer” to “lawyer-client” to conform with the convention used in the Bus. & Prof. and Evid. Codes.

Rule 1.6 Confidentiality of Information

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b).
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e)(1) 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 information protected by Business and Professions Code section 6068(e)(1) 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 information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b)(1).
- (d) In revealing information protected by Business and Professions Code section 6068(e)(1) 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 information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b) does not violate this Rule.

Comment

- [1] This Rule governs the disclosure by a lawyer of information protected by Business and Professions Code section 6068(e)(1) during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a

prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8.2 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 information protected by Business and Professions Code section 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Information protected by Business and Professions Code section 6068(e)(1).

- [3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)(1)" 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 as defined in Business and Professions Code section 6068(e) 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 protected 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. Information protected by Business and Professions Code section 6068(e)(1) 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 information protected by Business and Professions Code section 6068(e)(1) 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] "Information protected by Business and Professions Code section 6068(e)(1)" 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. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)
- [7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e)(1). 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 client's 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 information protected by Business and Professions Code section 6068(e)(1) that is related 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] Notwithstanding the important public policies promoted by the duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under Business and Professions Code section 6068(e)(1). Paragraph (b)(1) is based on Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068(e)(1) 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 protected 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 Protected 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 protected information as permitted under paragraph (b)(1) is not subject to discipline.

No Duty to Reveal Information protected by Business and Professions Code section 6068(e)(1)

- [11] Neither Business and Professions Code section 6068(e)(2) nor paragraph (b)(1) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068(e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal protected 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 Protected 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 protected 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 such 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 protected 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 protected information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the protected 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 or Substantial Bodily Harm

- [13] Paragraph (c)(1) provides that, before a lawyer may reveal information protected by Business and Professions Code section 6068(e)(1), 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 protected 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 protected 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 protected 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.

Requirement under Paragraph (c)(2) to Inform Client of Lawyer's Ability or Decision to Reveal Protected Information

[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 protected 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 protected 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 Protected 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 protected 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 protected 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 protected 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 protected 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 protected 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, 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 protected information as permitted by this Rule, 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).

Disclosure as Permitted by Paragraphs (b)(2) through (b)(5)

- [19] If a legal claim by a client or the client's representative alleges a breach of duty 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 only 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 information protected by Business and Professions Code section 6068(e)(1) 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 to the extent required by Rule 1.4 about the possibility of appeal. 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 protected 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 information protected by Business and Professions Code section 6068(e)(1) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

Acting Competently to Preserve Confidentiality

- [24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e)(1) 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 protected by Business and Professions Code section 6068(e)(1), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

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

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice ("CACJ")	M		1.6(b)(4)	Our proposed modification would be to paragraph (b)(4) to add the following language to say: to comply with a "valid" court order.	The Commission did not make the requested change. Whether a court order is valid will require resolution by an appellate court. Comment [21] has been added to provide guidance for proceeding under the circumstances. The Comment requires the lawyer to "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," and includes a citation to <i>People v. Kor</i> (1954) 129 Cal. App. 2d 436, a seminal Supreme Court case on a lawyer's duty when ordered by a court to disclose confidential information. The comment also clarifies that in the event of an adverse ruling, the lawyer "must" consult the client concerning an appeal. Only after an appeal or if no appeal is taken, may a lawyer reveal confidential information to comply with a court order.
2	COPRAC	M		1.6(a)	COPRAC agrees with the minority position and believes the use of the phrase "relating to the representation" is too limited to conform to Business & Professions Code Section 6068(e)(1). This rule should extend the duty of confidentiality to the same extent	The Commission has substituted the defined term, "information protected by Business and Professions Code section 6068(e)(1)" for "information relating to the representation" throughout the Rule. See Introduction to Rule & Comment Comparison Charts.

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

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Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [3]	delineated by Section 6068(e). Comment [3] to the proposed Rule should be revised to reference Section 6068(e).	The Commission made the requested change. No response is necessary.
				Stricken 1.6(b)(2), (b)(3)	COPRAC does not favor adoption of the so-called Enron exceptions permitting disclosure in certain situations involving financial harm.	No response is necessary. See also response to CACJ, above.
				1.6(b)(4)	We agree that compliance with a court order addressing disclosure of confidential information should be permitted by the proposed rule, with the proviso set forth in the comment than an appeal should be considered.	No response necessary. In any event, the Commission notes that including the "other law" exception would effectively permit disclosures under stricken MR 1.6(b)(2) and (3), at least for publicly-traded companies under the Sarbanes-Oxley Act.
				1.6(b)(4)	COPRAC members are divided on whether the compliance with "other law" should also be included as a scenario in which disclosure should be permitted. A majority of COPRAC members believe that this exception should not be included in the California rule.	
3	Judge, Michael P. Los Angeles County Public Defender	M		1.6(a)	We object to limiting "confidential information" to "relating to the representation" in 1.6(a). This protection should not be narrowed.	Please see response to COPRAC comment re paragraph (a), above.
				1.6(b)(4)	Under <i>People v. Kor</i> , the lawyer is required to resist a court order to disclose confidential information, even upon pain of contempt. Thus, section (4) should be stricken, as should the part of section 1.6(d) allowing the lawyer to comply with a court order (to	Please see response to CACJ, above.

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Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					disclose confidential information).	
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Cmt. [5] Cmt. [6] Cmt. [9] Cmts. [23] & [26]	We are concerned about the broad reference to the State Bar Act at the end of the Comment. That is overbroad, and makes the rule difficult to analyze. The Comment should refer directly to the specific provisions of the State Bar Act that are intended to be incorporated, such as Section 6068(e). Comment [6] should be clarified to distinguish between “generally known” information, which is not protected under the rule, and information in the public record, which is protected. The first line of Comment [9] is an incomplete sentence. If this is intended as a title for the Comment, perhaps it should be italicized? We also believe that Comments [23] and [26] do not add anything to the interpretation of the rule and should be deleted. These are simply repetitive of what is stated elsewhere in the comments or rules. Even though Comment [26] is derived from ABA Comments, we believe it is unnecessary and duplicative.	The Commission did not make the requested change. A general reference is adequate in the event the legislature amends the State Bar Act to permit other exceptions. The Commission agrees and has added a sentence to Comment [6]. LACBA correctly noted the first “sentence” is a heading and it has been revised as a heading in conformance with the Rules format. The Commission has not made the requested changes. Comment [23] corresponds to Comment [11], currently found in rule 3-100. What Comment [11] states with respect to paragraph (b)(1), Comment [23] does with respect to paragraphs (b)(2) – (b)(5). Comment [26] and its heading points lawyers to Rule 1.9 concerning their duties with respect to former clients' confidential information.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Office of Chief Trial Counsel ("OCTC"), State Bar of California	M		1.6(a)	1. OCTC believes the proposed Rule might cause confusion because it does not use the same language in paragraph (a) as is found in Bus. & Prof. Code § 6068(e)(1) ("confidence" and "secrets"). OCTC also believes that paragraph (a) should refer to all of § 6068(e) and not just 6068(e)(1).	1. The language used in paragraph (a) was compromise language approved by representatives of the Legislature during the drafting of current rule 3-100. The representatives did not want language that paralleled section 6068(e)(1) in paragraph (a). The Commission disagrees. Section 6068(e)(1) is the statement of the duty of confidentiality in California, just as Model Rule 1.6(a) is the statement of confidentiality in Model Rule states. Proposed Rule 1.6(a) attempts to parallel the substance of Model Rule 1.6(a) and 6068(e)(1). By contrast, section 6068(e)(2) is an <u>exception</u> to the duty; its counterpart is proposed Rule 1.6(b), as is true in Model Rule states.
				1.6(b)	2. OCTC suggests that paragraph (b) does not address what will happen if further changes are made to section 6068(e) that permit other exceptions. OCTC further suggests that to avoid conflicting rules, paragraph (b)(1) simply state that paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e).	2. The Commission has not made the suggested change. First, there is no guarantee that the Legislature would place exceptions to § 6068(e)(1) in § 6068(e) or even in § 6068. In the past, proposed exceptions have appeared in different-numbered sections of the State Bar Act. Second, the experience of AB 1101, which resulted in the exception for death and substantial bodily harm that is in current rule 3-100 indicates that the Legislature is unlikely to enact any exceptions that would become operative before the Supreme Court has had an opportunity to approve a parallel rule.
				1.6(b)(3)	3. OCTC agrees with the minority that paragraph 1.6(b)(3) would permit disclosure	3. Please see response to SDCBA, below. The provision is narrowly drafted and revisions to

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Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					to establish a claim or defense on behalf of the lawyer without a court determination.	Comment [19] emphasize that a lawyer may reveal information only to the extent that it is necessary to establish a claim or defense. As the lawyer will be revealing such information only before a tribunal in which the lawyer-client controversy plays out, the necessary protections should be present.
				1.6(b)(4)	4. OCTC disagrees with the removal of the Model Rule's phrase "other law" from subparagraph (b)(4). OCTC agrees with retaining "court order" exception in subparagraph (b)(4).	4. Please see response to COPRAC comment re 1.6(b)(4), above. No response necessary.
				1.6(b)(5)	5. OCTC has expressed concerns in relation to proposed Rule 1.14.	5. Please see discussion in Chart re proposed Rule 1.14.
				1.6(e)	6. OCTC believes that paragraph (e) is too broad in extending current rule 3-100(E) to all subparagraphs of paragraph (b) and not limit it to subparagraph (b)(1) as in current rule 3-100. For example, OCTC believes paragraph (e) would permit a lawyer to escape discipline even if the lawyer refused a court order after an appeal determined the information sought must be disclosed.	The Commission does not believe any change need be made to paragraph (e), which provides only that "[a] lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule." If, after an appeal, an appellate court has determined that the lawyer must disclose what the lawyer has argued is protected under Rule 1.6, the court in effect is stating that the information is not protected under the Rule, and so the lawyer cannot rely on the rule to oppose disclosure. Regardless, refusal to disclose should not subject a lawyer to discipline under a Rule that only permits disclosure. Further, the lawyer otherwise would be subject to discipline under other provisions of the

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				General	7. OCTC believes that there are too many comments and does not believe a rule comment should explain a statute.	State Bar Act. 7. The Commission has not made any changes. The specific comment to which OCTC refers, Cmt. [9], is in the Discussion to current rule 3-100 (¶. 3). The drafting of rule 3-100 was a cooperative venture among the Legislature, the Supreme Court, and the State Bar, as provided in AB 1101, which expressly provided for the appointment of a task force by the State Bar President in consultation with the Supreme Court "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act." In addition, the bill identified a number of issues that should be addressed in the rule, which are the subject of the Comments [9] to [18] of the proposed Rule.
				Cmt. [15]	8. OCTC suggests that Comment [15] is too narrow and applies only to prevent criminal conduct and should be stricken.	8. The Commission has not made the suggested change. Comment [15] concerns only subparagraph (b)(1), which itself is limited to preventing criminal conduct.
				Cmt. [19]	OCTC also objects to Comment [19], arguing that it "could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information."	The Commission notes that Comment [19] provides only that a lawyer may disclose information without the client's permission in order to defend himself or herself against the client's allegations. Neither paragraph (b)(3) nor Comment [19] is not intended to provide OCTC with the ability to force a lawyer to breach his or her duty of confidentiality without the client's permission.

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Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [21]	OCTC also suggests that Comment [21]'s last sentence "could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it."	The Commission disagrees with this assessment. The last sentence of Comment [21] provides: "Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order." See response concerning paragraph (e), at RRC Response, ¶. 6, above.
				Cmt. [23]	OCTC also believes that Comment [23] would permit a lawyer to disobey a court order or law.	Please see response to paragraph (e), at RRC Response, ¶. 6, above.
6	Orange County Bar Association	M		1.6(b)(3)	The OCBA recommends one revision to the proposed Rule, and a corresponding change in one of the Comments, in order to emphasize the scope of a lawyer's disclosure under certain circumstances. In paragraph (b)(3) of the proposed Rule, we suggest the following changes: "(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, but only to the extent necessary to establish a claim or defense ; or . . ."	The Commission did not make the requested change as to paragraph (b)(3) as the requested limitation already appears in the introductory paragraph to (b) ("(b) A lawyer may, but is not required to, reveal confidential information relating to the representation of a client <i>to the extent that the lawyer reasonably believes the disclosure is necessary</i> ." [Emphasis added].)
				Cmt. [19]	In addition, we recommend the following changes to the first sentence in Comment [19]: "If a legal claim by a client or the client's	The Commission agrees with this clarifying change and has implemented it.

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Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					representative alleges a breach of duty by the lawyer . . . paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense.”	
7	Sall, Robert K.	M		1.6(b) & Cmt. [22]	The “reasonable belief” standard is too subjective. It should be retained in subparagraph (b)(1) but should be removed from the introduction to paragraph (b). The same change should be made to Comment [22].	The Commission did not make the requested change. The “reasonable belief” standard is an objective standard; it appears in both B & P Code § 6068(e)(2) and in current rule 3-100(B).
				1.6(b)(3) & Cmt. [19]	There is a concern that a lawyer might use paragraph (b)(3) to justify disclosure of information not necessary to establish a claim or defense. Recommends revising Comment [19] to avoid any implication that a lawyer may do so.	Please see response to OCBA re Comment [19], above.
				1.6(c)(1)	Paragraph (c)(1) should be revised to require that the lawyer do both (i) and (ii). The commenter suggests the following: (1) make a good faith effort to persuade the client not to commit or to continue the criminal act and counsel the client to pursue a course of conduct that will prevent the threatened death or substantial bodily harm;	The Commission has not made the suggested change. The two courses of conduct in paragraph (c)(1) appear in current rule 3-100. They were written in the alternative because (1) addresses the situation where the client is the actor and (2) addresses the situation where a third person is the actor. In some instances where the client is acting with another person, the lawyer might want to do both. Comment [13] to proposed Rule 1.6 [which is taken nearly verbatim from paragraph 7 of current rule 3-100], clarifies this distinction.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [6]	There is a possibility that a person who reads Comment [6] will not understand the distinction between information that is "generally known" and information that is in the public record.	Please see response to LACBA, above.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	Santa Clara County Bar Association	D		MR 1.6(b)(2), (3)	We oppose the revisions proposes by the RRC in completely deleting subsection (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application.	The Commission did not make the suggested change. As noted in the Introduction to the Rule, MR 1.6(b)(2) and (3) are inimical to California's settled policy favoring strong confidentiality to better enable a lawyer to provide competent representation and compliance with the law: These provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law.
10	Trusts and Estates Section of the State Bar of California, Executive Committee	M		1.6(b)(4) 1.6(a)	We urge (1) retaining subparagraph (b)(4) of the Proposed Rule which would allow disclosure of confidential client-information when necessary to comply with a court order; and (2) including in subparagraph (a) the Model Rule exception that allows for disclosure of confidential client information when "disclosure is impliedly authorized in order to carry out the representation." Otherwise, the only general exception to the Business & Professions Code Section 6068 prohibition on disclosure would be for when the client gives informed consent.	No response necessary to position (1). As to position (2), the Commission has already noted that the concept of "implied authority," which has been incorporated into the Model Rule, is a dangerous catchall that threatens to swallow the duty of confidentiality. Rather than incorporate a term the Model Rules do not define, the Commission in Comment [3] has defined "confidential information relating to the representation" (another term the Model Rules do not define). As provided in Comment [3], that term means "information gained by virtue of the

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = 10 Agree = 0 Disagree = 1 Modify = 9 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						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.” The lawyer thus would be impliedly authorized to reveal information that does not fall within (a), (b) or (c) – that is, so long as it is not privileged, embarrassing or detrimental to the client, or which the client has expressly requested that the lawyer not divulge. The Commission has determined that this approach provides more of a bright-line standard and thus provides better guidance and predictability to lawyers in representing their clients.

Rule 1.6: Confidentiality of Information

STATE VARIATIONS

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

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

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

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

Arizona: Rule 1.6(d)(5) applies only to “other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.” Arizona also has an unusual statute governing the attorney-client privilege for

corporations and other entities—see the Arizona entry in the Selected State Variations following ABA Model Rule 1.13.

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

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

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

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

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

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

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

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

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

District of Columbia: Rule 1.6 combines language from the ABA Model Code and the ABA Model Rules plus other language unique to D.C. Rule 1.6(c)(2) permits a lawyer to reveal client confidences "to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer

reasonably believes" such acts will likely occur without revelation. Rule 1.6(d) is substantially the same as Model Rule 1.6(b)(2) and (3), although differently phrased. Rule 1.6(h) applies the obligations of the Rule "to (confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer."

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

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

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

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

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

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

(c) The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.

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

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

Massachusetts: Rule 1.6(b) provides as follows:

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

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

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

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

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

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

(1) the client gives informed consent;

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

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

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

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

New Hampshire: In the rules effective January 1, 2008, Rule 1.6(b)(1) also permit disclosure to prevent the client from committing "a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another," without any requirement that the client is using or has used the lawyer's services. New Hampshire omits ABA Model Rule 1.6(b)(3).

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

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

New York: DR 4-101 is the same as DR 4-101 of the ABA Model Code of Professional Responsibility, except that New York adds a special exception to confidentiality in DR 4-101(C)(5) permitting a lawyer to reveal confidences and secrets "to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." New York DR 7-102(B) tracks the ABA Model Code except that DR 7-102(B)(1) exempts disclosure "when the information is protected as a confidence or secret."¹

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

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

Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered.”

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

Oklahoma: Rule 1.6(b)(2) permits revelation only if “the lawyer has first made reasonable efforts to contact the client so that the client can rectify such criminal or fraudulent act, but the lawyer has been unable to do so, or the lawyer has contacted the client and called upon the client to rectify such criminal or fraudulent act and the client has refused or has been unable to do so.”

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

client ultimately consents to representation by the purchasing lawyer.”

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

Tennessee: Rule 1.6(b)(1) permits a lawyer to reveal client confidences “to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another,” unless Rule 3.3 forbids revelation. Rule 1.6(c) provides that a lawyer “shall” reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

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

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

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

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

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

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

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

Virginia: Rule 1.6(a) contains the Code's definitions of "confidence" and "secret" without using these terms. A lawyer may reveal a client confidence "which clearly establishes that the client has, in the course of the representation, perpetrated

upon a third party a fraud related to the subject matter of the representation." Rule 1.6(b)(3). The lawyer must "promptly" reveal "the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime," but if feasible must first give the client the opportunity to desist and must advise the client of the lawyer's obligation. If "the crime involves perjury by the client," the lawyer must advise the client that he or she "shall seek to withdraw as counsel." Rule 1.6(c)(1). Rule 1.6(c)(2) also requires the lawyer to promptly reveal "information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal." Information is clearly established when "the client acknowledges to the attorney that the client has perpetrated a fraud."

Proposed Rule 1.7 [3-310]

“Conflicts of Interest: Current Clients”

(ALT1, Draft # 2.2, 2/28/10)

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

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

Primary Factors Considered

☒ Existing California Law

Rules

RPC 3-310

Statute

Bus. & Prof. Code § 6131.

Case law

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution ☐

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 4

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Stakeholders and Level of Controversy

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

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

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

☒ Very Controversial – Explanation:

A minority of the Commission favors retaining the current California Rule approach. See Introduction. In addition, concerns have been expressed over the inclusion of Comment [22], regarding advance waivers of conflicts.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.7* Conflict of Interest: Current Clients

March 2010

(Draft rule following consideration of Public and RAC comment)

INTRODUCTION:

Proposed Rule 1.7, which is based on Model Rule 1.7, is the basic conflicts of interest rule. It addresses conflicts of interest in the representation of current clients, and it is the point of reference for several other conflicts rules, including possible conflicts of interest that might arise because of continuing duties to former clients (Rule 1.9) and conflicts of interest affecting current and former government lawyers (Rule 1.11). After consideration of public comment and concerns expressed by the Board committee at its November 2009 meeting, and after reconsidering the interjurisdictional implications of national practices, the Commission has come to agree with the Model Rule's identification of situations that create potential or actual conflicts of interest for a lawyer in representing current clients. The Commission recommends that the Board reject the public comment version of the Rule (which carries forward current California Rule 3-310's "checklist" approach to conflicts) and for the most part recommends adoption of the Model Rule. The Commission has concluded that the format and certain of substantive elements of the Model Rule, as supplemented by language and law developed in California case law, statutes and regulations, will act to protect vital client interests. Specifically, the Commission recommends the nearly verbatim adoption of the black letter of the Model Rule, with the only change being the substitution of the heightened California "informed written consent" standard for the Model Rule's less client protective "informed consent, confirmed in writing." The Commission also recommends the adoption of the structure and organization of the Model Rule, with a number of changes made for clarification and to provide better guidance for lawyers to apply the Rule and be in compliance with their professional obligations.

The Commission notes that few issues face lawyers more often than conflicts of interest. Thus, public policy strongly favors having a consistent rule on conflicts that is coherent, complete and is in accord with California law and with the rules in other jurisdictions. Most jurisdictions, including California, recognize that a conflict on interest exists where the particular circumstances present a significant risk that

* Proposed Rule 1.7, ALT1, Draft 2.2 (2/28/10)

the lawyer's representation of a client will be materially and adversely affected by the lawyer's responsibilities to another client, a former client, or to a third party or by the lawyer's own interests. Restatement Third, The Law Governing Lawyers, section 121 (ALI 2000); *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal. App. 4th 275, 282. Model Rule 1.7(a) correctly reflects that standard. The standard articulated in the Model Rule has been developed through case law and is the standard adopted in the rules of most jurisdictions. The Commission has recommended following the Model Rule when it comes to former client conflicts. Similarly, there is no good reason for departing from the widely accepted rule on current client conflicts.

The Commission also notes that current California Rule 3-310 has a complex structure that is confusing to lawyers and difficult to understand and apply. Model Rule 1.7 is more concise and covers the same ground as the current California rule with more clarity. situations. Moreover, although the current rule might be drafted with more specificity, it does not cover all conflict situations. While the checklist approach of the current rule might appear preferable in concept, it misses the mark in terms of comprehensiveness. For example, current rule 3-310(B)(2) is limited to a lawyer's relationships with a "party or witness" rather than duties to any third party that would materially and adversely affect the lawyer's independent judgment and loyalty to the client. Current rule (B)(3) is limited to relationships with a third person where the third person, rather than the client, would be "affected substantially by resolution of the matter." The paragraph provides no protection where the lawyer's duties to the third person will materially limit the client's representation. Proposed Rule 1.7(a)(2), which is identical to the Model Rule, provides a more coherent and complete standard that requires client consent where there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. See proposed Rule 1.7, Comments [7B] and [8]. This is an objective and enforceable standard by which to assess the effect on the risk of adversity and materiality on the representation. See Rest. Section 121, Comment c.; and see, e.g., *Fiandaca v. Cunningham* (1st Cir.1987) 827 F.2d 825. The Commission takes the position that lawyers in California should have the same consistent and accepted standard as lawyers in other jurisdictions for determining the existence of a concurrent conflict of interest.

Moreover, the Commission has not completely discarded the current rule. Instead, it has recommended including in the Comment language from the current black letter rule (that was carried forward in the public comment version of the Rule), as well as language from State Bar ethics opinions, to help lawyers analyze actual and potential conflict situations. The Commission's approach thus provides the more comprehensive Model Rule standard *and* the specific guidance the minority claims is present in the current rule and public comment version but is lacking in the proposed Rule.

Minority. A minority of the Commission has submitted a dissent to the Commission’s decision to recommend adoption of a Rule patterned on Model Rule 1.7. The minority takes the position that “[t]his represents a sea change that will radically reduce client protection.” The full minority dissent, together with the minority’s proposed Rule draft which the minority states addresses the concerns expressed at the Board Committee’s meeting in November 2009, is attached below following the Rule & Comment Comparison Chart.

Public Comment. The Commission received a substantial amount of public comment, much of it addressed to Comment [31] (now renumbered Comment [22] as in Model Rule 1.7), concerning advance waivers of conflicts of interest, and much of it opposing the proposed comment. The proposed comment uses Model Rule 1.7, cmt. [22] as its starting point, but has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers. The Commission carefully considered the opposing viewpoints but ultimately concluded that omitting Comment [31] would not add to lawyers’ understanding of this important subject, and recommends that it be adopted. Instead, the Commission has made a number of revisions that are intended to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection.

Variations in other jurisdictions: All other jurisdictions have rules based on the Model Rule format but with a number of variations. Some of these correspond to aspects of the proposed Rule. For example, Maine’s Rule requires disclosure of the lawyer’s own relationships and interests along the lines of proposed paragraph (d). The District of Columbia has added paragraph (b)(4), which also is along the lines of proposed paragraph (d), and its Comment section, which uses the 1983 version of the Model Rule as its starting point, diverges markedly from either the 1983 or the 2002 version of the Model Rule. Alaska has defined client to exclude class members (see proposed Comment [34]). Florida and Ohio also have added a provision regarding a lawyer’s relationship with another lawyer in a matter that is along the lines of California’s rule 3-320 (proposed Rule 1.8.11). Idaho includes a brief reference to a lawyer’s personal interests and family relationships that is a highly diluted version of proposed paragraph (d) and of proposed Rule 1.8.11. North Dakota and Ohio also add Rule references to the lawyer’s personal interests, but overlook the lawyer’s personal relationships.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.	(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.	Paragraph (a) is identical to Model Rule 1.7(a).

* Proposed Rule 1.7, ALT1, Draft 2.2 (2/28/10). Redline/strikeout showing changes to the ABA Model Rule

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

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
General Principles [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).	General Principles [1] <u>Undivided</u> Loyalty and independent <u>professional judgment</u> are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. <u>See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client.</u> For specific ~~Rules~~<u>rules</u> regarding certain concurrent conflicts of interest, see ~~Rule 1.8~~<u>Rules 1.8.1 through 1.8.11</u>. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "~~confirmed in writing~~<u>informed written consent</u>," see Rule 1.0(e) and (~~be-1~~), <u>and Comments [6] and [7] to that Rule.</u>	Comment [1] is based on Model Rule 1.7, cmt. [1], with the beginning and end of the Comment nearly identical to the Model Rule. Although there is no counterpart for it in the Model Rule, the Commission recommends including the middle section of the Comment, which identifies other duties besides loyalty and independent judgment, that factor into conflicts analysis. As Rule 1.7 is the first of four rules concerning conflicts, its placement in the first comment of the first rule in the series is appropriate. In addition to the middle section, the Commission recommends substituting "undivided loyalty" and "independent professional judgment" for the corresponding "loyalty" and "independent judgment," respectively. California case law repeatedly refers to a lawyer's "duty of undivided loyalty" and the term "independent professional judgment" is used throughout the proposed Rules. In the last part of the Comment, the term "Rules 1.8.1 through 1.8.11" has been substituted for "Rule 1.8" because the the Board has adopted, the Commission's recommended numbering convention of assigning each counterpart provision to Model Rule 1.8 a separate rule number and title ("1.8.x"). The Commission recommended the foregoing approach because Model Rule 1.8 is largely a collection of unrelated provisions and the Commission's approach provides ease of reference and indexing. Finally, California's heightened "informed written consent" standard is substituted for the Model Rules "consent, confirmed in writing."

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).	[2] Resolution of a conflict of interest ~~problem~~ under this Rule requires the lawyer to: (1) clearly identify the client or clients; <u>(2) determine the scope of each relevant representation of a client or proposed representation of a client;</u> (3) determine whether a conflict of interest exists; ~~3(4)~~ decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict ~~is consentable~~<u>can be waived by the client;</u> and ~~4(5)~~ if so, consult with the clients affected under paragraph (a) and obtain their informed <u>written</u> consent; ~~confirmed in writing~~. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).	Comment [2] is based on Model Rule 1.7, cmt. [2], the principal change being to include an additional factor in the analysis, i.e., the scope of the representation or proposed representation. This factor has particular relevance in light of the Board's Resolution on limited scope representation. The term "consentable" has been replaced throughout the Rule because that term is not a word. The Commission has substituted language to identify the concept that "consentable" presumably is intended to communicate, i.e., the lawyer's ability to obtain the client's consent to the conflict. See also Explanation of Changes for Comments [14]-[17A]. Finally, California's heightened "informed written consent" standard is substituted for the Model Rules "consent, confirmed in writing."
[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship	[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed <u>written</u> consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. ~~As to whether~~ <u>Whether a client-lawyer-client</u>	Comment [3] is based on Model Rule 1.7, cmt. [3]. The word "written" has been added to track California's heightened consent standard. The last sentence of the Comment has been revised for two reasons. First, the Commission has not recommended adoption of the specific provisions referred to in the Model Rule comment. Second, and more importantly, the question of whether an attorney-client relationship has been formed or is continuing often requires a complex analysis that is not easily susceptible to a simple rule. See, e.g., State Bar Formal Ethics Opn. 2003-161. Finally, "lawyer-client" is substituted for "client-lawyer" throughout the Rules to better track the phraseology in the Business &

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.	relationship exists or, having once been established, is continuing, ~~see Comment to Rule 1.3 and Scope~~ is beyond the scope of these Rules.	Profession and Evidence Codes.
[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].	[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed written consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to ~~the~~ a client who becomes a former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also ~~Comments [5] and~~ Comment [29].	Comment [4] is based on Model Rule 1.7, cmt. [4]. The word "written" has been added to track California's heightened consent standard. The second sentence has been revised for clarification; no change in meaning is intended. Finally, the reference to Comment [5], concerning "thrust upon" or "unforeseeable conflicts," has been stricken because the Commission does not recommend adoption of that Comment.
[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The	[5] ~~[RESERVED] — Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to~~	The Commission does not recommend adoption of Comment [5], concerning "thrust upon" or "unforeseeable conflicts," because the Commission is not aware of any California authority on this issue. The Commission determined that the development of the law in this area is better left to development by the courts.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).	~~avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~	
Identifying Conflicts of Interest: Directly Adverse [6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is	<u>Paragraph (a)(1): Identifying Conflicts of Interest: Directly Adverse</u> [6] ~~Loyalty~~<u>The duty of undivided loyalty</u> to a current client prohibits undertaking representation directly adverse to that client without that client's informed <u>written</u> consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the ~~client-lawyer-client~~ relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. <u>Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in</u>	The Commission recommends adding "Paragraph (a)(1)" to the title of this section of the Comment to call readers' attention to its applicability to that provision of the Rule. The Commission recommends substituting "undivided loyalty" "loyalty" because California case law repeatedly refers to a lawyer's "duty of undivided loyalty". The word "written" has been added to track California's heightened consent standard. The term "lawyer-client" is substituted for "client-lawyer" throughout the Rules to better track the phraseology in the Business & Profession and Evidence Codes. A middle section has been added to (i) include the holding of a seminal California Supreme Court case, <i>Flatt v. Superior Court</i>, involving a directly adverse conflict; and (ii) carry forward another example of direct adversity from current rule 3-310(C)(3). The Commission also recommends deleting language in the Model Rule's sentence concerning a lawyer cross-examining a client as too limiting. The lawyer would also violate his or her duty of undivided loyalty to the client being cross-examined, for

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represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.	another matter. See <i>Flatt v. Superior Court</i> (1994) 9 Cal.4th 275. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. A directly adverse conflict may also arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, ~~as when the testimony will be damaging to the client who is represented in the lawsuit.~~ On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so	example, if the testimony elicited on cross-examination were advantageous to the client being represented in the law suit but damaging to the client being cross-examined. See, e.g., <i>Hernandez v. Paicius</i> (2003) 109 Cal.App.4th 452, 134 Cal.Rptr.2d 756, disapproved on other grounds in <i>People v. Freeman</i> (2010) 47 Cal.4th 993, 103 Cal.Rptr.3d 723, 733 n.4. Finally, the Commission has recommended including the section at the end of the Comment which provides numerous other examples of situations that would not constitute "direct adversity". The Commission believes that including these examples will assist lawyers in identifying those situations in which they are required to obtain a client's informed written consent, enhancing both the administration of justice and client protection.

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	would interfere with the lawyer's ability to represent either client competently, as might occur, e.g., if the lawyer were advocating inconsistent positions in front of the same tribunal. See Comments [14]-[17A)].	
[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.	[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed written consent of each client. Paragraph (a)(1) applies even if the parties to the transaction have a common interest or contemplate working cooperatively toward a common goal.	Comment [7] is based on Model Rule 1.7, cmt. [7]. The word “written” has been added to track California’s heightened consent standard. The last sentence has been added to emphasize that paragraph (a)(1) applies (and thus informed written consent of each affected client must be obtained) even if the parties on different sides of a transaction have a common goal or interest.
	[7A]If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].	Comment [7A] has no counterpart in the Model Rule. It has been added to direct the reader's attention to paragraph (a)(2) and related comments when the lawyer seeks to represent two or more parties on the same side of a matter.
Identifying Conflicts of Interest: Material Limitation	Paragraph (a)(2): Identifying Conflicts of Interest: Material Limitation [7B]Conflicts of interest that create a significant risk that a lawyer's representation of one or more clients will be materially limited as provided in paragraph	The Commission recommends adding “Paragraph (a)(2)” to the title of this section of the Comment to call readers’ attention to its applicability to that provision of the Rule. Comment [7B] has no counterpart in the Model Rule. It has been added to call readers’ attention to the fact that several kinds of

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	(a)(2) can arise from: (1) duties owed a former client or a third person (see Comment [9]); (2) a lawyer's personal interests (see Comments [10]-[12]); or (3) a lawyer's joint representation of two or more clients in the same matter (see Comments [29]-[33]).	distinctly different situations require analysis under paragraph (a)(2), and directs the reader to the specific sections of the Comment that concern those situations. Comment [7B] acts as a "bridge" to the sections that elaborate and clarify paragraph (a)(2) and Comment [8].
[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.	[8] Even where there is no direct ~~adverseness~~ adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent two or more clients in the same matter, such as several individuals seeking to form a joint venture, is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the ~~others~~other clients. The conflict in effect forecloses alternatives that would otherwise be available to each of the ~~client~~clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of ~~action~~actions that reasonably should be pursued on behalf of ~~the~~each client. See Comments [29]-[33]. Depending on the circumstances, various relationships a lawyer	Comment [8] is based on Model Rule 1.7, cmt. [8]. The word "adversity" has been substituted for "adverseness" because the former is the term more commonly used in California case law. A number of clarifying changes have been made to the Model Rule comment and "informed written" has been added to modify "consent" to reflect California's heightened consent standard. A cross-reference to Comments [29]-[33] is provided to direct the reader to the Comments clarifying a lawyer's duties when jointly representing clients. Finally, a lengthy section, derived from the black letter of current rules 3-310(B) and 3-320, has been added to elaborate on the kinds of relationships or situations that can require compliance with paragraph (a)(2).

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	has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (2) the lawyer knows or reasonably should know that: (i) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and (ii) the previous relationship would substantially affect the lawyer's representation; (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; (4) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.	
Lawyer's Responsibilities to Former Clients and Other Third Persons [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former	Lawyer's Responsibilities to Former Clients and Other Third Persons [9] ~~In addition to conflicts with other current clients,~~ a lawyer's duties of undivided loyalty and independence of professional judgment may be	Comment [9] is based on Model Rule 1.7, cmt. [9]. See Explanation of Changes for Comment [1]. The Comment also includes a citation to an important California Court of Appeal

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clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.	materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director. See, e.g., <i>William H. Raley Co., Inc. v. Superior Court</i> (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].	case.
Personal Interest Conflicts [10]The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).	Personal Interest Conflicts [10]The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a the client detached advice. A lawyer's legal, business, professional or financial interest in the subject matter of the representation might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; or (3) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to	Comment [10] is based on Model Rule 1.7, cmt. [10]. A middle section has been added to provide specific examples of the kinds of personal interest relationships that can require compliance with paragraph (a)(2). As to the substitution of "1.8.1 through 1.8.11," see Explanation of Changes for Comment [1]. A reference to Rule 3.7 has also been added to call lawyers' attention to the fact that that specific rule might be applicable and not paragraph (a)(2).

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	affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See ~~Rule 1.8~~Rules 1.8.1 through 1.8.11 for specific ~~Rules~~rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 3.7 concerning a lawyer as witness and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).	
[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.	[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, <u>or when there is an intimate personal relationship between the lawyers</u>, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer <u>who is</u> related to another lawyer, e.g., as parent, child, sibling or spouse, <u>or who is in an intimate personal relationship with another lawyer</u>, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed <u>written</u> consent. The ~~disqualification~~<u>prohibition on representation</u> arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.	Comment [11] is based on Model Rule 1.7, cmt. [11]. The addition of "intimate personal relationship" has been added to track language used in other California statutes and rules requiring disclosure and/or consent in fiduciary relationships. The word "written" has been added to track California's heightened consent standard. The term "prohibition on representation" has been substituted for "disqualification" because this Rule applies in transactional situations as well as litigation. See Comments [26]-[27], below.

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[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).	[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the ~~client-~~lawyer-client relationship. See Rule ~~1.8(j)~~1.8.10.	Comment [12] is identical to Model Rule 1.7, cmt. [12], except that “lawyer-client” has been substituted for “client-lawyer” and “Rule 1.8.10” has been substituted for “1.8(j),” the Model Rule counterpart for proposed Rule 1.8.10.
Interest of Person Paying for a Lawyer's Service [13]A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.	Interest of Person Paying for a Lawyer's Service [13]A lawyer may be paid from a source other than the client, including a co-client, if the client ~~is~~gives informed ~~of that fact and consents~~written consent and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule ~~1.8(f)~~1.8.6. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a ~~payer~~payor who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the ~~conflict~~—is consentablelawyer has the ability to obtain the client's consent to the representation and, if so, ~~that~~whether the client has adequate information about the material risks of the representation. <u>See Comments [14]-[17A].</u>	Comment [13] is based on Model Rule 1.7, cmt. [13]. The term “written consent” has been added to track California's heightened consent standard. “Rule 1.8.6” has been substituted for “1.8(f)” because that is the rule number assigned the counterpart to Model Rule 1.8(f). “Payor” is the term traditionally used in California Rules. For an explanation of the language substituted for “consentable,” see Explanation of Changes for Comment [2].

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Prohibited Representations [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.	Prohibited Representations [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), ~~in some conflicts are nonconsentable, meaning that the situations a~~ lawyer ~~involved~~ cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of ~~consentability~~<u>consent</u> must be resolved as to each client.	Comment [14] is based on Model Rule 1.7, cmt. [14]. For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].
[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).	[15] ~~Consentability~~<u>A lawyer's ability to obtain consent</u> is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed <u>written</u> consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 ~~(competence) and Rule 1.3 (diligence)~~.	Comment [15] is based on Model Rule 1.7, cmt. [15]. For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2]. The word "written" has been added to track California's heightened consent standard. The cross-reference to Rule 1.3 (diligence) has been stricken because the Commission has recommended and the Board adopted the inclusion of the concept of diligence in Rule 1.1.
[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a	[16] Paragraph (b)(2) describes conflicts ~~that are nonconsentable~~<u>to which a client cannot consent</u> because the representation is prohibited by applicable law. For example, ~~in some states substantive law provides that the same lawyer may~~	Comment [16] is based on Model Rule, cmt. [16]. For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].

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capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.	~~not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain~~ <u>certain</u> representations by a former government lawyer are <u>also</u> prohibited, despite the informed consent of the former client. ~~In addition~~ <u>See, decisional law in some states limits the ability of a governmental client e.g., such as a municipality, to consent to a conflict of interest</u> <u>Business & Professions Code section 6131.</u>	Most of the remainder of the Model Rule language has been stricken because it is simply generally guidance on what might be the law in some jurisdictions. It has been replaced by a specific example of a representation prohibited by California statutory law.
[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).	[17] Paragraph (b)(3) describes conflicts ~~that are nonconsentable~~ <u>for which client consent cannot be obtained</u> because of the ~~institutional interest~~ <u>interests of the legal system</u> in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. <u>See, e.g., Woods v. Superior Court (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); Klemm v. Superior Court (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict).</u> Although ~~this~~ <u>paragraph (b)(3)</u> does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is	Comment [17] is based on Model Rule 1.7, cmt. [17]. For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2]. The phrase "interests of the legal system" has been substituted for "institutional interest" to clarify what is intended and also to better track the language adopted in proposed Rule 1.0(a)(3), which states a purpose of the Rules is "To protect the integrity of the legal system and to promote the administration of justice." A middle section has been added to the Comment to provide two specific examples from California case law. See also <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857] [lawyer may not represent both a closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]].

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	not a proceeding before a “tribunal” under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).	
	[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Business and Professions Code section 6068(e)(1) and Rule 1.6. A lawyer might also be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained when the person who grants consent lacks capacity or authority. See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.	Paragraph [17A] has no counterpart in the Model Rule. It has been added because there are two other important situations in which a lawyer is not able to obtain consent to a conflict: (i) when the lawyer is precluded by confidentiality obligations from providing sufficient disclosure to support informed consent; or (ii) the client lacks capacity or authority to give consent. Although the Model Rule addresses the former concept in Comment [19] to that Rule, the Commission concluded it was better placed in this section on “Prohibited Representations,” with a cross-reference in Comment [19] to Comment [17A].

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Informed Consent [18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).	<u>Disclosure and</u> Informed <u>Written</u> Consent [18] Informed <u>written</u> consent requires that <u>the lawyer communicate in writing to</u> each affected client ~~be aware of~~ the relevant circumstances and ~~of~~ the ~~material~~<u>actual</u> and reasonably foreseeable ~~ways that adverse consequences of the conflict could have adverse effects on the client's~~ interests ~~of and the lawyer's representation and that the client thereafter gives his or her consent in writing~~. See ~~Rule 1.0~~<u>Rules 1.0.1(e) (informed consent) and 1.0.1(e-1) (informed written consent) and Comments [6] and [7] to that Rule</u>. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the ~~common~~<u>joint</u> representation, including possible effects on loyalty, confidentiality and the ~~attorney~~<u>lawyer</u>-client privilege and the advantages and risks involved. See ~~Comments Comment [30] and [31]~~ (effect of ~~common~~<u>joint</u> representation on confidentiality).	Comment [18] contains the same concept as Model Rule 1.7, cmt. [18], but has been substantially revised to incorporate the different protocol required for California's heightened "informed written consent" standard. The word "joint" has been substituted for "common," as the former term is used in California case law. The cross-reference to Comment [31] has been stricken because the Commission does not recommend adoption of that Comment.
[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.	[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. <u>See Comments [14]-[17A]</u>.~~For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot~~	Comment [19] retains only the first sentence of Model Rule 1.7, cmt. [19]. See Explanation of Changes for Comment [17A].

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In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.	~~properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.~~	
Consent Confirmed in Writing [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the	~~Consent Confirmed in Writing~~ [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, ~~confirmed~~ in writing. ~~Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b).~~ The requirement of a ~~writing~~<u>written disclosure, (see Comment [18])</u>, does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to	The heading has been deleted because California does not follow the Model Rules' less-protective standard. Comment [20] is based loosely on Model Rule 1.7, cmt. [20]. Most of the first part of the Model Rule comment has been stricken because the Commission determined that California's more robust consent protocol should be described in the first comment to this section on informed written consent (Comments [18]-[20].) However, the Commission recommends adoption of the last part of the Model Rule comment because it provides valuable guidance.

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seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.	impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.	
	<u>Duration of Consent</u> <u>[20A] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the relevant facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and obtaining a new written consent.</u>	Comment [20A] has no counterpart in the Model Rule. It provides a critical reminder that a consent conforms to the Rule only so long as there is no material change in the facts and circumstances on which the consent is based.
Revoking Consent [21]A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.	Revoking Consent [21]A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation <u>of that client</u> at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client ~~and~~, whether material detriment to the other clients or the lawyer would result, <u>and the lawyer's confidentiality obligations to the client revoking consent.</u>	Comment [21] is nearly identical to Model Rule 1.7, cmt. [21], with two clarifying changes.

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Consent to Future Conflict [22]Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such	Consent to Future Conflict ~~[22]Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such~~	Comment [22] shares much with the substance of Model Rule 1.7, cmt. [22]. However, the proposed Comment has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers. It was further edited after Board members expressed concerns about the Comment's discussion of advance waivers. The changes are intended to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection.

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as would make the conflict nonconsentable under paragraph (b).	~~as would make the conflict nonconsentable under paragraph (b).~~ <u>Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of</u>	

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	the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved that was independently represented regarding the consent or was advised in	

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	writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.	
Conflicts in Litigation [23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to	Conflicts in Litigation [23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to	Comment [23] is nearly identical to Model Rule 1.7, cmt. [23], except that the word "joint" has been substituted for "common," as the former term is used in California case law, two other non-substantive word changes were made.

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represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.	represent more than one codefendant. On the other hand, ~~common~~<u>joint</u> representation of persons having similar interests in civil litigation is ~~proper~~<u>permitted</u> if the requirements of paragraph (b) are ~~met~~<u>satisfied</u>.	
[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.	[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be ~~advised~~<u>informed</u> of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed <u>written</u> consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters <u>to the extent permitted by Rule 1.16</u>.	Comment [24] is based on Model Rule 1.7, cmt. [24]. The word "informed" was substituted for "advised" to track the language in the definition of "informed consent," Rule 1.0.1(e). The word "written" has been added to track California's heightened consent standard. Finally, a cross-reference to Rule 1.16 has been added to point the reader to the Rule governing termination of a representation.

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	[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).	Comment [24] has no counterpart in the Model Rule. It has been added in recognition that, notwithstanding this Rule, a court has inherent authority to control the conduct of persons appearing before it.
[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.	[25] ~~When~~ This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent ~~a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule.~~ Thus, the lawyer does not typically need to get the consent of ~~such a person~~ an unnamed class member before representing a client ~~suing the~~ who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.	Comment [25] is based on Model Rule, cmt. [25]. Several clarifying changes have been made.

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Nonlitigation Conflicts [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].	Nonlitigation Conflicts [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters <u>that are prohibited by paragraph (a)(1)</u>, see Comment [7]. Relevant factors in determining whether there is significant ~~potential~~<u>risk</u> for material limitation <u>as provided in paragraph (a)(2)</u> include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].	Comment [26] is based on Model Rule 1.7, cmt. [26]. References to specific sections of the Rule have been added for clarification.
[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.	[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. ~~In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.~~	Comment [27] is identical to the first two sentences of Model Rule 1.7, cmt. [27]. The balance of the Comment has been stricken as a potentially misleading statement of California law.

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[28]Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.	~~[28]Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.~~	The Commission is recommending that Model Rule 1.7, cmt. [28] not be adopted because it is an inaccurate statement of California law.
Special Considerations in Common Representation [29]In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails	Special Considerations in ~~Common~~Joint Representation [29]When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's	The heading for this section has been changed, with the word "joint" substituted for "common," as the former term is used in California case law. The same change has been made throughout this section of the Comment. Comment [29] is based on Model Rule 1.7, cmt. [29]. The first

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because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.	duties to the other clients. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the ~~common~~joint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the ~~common~~joint representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake ~~common~~joint representation of clients where contentious litigation or negotiations between them are imminent or contemplated. ~~Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained.~~ Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by ~~very good~~likely ~~are~~include whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.	sentence has been added to identify the basic concern underlying a lawyer's acceptance of a joint representation. The sentence beginning with "Moreover" has been deleted because it is a misleading statement of the duty of loyalty. Two grammatical changes have been made in the last and next-to-last sentence.

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	[29A] Examples of conflicts that arise under paragraph (a)(2) from representing multiple clients in the same matter and that will likely preclude a lawyer from accepting or continuing a joint representation unless the lawyer complies with paragraph (b) include the following situations: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer is obligated to advise each client about how to advance that client's position relative to the other's position; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); (6) the clients make inconsistent demands for the original file.	Comment [29A] has no counterpart in the Model Rule. The substance of this comment derives from State Bar Formal Ethics Opn. 1998-153, which described the kinds of conflict situations that might exist or arise in a joint representation. The Commission concluded that including a description of these comments would provide valuable guidance and better enable lawyers to identify representations that present a serious risk of a conflict.
[30]A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between	[30]A particularly important factor in determining the appropriateness of ~~common~~joint representation is the effect on ~~client~~-lawyer-client confidentiality and the ~~attorney~~lawyer-client privilege. With regard to the ~~attorney~~lawyer-client privilege, although each	Comment [30] is based on Model Rule 1.7, cmt. [30]. It has been revised to include a discussion of specific California law, and also to clarify a lawyer's confidentiality duties in joint representations under California law.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.	<u>client's communications with the</u> ~~prevailing rule is that~~<u>lawyer are protected as to third persons</u>, as between ~~commonly~~<u>jointly</u> represented clients, the privilege does not attach. Hence, it must be assumed that if litigation ~~eventuates~~<u>results</u> between the <u>joint</u> clients, the privilege will not protect any such communications. <u>See Evidence Code sections 952 and 962. In addition, because of the</u> ~~clients~~<u>lawyer's obligations under Rule 1.4, the lawyer must inform each jointly represented client in writing of that fact and also that the client should normally expect that his or her communications with the lawyer will be</u> ~~so advised~~<u>shared with other jointly-represented clients. See also Comments [18]-[20].</u>	
[31]As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the	~~[31][RESERVED] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the~~	The Commission recommends that Model Rule 1.7, cmt. [30] not be adopted as duplicative of other Comments. See, e.g., Comment [17A].

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.	~~representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.~~	
[32]When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).	[32]When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the ~~common~~<u>joint</u> representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).	Comment [32] is identical to Model Rule, cmt. [30], except that it substitutes "joint" for "common."
[33]Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.	[33]Subject to the above limitations, each client in the ~~common~~<u>joint</u> representation has the right to ~~loyal and diligent representation~~<u>the lawyer's undivided loyalty</u> and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.	Comment [33] is based on Model Rule 1.7, cmt. [33], with "joint" substituted for "common" and the emphasis placed on the duty of undivided loyalty.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Organizational Clients [34]A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.	Organizational Clients [34]A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.	Comment [34] is identical to Model Rule 1.7, cmt. [34].
[35]A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is	[35]A lawyer for a corporation ~~or other organization~~ who is also a member of its board of directors <u>(or a lawyer for another type of organization who has corresponding fiduciary duties to it)</u> should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the	Comment [35] is identical to Model Rule 1.7, cmt. [35], except that a parenthetical has been added in place of the phrase "or other organization" to clarify it is the fiduciary duties the lawyer might owe the organization that should be the focus of the lawyer's analysis.

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.	possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the ~~attorney~~lawyer-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.	
	<u>Insurance Defense</u> <u>[36]In State Farm Mutual Automobile Insurance Company v. Federal Insurance Company (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (a) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, paragraph (a) does not apply to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.</u>	Comment [36] has no counterpart in the Model Rule. It carries forward verbatim current rule 3-310, Discussion ¶. 9, which was inserted following lengthy deliberations among stakeholders pursuant to legislation (Assembly Bill 2069).

<u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[37] Paragraph (a)(2) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a significant risk that the representation of the insured, insurer, or both will be materially limited under paragraph (a)(2).	Comment [37] has no counterpart in the Model Rule. It carries forward current rule 3-310, Discussion ¶. 11, as revised.
	<u>Public Service</u> [38] For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see Rule 6.5.	Comment [38] has no counterpart in the Model Rule. It has been added to the Rule to call the reader's attention to the fact that special rules govern certain kinds of work in which a lawyer might engage when performing public service.

Proposed Rule 1.7 [3-310]
Conflicts of Interest: Current Clients
Comment [22] Excerpt (re: Consent to Future Conflict)
Clean Draft

Consent to Future Conflicts

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen

was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved that was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Proposed Rule 1.7 [3-310]
Conflicts of Interest: Current Clients
Comment [22] Excerpt (re: Consent to Future Conflict)
Redline/Strikeout Version Showing Changes to Draft Presented at RAC's November, 2009 Meeting

Consent to Future Conflicts

~~[31-22]~~ Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but ~~this is subject to the usual requirement that~~ a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in ~~Comment~~Comments ~~[2618]-[20]~~ (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation ~~Comment~~Comments ~~[2618]-[20]~~ ordinarily requires. ~~Whenever seeking an advance consent, the~~A lawyer's disclosure to ~~the~~a client ~~should~~must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also shouldmust disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, ~~including whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, or~~and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to

the use of an adequate ethics screen and whether the screen was ~~adequately~~timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved that was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in ~~Comment~~Comments ~~[2414]-[17A]~~ (prohibited representations). See Rule 1.0.1(~~ge~~) ("informed consent") and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Proposed Rule 1.7 Conflicts of Interest: Current Clients

Minority Dissent

At its November 2009 meeting, RAC referred Rule 1.7 back to the Revision Commission to address three principle issues: (i) the advance consent discussion in the Comment to Rule 1.7, (ii) to clarify paragraph (c) in the November draft Rule (which is currently embodied in Rule 3-310(C)(3)), and (iii) to clarify the rule regarding a lawyer's interest in the subject matter of a representation. In response, a majority of the Commission voted to use the language in ABA Model Rule 1.7 in place of the draft rule that was before RAC last November.

This represents a sea change that will radically reduce client protection. Here is one of many possible examples: Imagine a situation in which a lawyer represents a client in a lawsuit, and one of the other parties is the lawyer's oldest friend, brother-in-law or lover, or someone to whom the lawyer owes money. Under the current California rules, the lawyer is absolutely prohibited from accepting that representation without first fully disclosing the facts to the client. This disclosure puts the client in complete control of the situation, by requiring the lawyer to disclose the relationship and its impact on the representation and allowing the client to decide whether to accept the lawyer, and if so with what limitations and protections. Under the proposed rule, it is highly unpredictable whether the client will receive this information. To the extent the disclosure occurs at all, it frequently will be too late to avoid injury to the client.

The revised rule replaces all of the rules currently in Rule 3-310 (and continued in the draft of Rule 1.7 RAC last saw), with two rules - Rule 1.7(a)(1) to which the minority does not dissent and Rule 1.7(a)(2) to which the minority dissents.

Paragraph 1.7(a)(2) states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The minority dissent to Rule 1.7(a)(2) because the proposed Rule adopts an ABA Model Rule formula that focuses on the likelihood that a conflict of interest will affect a representation enough to hurt a client. Rule 1.7(a)(2) applies only when there is a "significant risk" that the circumstance will "materially limit" the lawyer's representation of a client. "Significant risk" and "materially limited" are not defined. There is no uniform standard for their application nationally. The terminology focuses not on what is reasonably possible but on what is very likely or predictable. The difference is important for client protection. Requiring informed written consent as

early in the representation as possible not only informs clients about potential problems but also allows lawyers and clients to structure the engagement to avoid those problems. The current California rule provides that client protection by requiring informed written consent in defined situations that are the most frequent sources of conflicts of interest. The Model Rule delays the requirement until the risk of client injury becomes significant, which in many cases will occur when it is too late to avoid injury to the client. Because the "significant risk" standard focuses on the predictability of the harm, it will be extremely difficult, if not impossible, for the State Bar to enforce a preventative standard, which the current California rule affords.

There cannot be any question that allowing a lawyer to defer disclosure until the risk of client harm becomes significant will reduce the likelihood that the lawyer will make what the minority believes should be an absolutely required disclosure. There also cannot be any question that the lawyer's assessment of the risk often will be influenced by the lawyer's own financial interest and other personal concerns. There also cannot be any question that the proposed rule would alter the nature of the lawyer-client relationship by placing the lawyer in charge of the relationship, robbing the client of protection and control that the client should have.

In addition, Rule 1.7(a)(2) will upset twenty years of California jurisprudence involving conflicts of interest and will require years of litigation to resolve at the expense of clients. While creating new avenues of litigation may be a boon for the legal community, clients will bear the cost of that litigation, which would become necessary only because of the sea change this Rule will create.

To assist RAC in its deliberations on Rule 1.7, the minority are providing the following redraft of the version of Rule 1.7 that was before RAC last November. The minority has revised the prior draft of the Rule in response to the comments from RAC at the November 2009 meeting.

RULE 1.7 MINORITY DRAFT RULE

Rule 1.7: Conflict Of Interest: Current Clients

- (a) **Representation of directly adverse clients.** A lawyer shall not, without the informed written consent of each client
 - (1) accept or continue representation of a client if the representation will be directly adverse to another client the lawyer currently represents in another matter; or
 - (2) while representing a client, accept in another matter the representation of a person or organization who is directly adverse to the client in the matter in which the lawyer represents the client.
- (b) **Representation of multiple clients in one matter.** A lawyer shall not, without the informed written consent of each client:
 - (1) Accept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict; or

- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.

(c) **Personal relationships and interests.** A lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:

- (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
- (2) the lawyer knows or reasonably should know that:
 - (a) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (b) the previous relationship would substantially affect the lawyer's representation; or
- (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; or

- (4) the lawyer has or had a legal, business, financial, or professional interest in the subject matter of the representation

(d) **Relationships with another Lawyer.** A lawyer shall not accept or continue representation of a client without the client's informed written consent where the lawyer knows that:

- (1) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; or
- (2) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has a cohabitational or intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

Comment

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

[1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, a lawyer should consider all of the following: (1) the duty of undivided

loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to make full and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer; and (5) the duty to represent the client competently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client.

[2] The first step in a lawyer's conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules.

[3] This rule describes a lawyer's duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1 to [1.8.12]. For conflicts duties to former clients, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For

definitions of "informed consent" and "written," see Rule 1.0.1(e) and (b). See also Comments [26] – [30] to this Rule.

Lawyer Acting in Dual Roles

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

Paragraph (a): Representation Adverse to Current Client

[5] A lawyer owes a duty of undivided loyalty to each current client, which prevents a lawyer from representing one client against another. These situations also may involve a conflict between a lawyer's duty to inform one of the clients about information that the lawyer owes a duty to the other client to keep confidential. Paragraph (a) identifies two scenarios. Paragraph (a) (1) prevents a lawyer from representing a client against another current client of the lawyer, without first obtaining both clients' informed written consent. Paragraph (a)(2) provides that while a lawyer represents a client in a matter directly adverse to a non-client, the lawyer cannot take on the representation of the non-client in another matter without first obtaining both clients' informed written consent.

[5a] Paragraph (a)(1) encompasses those situations in which a lawyer is asked to act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the matters are wholly unrelated. For example, under paragraph (a)(1), a lawyer cannot accept or continue to representation A against B, if B is a client of the firm when the adverse representation arises. Paragraph (a)(1) applies equally in transactional and litigation matters. For example, a lawyer may not represent the seller of a business in negotiations when the lawyer represents the buyer in another matter, even if unrelated, without the informed written consent of each client. Paragraph (a)(1) would apply even if the parties to the transaction expect to, or are, working cooperatively toward a goal of common interest to them. (If a lawyer proposes to represent two or more parties concerning the same negotiation or lawsuit, the situation should be analyzed under paragraph (b), not paragraph (a). As an example, if a lawyer proposes to represent two parties concerning a transaction between them, the lawyer should consult paragraph (b).)

[6] Paragraph (a)(1) applies only to engagements in which the lawyer's work in a matter is *directly* adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could

become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule.

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

[8] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a)(1). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, e.g., if a

client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.

[8A] Paragraph (a)(2) applies in a situation where a lawyer represents A in a matter against B, a non-client, and while that matter is pending, B seeks to hire the lawyer to represent B in another matter. If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a)(1) would apply, not paragraph (a)(2). As with paragraph (a)(1), paragraph (a)(2) applies to both litigation and transactional matters. The same considerations that determine whether a representation is directly adverse under paragraph (a)(1) apply to paragraph (a)(2).

[8B] Relevant considerations under paragraphs (a)(1) and (a)(2) include (i) whether the lawyer can faithfully represent and exercise independent judgment on behalf of client A in the matter adverse to B in light of the lawyer's representation of B, (ii) whether the lawyer's representation of A against B would undermine B's trust in the lawyer-client relationship, and (iii) whether the lawyer would be placed in a situation where the lawyer receives confidential information in connection with

representing B that the lawyer has a duty to reveal to A, such that the lawyer could not fulfill the duty to inform A without breaching the lawyer's duty to B to not reveal the information.

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

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

[10] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients often can interfere with the full performance of the duties the lawyer owes to the other clients. As a result, paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. Examples of a transaction or common enterprise include the formation of a business organization for multiple investors, the preparation of an ante-nuptial agreement for both parties, and the preparation of a post-nuptial agreement, a trust or wills, and the resolution of an "uncontested" marital dissolution, for both spouses. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer knows or reasonably should know it is reasonably

possible that the lawyer's performance of the lawyer's duties to one of the joint clients will or does interfere with the lawyer's performance of the duties owed to another of the joint clients. See Comment [36] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.

[11] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.

[12] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are

protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068(e)(1), Rule 1.6, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4, and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.

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

[14] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to

benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). See Rule 1.2 (c) (limiting the scope of representation).

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

[16] Reserved.

Paragraph (c): Lawyer Relationships and Interests

[17] A lawyer's personal relationships and interests might interfere with the lawyer's full performance of the duties owed to a client. As result, paragraph (c) requires a lawyer to obtain a client's informed written consent when the lawyer has any of certain present or past relationships with others. The purpose of this requirement is to permit the client or potential client to make a more informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (c) applies in litigation and in non-litigation representations.

[18] A lawyer also should not allow his or her own interests to have an adverse effect on the representation of a client. Paragraph (c)(4) requires a lawyer to obtain the client's informed written consent when the lawyer has an interest in the subject matter of the representation. Examples of this include the following: (1) a lawyer would have a legal interest if the lawyer is a party to a contract being litigated; (2) a lawyer would have a business and financial interest if the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (3) a lawyer would have a professional interest if the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. Some situations might come within more than one of the paragraph (c) categories, such as when the subject of a representation might raise questions about the lawyer's own conduct, including questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by paragraph (c)(4) unless the lawyer and client have agreed to take a common position, as might occur, for example, in response to a motion for discovery sanctions. See Rules 1.8.1 through 1.8.12 for additional rules pertaining to other personal interest conflicts, including business transactions with clients, and Rule 3.7 concerning lawyer as witness.

[19] When a lawyer owns an interest in a publicly-traded investment vehicle, such as a mutual fund, paragraph (c)(4) does not require the lawyer to investigate whether the investment vehicle owns an interest in parties to a matter. However, if the lawyer knows that a publicly-traded investment vehicle in which the lawyer owns an interest owns an interest in a party to

the matter, the lawyer must disclose the interest to the client and obtain the client's informed written consent to the lawyer's continued representation of the client.

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

[21] Paragraph (c) applies only to a lawyer's own relationships and interests, except: (1) when the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party or witness, or has or had an interest in the subject matter of the representation. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[22] Paragraph (c) requires informed written consent only from current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.

[23] Paragraph (a)(1) applies, rather than paragraph (c)(1) or (c)(3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [5] to this Rule.)

Prohibited and Required Representations

[24] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent.

These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068(e)(1) and Rule 1.6); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action"]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857] [attorney may not represent both a closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.)

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

Disclosure and Informed Written Consent

[26] Informed written consent requires the lawyer to disclose in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client. See Rule 1.0.1(e) (informed written consent). The facts and explanation the lawyer must disclose will depend on the nature of the potential or actual conflict and the nature of the risks involved for the client or potential client. When undertaking the representation of multiple clients in a single matter, the information must include the implications of the joint representation, including possible effects on loyalty, and the confidentiality and lawyer-client privilege issues described in Comment [12] to this Rule.

[27] The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

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

disclosure to each affected client and obtaining a new written consent.

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

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

Consent to Future Conflict

[31] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [26] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [26] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and

reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will

comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved that was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in Comment[24] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Representation of a Class

[32] This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to obtain the consent of an unnamed class member before representing a client who is adverse to that person in an unrelated matter.

Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed class member whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

Organizational Clients

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

[34] A lawyer for a corporation who also is a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether it is reasonably foreseeable that the responsibilities of the two roles might conflict, for example, because, as its lawyer, he or she might be called on to advise the corporation on matters involving actions of the directors. The lawyer should consider such things as the frequency with which these situations might arise, the potential materiality of the conflict to the lawyer's performance of his or her duties as a lawyer, and the possibility of the corporation obtaining legal

advice from another lawyer in these situations. If there is material risk that the dual role will compromise the lawyer's ability to perform any of his or her duties to the client, the lawyer should not serve as a director or should cease to act as the corporation's lawyer. The lawyer should advise the other members of the board whenever matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that conflict of interest considerations might require the lawyer to withdraw as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

[35] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraphs (a) and (c) do not apply to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[36] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the

lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

Public Service

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

Rule 1.7 Conflict of Interest: Current Clients

(Commission's Proposed Rule – Clean Version)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed written consent.

Comment

General Principles

[1] Undivided Loyalty and independent professional judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client. For specific rules regarding certain concurrent conflicts of interest, see Rules 1.8.1 through 1.8.11. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "informed written consent," see Rule 1.0(e) and (e-1), and Comments [6] and [7] to that Rule.

[2] Resolution of a conflict of interest under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine the scope of each relevant representation of a client or proposed representation of a client; (3) determine whether a conflict of interest exists; (4) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether lawyer has the ability to obtain the client's consent to the conflict; and

(5) if so, consult with the clients affected under paragraph (a) and obtain their informed written consent. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed written consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. Whether a lawyer-client relationship exists or, having once been established, is continuing, is beyond the scope of these Rules.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed written consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to a client who becomes a former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comment [29].

[5] [RESERVED]

Paragraph (a)(1): Identifying Conflicts of Interest: Directly Adverse

[6] The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate

in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in another matter. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. A directly adverse conflict may also arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as

might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal. See Comments [14]-[17A].

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed written consent of each client. Paragraph (a)(1) applies even if the parties to the transaction have a common interest or contemplate working cooperatively toward a common goal.

[7A] If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].

Paragraph (a)(2): Identifying Conflicts of Interest: Material Limitation

[7B] Conflicts of interest that create a significant risk that a lawyer's representation of one or more clients will be materially limited as provided in paragraph (a)(2) can arise from: (1) duties owed a former client or a third person (see Comment [9]); (2) a lawyer's personal interests (see Comments [10]-[12]); or (3) a lawyer's joint representation of two or more clients in the same matter (see Comments [29]-[33]).

[8] Even where there is no direct adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent two or more clients in the same matter, such as several individuals seeking to form a joint venture, is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The conflict in effect forecloses alternatives that would otherwise be

available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of actions that reasonably should be pursued on behalf of each client. See Comments [29]-[33]. Depending on the circumstances, various relationships a lawyer has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (2) the lawyer knows or reasonably should know that: (i) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and (ii) the previous relationship would substantially affect the lawyer's representation; (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; (4) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] A lawyer's duties of undivided loyalty and independence of professional judgment may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director. See, *e.g.*, *William H. Raley Co., Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give the client detached advice. A lawyer's legal, business, professional or financial interest in the subject matter of the representation might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; or (3) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rules 1.8.1 through 1.8.11 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 3.7 concerning a lawyer as witness and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, or when there is an intimate personal relationship between the lawyers, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer who is related to another lawyer, e.g., as parent, child, sibling or spouse, or who is in an intimate

personal relationship with another lawyer, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed written consent. The prohibition on representation arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the lawyer-client relationship. See Rule 1.8.10.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client gives informed written consent and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8.6. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payor who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the lawyer has the ability to obtain the client's consent to the representation and, if so, whether the client has adequate information about the material risks of the representation. See Comments [14]-[17A].

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), in some situations a lawyer cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consent must be resolved as to each client.

[15] A lawyer's ability to obtain consent is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed written consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1.

[16] Paragraph (b)(2) describes conflicts to which a client cannot consent because the representation is prohibited by applicable law. For example, certain representations by a former government lawyer are also prohibited, despite the informed consent of the former client. See, e.g., Business & Professions Code section 6131.

[17] Paragraph (b)(3) describes conflicts for which client consent cannot be obtained because of the interests of the legal system in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. See, e.g., *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict). Although paragraph (b)(3) does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a

representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Business and Professions Code section 6068(e)(1) and Rule 1.6. A lawyer might also be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained when the person who grants consent lacks capacity or authority. See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.

Disclosure and Informed Written Consent

[18] Informed written consent requires that the lawyer communicate in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences of the conflict on the client's interests and the lawyer's representation and that the client thereafter gives his or her consent in writing. See Rules 1.0.1(e) (informed consent) and 1.0.1(e-1) (informed written consent) and Comments [6] and [7] to that Rule. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the joint representation, including possible effects on loyalty, confidentiality and the lawyer-client privilege and the advantages and risks involved. See Comment [30] (effect of joint representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. See Comments [14]-[17A].

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. See Rule 1.0(n) (writing includes electronic transmission). The requirement of a written disclosure, (see Comment [18]), does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Duration of Consent

[20A] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the relevant facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and obtaining a new written consent.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation of that client at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client, whether material detriment to the other clients or the lawyer would result, and the lawyer's confidentiality obligations to the client revoking consent.

Consent to Future Conflict

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future

conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved that was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple

defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, joint representation of persons having similar interests in civil litigation is permitted if the requirements of paragraph (b) are satisfied.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be informed of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed written consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters to the extent permitted by Rule 1.16.

[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).

[25] This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not typically need to get

the consent of an unnamed class member before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters that are prohibited by paragraph (a)(1), see Comment [7]. Relevant factors in determining whether there is significant risk for material limitation as provided in paragraph (a)(2) include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.

[28] [RESERVED]

Special Considerations in Joint Representation

[29] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's duties to the other clients. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the joint

representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the joint representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake joint representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by joint representation is not likely. Other relevant factors include whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29A] Examples of conflicts that arise under paragraph (a)(2) from representing multiple clients in the same matter and that will likely preclude a lawyer from accepting or continuing a joint representation unless the lawyer complies with paragraph (b) include the following situations: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer is obligated to advise each client about how to advance that client's position relative to the other's position; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); (6) the clients make inconsistent demands for the original file.

[30] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the

lawyer-client privilege. With regard to the lawyer-client privilege, although each client's communications with the lawyer are protected as to third persons, as between jointly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation results between the joint clients, the privilege will not protect any such communications. See Evidence Code sections 952 and 962. In addition, because of the lawyer's obligations under Rule 1.4, the lawyer must inform each jointly represented client in writing of that fact and also that the client should normally expect that his or her communications with the lawyer will be shared with other jointly-represented clients. See also Comments [18]-[20].

[31] [RESERVED]

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the joint representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the joint representation has the right to the lawyer's undivided loyalty and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the

circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation who is also a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the lawyer-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

[36] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (a) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply

to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[37] Paragraph (a)(2) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a significant risk that the representation of the insured, insurer, or both will be materially limited under paragraph (a)(2).

Public Service

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

Rule 1.7 Conflicts of Interests: Current Clients.
[Sorted by Commenter]

TOTAL = 12 **Agree = 1**
Disagree = 5
Modify = 5
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response ²
1	COPRAC	M		Cmts. [9] & [16]	Comment [9] says that a lawyer “must in all events protect confidentiality” yet Comment [18] contradicts this by indicating that when a lawyer is representing a client’s adversary the lawyer has an obligation to disclose to the lawyer’s client “all information that is material to the representation of the client, including otherwise confidential information of the lawyer’s other client.” COPRAC concerned that disclosure without informed written consent constitutes a breach of duty of confidentiality.	The Commission agreed and made clarifying changes to Comment [9] and deleted Comment [18]. See footnote 2.
				Cmt. [4]	Comment [17] relates to a conflict arising from a lawyer’s fiduciary duties to a non-client and should not be placed within the comments relating to paragraph (b) unless the Comment is reworded to state that the term	See footnote 2.

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

² **Commission Note:** Following public comment and consideration of the post-public comment draft by the Board of Governors, the Commission reconsidered its overall approach in Rule 1.7 and voted to recommend adoption of the black letter of Model Rule 1.7 nearly verbatim, with the only change being the substitution of the heightened California “informed written consent” standard for the Model Rule’s less client protective “informed consent, confirmed in writing.” The Commission also recommends the adoption of the structure and organization of the Model Rule, with a number of changes made for clarification and to provide better guidance for lawyers to apply the Rule and be in compliance with their professional obligations. Therefore, most of the public comment submissions have been mooted by the recommend to substantially adopt the Model Rule.

Rule 1.7 Conflicts of Interests: Current Clients. [Sorted by Commenter]						TOTAL = 12 Agree = 1 Disagree = 5 Modify = 5 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response ²
					"representation of a client" is not limited to a lawyer's legal representation of a client in an attorney client relationship, but may also include a lawyer's fiduciary relationship with a non-client. Alternatively, Comment [17] could be placed with the comments regarding paragraph (d), in which the fiduciary relationship might be described as a legal, financial, or business relationship.	
				Cmt. [24]	Comment [27]'s provision that a lawyer cannot obtain effective client consent where the lawyer cannot provided competent representation to each affected client seems like a significant limitation that could be explained or illustrated better. No specific recommendation.	See footnote 2. Former Comment [24] has been expanded to several comments in the new proposed Rule. See Comments [14]-[17A] thereto.
				Cmt. [24]	Reference to rule 1.8.8(a) in Comment [27] is inappropriate.	See footnote 2.

2	Langford, Carol M.	D			Rule is overly broad as written and more specific guidelines should be included to determine whether there was informed consent. Comment [4] should include guidelines as to how thorough the informed consent would have to be. Cmt. [31] Blanket waivers should be treated with caution and only permitted where there is some type of limitation in scope. (One suggested limitation that courts have approved is the identification of potentially adverse parties in the waiver or establishing durational boundaries. See <i>Zador Corp v. Kwan</i>, 31 Cal.App.4th 1285; <i>Visa U.S.A., Inc. v. First Data Corp.</i>, 241 F.Supp.2d 1100). Comment [33] (now Cmt. [22]) therefore should be taken out unless the rule provides specific guidelines to act as safeguards against uninformed and unintended waivers. 1.7(a) Amend 1.7(a) by deleting references to “in that matter.”	The meaning of “informed consent” is contained in Model Rule 1.0 (proposed Rule 1.0.1) and not in Rule 1.7. It does not appear to be possible to define that term except along the lines of the Model Rule definition, which recognizes that whether a client’s consent is informed is inherently fact specific. The Commission therefore did not make this requested change. The Commission agrees that advance consents to future conflicts of interest should be treated with caution but believes it has done so in proposed Comment [22] (formerly numbered [33] in the public comment draft). Omitting Comment [22] would not add to lawyers’ understanding of the subject. There was perhaps no portion of the Commission’s work on Rule 1.7 that led to greater public involvement and comment. However, after careful consideration of the public comment, both pro and con, the Commission has revised Comment [22] with the intent to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection. See footnote 2.
3	Lewis, Steve	M		1.7(d)(4)	With regard to 1.7(d)(4), more than disclosure is necessary to protect a client, particularly in the situation where the lawyer makes a mistake. The Rule should require advising the client in writing of opportunity to seek independent counsel. This could be done by adding a (d)(5) that applies specifically to the	See footnote 2.

				Cmt. [10] situation where an attorney has made a mistake. Comment [10]: second sentence includes phrase “might or does interfere with lawyer’s full performance...” The word “might” makes this Comment too broad in scope; change “might” to “might reasonably be expected to.” Cmt. [21] Comment [21] mutual fund disclosure requirement is excessive and should be deleted entirely.	See footnote 2. See footnote 2.
4	Lodise, Margaret	D	Trust and Estates Section]	Requiring disqualification without tying it to the possession of confidential information relevant to the new matter will severely impact estate planners who may do planning for a client and place their firms into a conflict position merely by representation of the individual without access to any information which is in any way confidential or material to the new representation. Cmt. [10] Prior version of rule contained a comment relating to the situation of reciprocal will for a husband and wife or of representation in an antenuptial agreement as situations where a potential conflict might exist. This should be returned to the comments.	Rule 1.7 does not address the topic of disqualification, which is a matter within the control of the courts. Rule 1.7 in both the Model Rule and proposed versions recognizes the primacy of the duty of loyalty owed to current clients. The key to the expressed concerns is determined by whether a representation is directly adverse to another current client. See footnote 2.

5	Los Angeles County Bar Association (Toby J. Rothschild)	M		1.7(a)	Delete references in 1.7(a) to the “matter.” This makes (b) unnecessary.	See footnote 2.
				1.7(c)	Amend (c) to read: “A lawyer shall not accept the representation of a client if that client has a dispute with another of the lawyer’s clients, unless the lawyer’s representation of each client concerns matters other than those which are the subject of the dispute.	See footnote 2.
				Cmts. [5], [6] & [7]	Delete Comments [5], [6], and [7]. Utilize the Model Rule standard of “confirmed in writing” rather than the proposed “informed written consent”.	See footnote 2. The Commission believes this change would dilute important client protection and did not make this consent.
				Cmt. [23]	Expressed concern that Comment [23] buries a potential conflict that could exist among related attorneys but made no specific recommendation	See footnote 2.
				Cmts. [27] & [28]	Move section on prohibited representations (Comments [27] and [28]) closer to the beginning of the comments.	See footnote 2. The section on prohibited representations now appears at Comments [14]-[17A], immediately following the general overview of the Rule.
				Cmt. [31]	Third sentence of Comment [33] (now Cmt. [22] is contradictory and ambiguous and should be deleted.	See ¶.2 of response to Langford. Comment [33] is now Comment [22].
6	McGowan, David	M		1.7(a)	Delete references in 1.7(a) to the “matter,” which makes 1.7(c) [now paragraph (a)(2)] unnecessary because then (a) becomes a flat prohibition on all concurrent representation of directly adverse interests, including the types specified in (c) [now paragraph (a)(2)].	See footnote 2.

				"1.7(e)" & Cmt. [29] Add a section 1.7(e), which would provide a detailed safe harbor provision for advanced conflict waivers, including what steps a lawyer must take to ensure informed consent. Then change Comment [29] to reflect the evidentiary presumptions relating to section (e).	The Commission engaged with lawyers several times at its public sessions on the topic of a client's advance consent to a representation despite a potential for a future conflict of interest, received several written suggestions during the initial drafting stage, and received several written comments during the formal public comment process. The thoughts shared with the Commission covered a wide range of views extending from a desire to expand existing case law so as to make the process easier to two commenters who objected to advance consents on principle despite their facilitating a client's choice of counsel and being permitted by existing case law.
				Cmt. [33] Delete current Comment [33] [now Comment [31]].	The Commission recognized that removing Comment [33] (now Comment [22]) would cause confusion because Model Rule 1.7, cmt. [22] does cover the topic of advance consent, and it determined that the correct resolution is to acknowledge that advance consents can be obtained but to underline the limitations involved in the process. The Commission decided not to make Prof. McGowan's interesting suggestion to include in the Rule rather than the Comment presumptions about the effectiveness of advance consents, in part because it is not convinced that presumptions should be in a Rule. See also footnote 2.
7	Morrison & Foerster (Douglas Hendricks)	A		Support Comment [33] regarding advance waivers of conflicts of interest. Advanced waivers are used regularly in modern law practice and permit access to counsel of choice for clients.	No response necessary. Comment [33] has been renumbered Comment [22]. See also response to Langford, ¶. 2.

8	Office of Chief Trial Counsel ("OCTC"), State Bar of California	NI			Suggests the inclusion of a definition of potential and actual conflicts of interest. 1.7(a) The meaning of "directly adverse" will create multiple problems. The only suggestive alternative is to strike the word "directly". Cmt. [7] Disagrees with the description of a lawyer's cross-examination of his or her own client as "directly" adverse except in particular circumstances and would remove the second sentence of Comment [6] [now cmt. [7]]. 1.7(d) Would make paragraph (d) subject to a standard of "informed written consent" rather than only "disclosure". Cmt. [1] OCTC suggests that Comment [1], which lists factors to consider in determining whether there is a conflict is confusing and vague, and suggests that the presence of particular factor or not will determine whether a conflict exists. OCTC notes a conflict must be determined by reference to the surrounding circumstances. Cmt. [10] In Comment [10], strike "full" from the term "full performance." Cmt. [11] Comment [11] should be included in the text of the rule itself, perhaps as a definition.	See footnote 2. This term is central to the Model Rule and the proposed Rule, and there is no available alternative. Striking the word "directly" would create discipline where none would be warranted, such as those discussed in Comment [8]. The Commission disagrees because any cross-examination of one's own client is a violation of the lawyer's duty of undivided loyalty. The statement remains in new Comment [6]. See footnote 2. The Commission agrees and has increased the standard under paragraph (b) of MR 1.7 from obtaining "informed consent, confirmed in writing," to obtaining "informed written consent". See footnote 2. See footnote 2. See footnote 2.

				Cmt. [13]	OCTC expresses concern that rather than mandate conflict waivers in all joint representations as does Discussion ¶. 7 to current rule 3-310, proposed Comment [13] appears to make it just one factor that may sometimes be required.	See footnote 2.
				Cmt. [23]	OCTC believes that Comment [23] undermines an attorney's duty to have adequate conflict checking procedures and programs in place; the rule should encourage firms to have adequate conflict checking programs.	See footnote 2. See also new Comment [3].
				Cmt. [31]	Concerning Comment [33] [now Cmt. [22]], which provides advance conflict waivers are not prohibited, OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. OCTC recommends that advance conflict waivers be expressly prohibited.	The Commission disagrees that the Rule should expressly prohibit advance conflict waivers. After lengthy deliberations involving interested parties from outside the Commission, the Commission concluded that the correct resolution of the advance waiver issue is to acknowledge that advance consents can be obtained but to underline the limitations involved in the process. That is what Comment [22] (Comment [33] in the public comment draft) does. See also RRC Responses to Langford, McGowan, Sall, Zitrin.
9	Orange County Bar Association (Trudy Levindofske)	D		1.7(c)	The heading for paragraph (c) is confusing. The terms "direct adversity," "client's adversary," and "indirect adversity" are not adequately defined. Draft rule deviates from the Model Rule, making it difficult for attorneys to find guidance on interpretation.	See footnote 2. See footnote 2. See footnote 2.

					Rule should explain or define the distinctions between the same matter and different matter contexts that are fundamental to subparagraphs (a), (b), and (c).	See footnote 2. Neither the Model Rule nor the proposed Rule make an attempt to define “matter”, and that term is not included among the Model Rule 1.0 definitions. However, Alaska, D.C., New York, North Dakota, and Oregon have defined the term in their version of Rule 1.0. The Commission reconsidered this issue and determined that no meaningful definition is possible.
				Cmt. [10]	Criticized the word “full” in the fourth sentence of Comment [10].	See footnote 2.
				Cmts. [13] & [33]	With regard to advance waivers addressed in Comments [14] and [33], concern about adequacy of disclosure where the relevant factual circumstances have not yet developed.	The Commission agrees that the adequacy of disclosure is a key element and believes that is correctly stated in the Comment. Comment [14] has been deleted and [33] renumbered [22].
				Cmt. [33]	Suggestion in Comment [33] (now Cmt. [22]) that screening might be appropriate has yet to be endorsed by CA courts.	Comment [22] refers only to ethics screens instituted with client consent, which are permitted.
				Cmt. [33]	Suggestion in Comment [33] that the relative sophistication of the client may be factor is troubling because it requires a lawyer to assess the client's intellect and experience before knowing whether or not a particular disclosure will violate an ethical rule.	Client sophistication is a proper and accepted consideration in determining the effectiveness of an advance consent. See, e.g., <i>Visa U.S.A., Inc. v. First Data Corp.</i>, 241 F.Supp.2d 1100.
				Cmt. [34]	Requests deletion of Comment [34] (now Cmt. [25]) because, although it believes the Comment is accurate, the topic of class actions is too complex to cover in a Comment paragraph	See footnote 2. Comment [34] of the public comment draft (now numbered Comment [25]) does not attempt to cover all class action issues and could not, but the Commission believes that Comment [25] provides important guidance of some fundamental conflicts issues that arise in class action representations.

10	Sall, Robert K.	D		Cmt. [33] Troubled by Comment [33] (now Cmt. [22]) endorsement of advance waivers as they are rarely sufficient to disclose either the circumstance or the foreseeable adverse consequences. At a minimum, sentence in Comment [33] that suggests an open ended general waiver may be sufficient should be deleted. Focus on sophisticated clients versus unsophisticated clients is not appropriate. Cmt. [5] Concepts of “direct” and “indirect” adversity are ill-defined (no corrective drafting suggested). Also, Comment [5] statement that there is no single definition for what constitutes a direct conflict is not helpful and should be deleted.	There was perhaps no portion of the Commission’s work on Rule 1.7 that led to greater public involvement and comment than the topic of advance consent to future conflicts of interest. After careful consideration of the public comment, both pro and con, the Commission has edited Comment [33] (now numbered Comment [22]) for greater clarity and also to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection. See footnote 2. The concept of “direct adversity” is fundamental to application of Rule 1.7 both in the Model Rule and the proposed versions. The Commission carefully reviewed the Model Rule explanation and compared it to the proposed discussion, and as a result it did not make the requested revision.
11	San Diego County Bar Association (Heather L. Rosing)	M		Cmt. [32] Delete Comment [34] (now Cmt. [25]) regarding class representation because it should be addressed in a separate rule on class representation. Cmt. [33] Delete fourth sentence from end of Comment [33] (now Cmt. [22]) regarding advance consent because it does not accurately state the status of current law.	The Commission did not undertake to create a new class action rule (there being no such Model Rule) and instead retained Comment [34] (now numbered Comment [25]) as a helpful explanation of some of the key conflicts issues that can arise in a class action representation. Further, as stated above in response to the comment from the O.C. Bar Assoc., the Commission does not believe it would be possible to cover all class action issues in these Rules, but it does believe that this Comment provides important guidance on key conflicts issues. See footnote 2. The fourth sentence of currently-numbered Comment [22] describes potentially important client protection, and the Commission did not make the requested revision.

12	Zitrin, Richard, and California Legal Ethics Educators	D		1.7(a)	1.7(a) as drafted would allow lawyers to be adverse to their own clients (if a lawyer represents A in A v. B, the lawyer may undertake representation of B in B v. X without consent, even though B is directly adverse to the lawyer's client A). No jurisdiction in the US allows a lawyer to be directly adverse to that individual's own client and CA should not move in that direction.	See footnote 2.
				1.7(a)	1.7(a) should be amended to remove the three phrases concerning "matters" and what remains is a simple statement of the duty of loyalty.	See footnote 2.
				1.7(c)	1.7(c) is an amended restatement of 3-310(C)(3) that is considerably narrower than the current rule because it removes the language that now read "whose interest in the ... matter is adverse," adds the word "direct" to the word adverse, and puts the "matters" in chronological order, thus narrowing the rule's application.	See footnote 2.
				1.7(b)(1) and (2)	The language in 1.7(b)(1) and (2) could be combined by saying "potentially or actually conflict".	See footnote 2.
				Cmt. [33]	Commission's position on advance waivers is untenable and must be removed. Comment [33] (now Cmt. [22]) inappropriately allows clients to consent to blanket advance waivers of conflict even where adequate disclosure cannot possibly be met. Comment [33] states that "use of an adequate ethics screen" is a factor in determining the adequacy of a waiver	There was perhaps no portion of the Commission's work on Rule 1.7 that led to greater public involvement and comment than the topic of advance consent to future conflicts of interest. After careful consideration of the public comment, both pro and con, the Commission edited Comment [22] to the public comment draft (now numbered Comment [22]) for clarity and to more explicitly state the

					but screening is very limited under CA case law and the Commission appears to be legislating. Consulting independent counsel does not overcome the problem of inadequate disclosure.	requirements for obtaining client consent, thereby enhancing client protection. These modifications make no substantive change.
				1.7(d)	1.7(d) does not protect clients by requiring only written disclosure without written consent. Perhaps include a "materiality" standard that is used to set forth what 1.7(d) situations require consent.	See footnote 2. The Commission agreed and increased the standard under paragraph (b) Model Rule 1.7 obtaining "informed consent, confirmed in writing," to obtaining "informed written consent".
				1.7(d)(4)	Inadequate parallel language in (d)(3) and (d)(4) because word "personal" is left out of (d)(4).	See footnote 2.
				1.7(d)(3)	(d)(3) refers to a conflict that arises when the lawyer's friends or associates are "affected substantially" but language should include the client being affected substantially.	See footnote 2.

Rule 1.7: Conflicts and Interests: Current Clients

STATE VARIATIONS

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

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

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

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

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

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

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

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

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

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

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

(1) consultation with the lawyer,

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

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

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

(1) is prohibited by law or these rules;

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

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

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

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

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

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

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

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

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

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

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

Texas: Rule 1.06 provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Draft #4, 1/24/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-100; 3-310

Statute

Bus. & Prof. Code §6068(e)

Case law

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

Massachusetts; Virginia; Oregon; and Illinois

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 1

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

February 2010

(Draft rule prepared for circulation for public comment)

INTRODUCTION:

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

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

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

* Proposed Rule 1.8.2, Draft 4 (1/24/10).

<u>ABA Model Rule</u> Rule 1.8(b) Conflict of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.2 Use of Current Client's Information Relating to the Representation	<u>Explanation of Changes to the ABA Model Rule</u>
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.	~~(b)~~ A lawyer shall not use information relating to ~~representation of~~ a client to the disadvantage of the client unless the client gives informed <u>written</u> consent, except as permitted ~~or required~~ by these Rules <u>or the State Bar Act</u>.	Rule 1.8.2 is similar to Model Rule 1.8(b) but substantive changes have been made to enhance client protection. The letter designation of the Model Rule paragraph has been deleted because, unlike Model Rule 1.8, which gathers together many divergent concepts in separate paragraphs in a single rule, the Commission has made each paragraph of that Rule a separate, standalone rule. The phrase "information relating to the representation" has been replaced by "information relating to a client." Because this Rule applies to information of current clients, to which lawyers owe an undivided duty of loyalty, the Commission determined that information protected under this Rule should not be limited to that related only to the client's representation. The Commission has added the requirement that the client give informed <i>written</i> consent to the lawyer's use of information relating to the representation to the client's disadvantage. The Commission determined that mandating informed <i>written</i> consent, which requires that the lawyer's disclosure of adverse consequences to the client be provided to the client in writing, provides an extra layer of protection by adding the formality of a writing. For example, current California rule 3-310 requires a client's informed written consent before a client is deemed to have waived a conflict of interest. The phrase, "or required," has been deleted because there are no provisions in the Rules or the State Bar Act that <i>require</i> a lawyer to violate his or her duty of confidentiality.

* [Proposed Rule 1.8.2, Draft 4 \(1/24/10\)](#). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(b) Conflict of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.2 Use of Current Client's Information Relating to the Representation	<u>Explanation of Changes to the ABA Model Rule</u>
		As the Commission has throughout its proposed rules, a reference to the State Bar Act, which is also part of the regulatory landscape in California, has been added. <u>Minority: "Informed <i>Written</i> Consent"</u>. A minority of the Commission notes that current rule 3-100 requires only the client's informed consent to <i>disclose</i> the client's confidential information relating to the representation. The minority notes that the heightened written disclosure requirements for waiving conflicts of interest are appropriate in the conflicts context, because the adverse effects of a lawyer's conflicted representation are not necessarily apparently to a person who is not experienced in the use of legal services. That is not true of the use of the client's information to the client's disadvantage, where the potential adverse consequences will be readily apparent to the client. <u>Approaches in Other Jurisdictions</u>. There is little divergence from the Model Rule in other jurisdictions. Some jurisdictions, e.g., Massachusetts and Virginia, retain the ABA Model Code's prohibition on the use of client information to the advantage of the lawyer or a third person. Oregon permits use to the client's disadvantage only if the client's informed consent is "confirmed in writing." The current, pre-Ethics2000 Illinois Rules do not include Model Rule 1.8(b), but the Illinois State Bar has recommended its adoption.

<u>ABA Model Rule</u> Rule 1.8(b) Conflict of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule*</u> Rule 1.8.2 Use of Current Client's Information Relating to the Representation Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.	~~[5]~~ Use of information relating to ~~the representation~~<u>a client, whether or not confidential,</u> to the disadvantage of the client violates the lawyer's duty of loyalty. ~~Paragraph (b)~~<u>This Rule</u> applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, <u>to the disadvantage of the client.</u> For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. ~~Paragraph (b)~~<u>This Rule</u> prohibits disadvantageous use of client information unless the client gives informed <u>written</u> consent, except as permitted ~~or required~~<u>by these Rules or the State Bar Act.</u> See Rules ~~1.2(d), 1.6, 1.9(c), 3.3, and 4.1(b)(2), 8.1 and 8.3.~~	The Comment to proposed Rule 1.8.2 is substantially similar to Model Rule 1.8(b), comment [5]. Aside from necessary housekeeping revisions such as renumbering the comment and substituting "this Rule" for "paragraph (b)," the first sentence has been modified to emphasize that regardless of whether the client information in which a lawyer traffics is confidential, the lawyer will still violate his duty of loyalty and thus this rule if the information is used to the client's disadvantage. The first sentence has also been revised to conform to the change that the Commission recommends to the black letter rule. See Explanation of Changes to the Rule. The clause, "to the disadvantage of the client," has been added in the second sentence to emphasize that the Rule prohibits the disadvantageous use of client information. The more stringent "informed written consent" standard has been added in keeping with California practice. See Explanation of Changes to the Rule. The phrase "or required" has been deleted to conform to the Rule. The comment cross-references the three proposed rules the Commission contemplates will permit use or disclosure client information that might be to the disadvantage a client: Rules 1.6, 1.9(c), and 4.1(a)(2). The other rules referenced in the Model Rule comment do not comport with California policy on confidentiality. The Commission has rejected those rules to the extent they permit a lawyer to violate the duty of confidentiality.

* Redline/strikeout showing changes to the ABA Model Rule

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

(Commission's Proposed Rule – Clean Version)

A lawyer shall not use information relating to 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 a client, 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), 4.1(a)(2), and Business and Professions Code section 6068(e).

Rule 1.8.2 Use of Confidential Information [3-100, 3-310].
[Sorted by Commenter]

TOTAL = 6 **Agree = 3**
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice ("CACJ")	M			Our proposal is to follow precisely the ABA Model Rule 1.8(b).	The Commission disagrees with precisely following Model Rule 1.8(b). First, the phrase, "information relating to a client" has been substitute for "information relating to the representation of a client" to emphasize that the loyalty aspects of this Rule require a broader scope of protection for a client's information. Second, the phrase, "or required," was deleted because there are no provisions in the Rules or the State Bar Act that <i>require</i> a lawyer to violate his or her duty of confidentiality. Third, a reference to the State Bar Act, which is also part of the regulatory landscape in California, has been added to remind lawyers of other obligations they might have. Finally, the Commission has added a "written" consent requirement because it provides an extra layer of protection by adding the formality of a writing, thus impressing upon the client the importance of the matter.
2	COPRAC	M			COPRAC believes that written consent should be required, given the seriousness of the issue addressed by this rule, which involves a lawyer using confidential information of a client to the disadvantage of a client.	The Commission agrees. No response necessary.

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

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - DFT3 (01-24-10)-LM.doc

Rule 1.8.2 Use of Confidential Information [3-100, 3-310]. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	We encourage the Commission to address in the rules, perhaps in the definitions, whether informed written consent includes an email from the client. A majority of the members of COPRAC believe that an email should be sufficient. In the third sentence of Comment [1], the phrase "in competition with the client" should be moved to the end of the sentence. Recommending that another client make a purchase would not violate the rule unless such a purchase disadvantaged the client.	The Commission agrees. It has covered this in Rule 1.0.1 (the definitions Rule) by adopting as proposed Rule 1.0.1(n) the Evidence Code section 250 definition of 'writing', which includes, among other things, electronic mail. The Commission disagrees. The syntax is taken verbatim from the Model Rule and is correct. The end of the sentence states: "...or to recommend that another client make such a purchase." The use of the word "such" refers back to a purchase "in competition with the client," which is disadvantageous to the client.
3	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	A			We support the Commission for the Revision of the Rules of Professional Conduct's Proposed Rule 1.8.2.	No response necessary.
4	Office of Chief Trial Counsel ("OCTC"), State Bar of California				OCTC believes that the phrase "relating to the representation" not be used "because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it." OCTC also supports the idea of written consent in this Rule because it impresses upon the client the importance of the decision and assists in the enforcement of the Rule.	The Commission agrees and has substituted the phrase "information relating to a client" to broaden the scope of protection afforded to client information under this Rule. See Response to CACJ, above. No response necessary. The Commission agrees with requiring informed consent.

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - DFT3 (01-24-10)-LM.doc

Rule 1.8.2 Use of Confidential Information [3-100, 3-310].
[Sorted by Commenter]

TOTAL = 6 Agree = 3
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Orange County Bar Association	M			The OCBA believes the language “information relating to representation of a client” should be replaced with the language used in proposed Rule 1.6(a), specifically, “information protected from disclosure by Business and Professions Code section 6068(e)(1).” Currently, there is no statement in proposed Rule 1.8.2, as there is in proposed Rule 1.6(a), to explain the correlation between the phrases, nor does proposed Rule 1.8.2 contain the definition included in Comment [3] of proposed Rule 1.6. Adopting the same language as used in proposed Rule 1.6 not only ensures consistency between the two Rules, but also provides lawyers with more definitive guidance on how to comply with the Rule. The OCBA suggests adding to Comment [1] to proposed Rule 1.8.2 a reference to the definition in Comment [3] of proposed Rule 1.6. The OCBA proposes that the Rule be clarified as applying only to a “current” client’s information, as indicated in the Commission’s introductory statement and in the title of the proposed Rule.	The Commission agrees with the commenter’s concern with the phrase, “information relating to the representation of a client,” but has not made the specific change requested. Instead, the Commission has substituted “information relating to a client” to broaden the scope of protection afforded to client information under this Rule. See Response to CACJ, above. The Commission is unsure what OCBA is requesting. The rule applies only to a current client’s information, as reflected in the title. The word “client” is used throughout the Rules to refer only to a current client.

Rule 1.8.2 Use of Confidential Information [3-100, 3-310]. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					The OCBA agrees with the Commission's proposed modification to the Model Rule, adopting the "informed written consent" language. The OCBA suggests that proposed Rule 1.8.2 be modified to read as follows: "A lawyer shall not use a current client's information protected from disclosure by Business and Professions Code section 6068(e)(1) to the disadvantage of that client unless the client gives informed written consent, except as otherwise permitted by these Rules or the State Bar Act."	No response necessary. See RRC Response, above.
6	San Diego County Bar Association Legal Ethics Committee	A			We approve of the new rule in its entirety.	No response necessary.
7	Santa Clara County Bar Association	A			Agrees with the proposed rule.	No response necessary.

Rule 1.8.2: Use of Confidential Information

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.2 is highlighted.)

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

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

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

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

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

And Rule 4-210 provides in part as follows:

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

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

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

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

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

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

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

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

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

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

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

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

writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any

professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

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

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

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

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client’s disadvantage only if the client’s consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client’s ability to pay.” Finally, Oregon’s rule governing sexual relations with clients contains a detailed description of “sexual

relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

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

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

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

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

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

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

represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

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

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

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

Proposed Rule 1.8.11 [n/a] “Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9” (Draft #2.2, 01/06/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☐ Existing California Law

Rule

Statute

Case law

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 12

Opposed Rule as Recommended for Adoption 0

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☒ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.11* Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9

January 2010
(Draft rule to be considered for adoption.)

INTRODUCTION:

Proposed Rule 1.8.11, which governs the imputation of conduct prohibited in the 1.8 series of Rules to lawyers associated in law firms, is based on Model Rule 1.8(k). Changes to the language in Model Rule 1.8(k) are primarily intended to conform the Rule to the Commission's numbering convention for the proposed rule counterparts to Model Rule 1.8. Rather than follow the ABA in placing a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

Please note that this Rule went out for public comment as Rule 1.8.13, and as a result there are references to the earlier numbering in the public comment.

* Proposed Rule, Draft 2.2 (1/6/10). [Formerly proposed Rule 1.8.13]

<u>ABA Model Rule</u> Rule 1.8(k) Conflict Of Interest: Current Clients: Specific Rules	<u>Commission's Proposed Rule*</u> Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9	<u>Explanation of Changes to the ABA Model Rule</u>
(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.	~~(k)~~ While lawyers are associated in a <u>law</u> firm, a prohibition in ~~the foregoing paragraphs~~ ~~(a)~~<u>Rules 1.8.1</u> through ~~(i)~~<u>Rule 1.8.9</u> that applies to any one of them shall apply to all of them.	Rule 1.8.11 is based on Model Rule 1.8(k). The changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.

* Proposed Rule, Draft 2.2 (1/6/09). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.8(k) Conflict Of Interest: Current Clients: Specific Rules Comment	<u>Commission's Proposed Rule*</u> Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.8 Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.	~~[20]~~ ~~Under paragraph (k), a~~ prohibition on conduct by an individual lawyer in ~~paragraphs (a)~~ <u>Rules 1.8.1</u> through ~~(j)~~ <u>1.8.8</u> also applies to all lawyers associated in a <u>law</u> firm with the personally prohibited lawyer. For example, one lawyer in a <u>law</u> firm may not enter into a business transaction with a client of another ~~member of~~ <u>lawyer associated in</u> the <u>law</u> firm without complying with ~~paragraph (a)~~ <u>Rule 1.8.1</u>, even if the first lawyer is not personally involved in the representation of the client. ~~The~~ <u>This Rule does not apply to Rules 1.8.9 and 1.8.10 since the prohibition set forth in paragraph (j) those Rules</u> is personal and is not applied to associated lawyers.	Comment [1] to proposed Rule 1.8.11 is based on Model Rule 1.8, Comment [20]. As with the Rule itself, the changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.

* Proposed Rule, Draft 2.1 (1/5/09). Redline/strikeout showing changes to the ABA Model Rule

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9

(Commission's Proposed Rule – Clean Version)

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 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 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 Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

Rule 1.8.11* Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9 [Sorted by Commenter]						TOTAL = 3 Agree = 3 Disagree = 0 Modify = 0 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Orange County Bar Association	A			The OCBA endorses the adoption of proposed Rule 1.8.13, which is similar to ABA Model Rule 1.8(k).	No response needed.
2	San Diego County Bar Association Legal Ethics Committee	A			We approve of the new rule in its entirety.	No response needed.
3	Santa Clara County Bar Association	A			No comment.	No response needed.

*This rule was numbered Rule 1.8.13 when it was first issued for public comment. The new number is Rule 1.8.11.

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

RRC - 3-310 [1-8-13] - Public Comment Chart - By Commenter - DFT2.2 (02-22-10)RLK-RD-LM.doc

Rule 1.8.11: Imputation of Personal Conflicts

STATE VARIATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Draft #7, 2/9/10)

Summary: This Rule addresses conflicts of interest that arise when a lawyer's current representation is adverse to a client that the lawyer or the lawyer's firm (while the lawyer was still at the firm) formerly represented in the same or a substantially related matter. The black letter substantially follows the Model Rule but the Rule's comment is modified to address California case law. See Introduction & Explanation of Changes to the Comments.

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-310(E)

Statute

Bus. & Prof. Code §6068(e)

Case law

Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564; *In re Matter of Lane* (Rev.Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735

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

New Jersey Rule 1.9.

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☒ Yes ☐ No
(See the introduction.)

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

See the introduction and the Explanation of Changes for paragraph (b) of the proposed Rule and Comment [5] to the proposed Rule in the comparison chart.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.9* Duties to Former Clients

February 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.9, which governs a lawyer's duty to former clients, is substantially the same as Model Rule 1.9. The minor changes to the language in the black letter of Model Rule 1.9 are for clarity and to include the same reference to the California State Bar Act that has been made in a number of other Rules. The Comments to proposed Rule 1.9 contain substantive additions and deletions to the Model Rule counterparts that, in part, explain relevant California case law and elaborate on the meaning of the phrase "substantially related" as used in the rule. Of particular note is Comment [5], in which the Commission recommends that the Supreme Court reject the position taken by the Review Department in *In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735, that the substantial relationship test, which provides an irrebuttable presumption in civil disqualification matters, is also applicable to disciplinary proceedings. See Explanation of Changes for Comment [5].

Minority. A minority of the Commission objects to Comment [5] to rule on the ground that it reverses settled law concerning the application of the substantial relationship test to disciplinary and malpractice actions. The minority contends that the test is a substantive rule of law, not a rule of evidence that is rebuttable. The minority also takes the position that, even if it were a rule of evidence, then its application should be left to the courts. Finally, the minority objects to the differential application of the test in civil disqualification proceedings on the one hand, and disciplinary and malpractice actions on the other. The minority thus urges the deletion of Comment [5]. See Full Minority Dissent, below.

* Proposed Rule 1.9, Draft 7 (2/9/10).

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.	(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed <u>written</u> consent, ~~confirmed in writing~~.	The Commission proposes the adoption of Model Rule paragraph (a) except for the substitution of the more client-protective requirement that the lawyer obtain the client's <i>written</i> consent to the lawyer's adverse representation. This change affords more client protection and is consistent with California's requirement of <i>written</i> consent in other conflict situations.
(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 had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.	(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a <u>law</u> 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, <u>while at the former law firm</u>, had acquired information protected by <u>Business and Professions Code section 6068(e) and</u> Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed <u>written</u> consent, ~~confirmed in writing~~.	Proposed paragraph (b) is substantially the same as the corresponding Model Rule paragraph. The addition of "law" to modify "firm" conforms to the Rules style. The first change in (b)(2) is non-substantive; it clarifies that paragraph (b) applies when a lawyer learned information about a former client while in an earlier law firm association. The purpose of paragraph (b) is to describe the application of Rule 1.9 when the lawyer has departed that earlier law firm; the additional phrase in subparagraph (2) clarifies this connection. The addition of the reference to Bus. & Prof. Code § 6068(e) was made in response to public comment expressing concerns over the scope of protection afforded by proposed Rule 1.6. Although the Commission does not agree with the expressed concern, it has added the reference. Proposed paragraph (b) also substitutes the requirement of <i>written</i> consent in place of the MR's laxer "confirmed in writing" standard.

* Rule 1.9, Draft 7 (2/9/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:	(c) A lawyer who ~~has~~ formerly represented a client in a matter or whose present or former <u>law</u> firm has formerly represented a client in a matter shall not thereafter:	Proposed paragraph (c) is identical to the Model Rule paragraph, except for the elimination of one unnecessary word and the addition of "law" to modify "firm" to conform to the Rules style.
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or	(1) use information relating to ~~the representation—a~~ <u>former client</u> to the disadvantage of the former client except as these Rules <u>or the State Bar Act</u> would permit ~~or require~~ with respect to a <u>current</u> client, or when the information has become generally known; or	The use of 'relating to a former client' in place of the Model Rule's 'relating to the representation of a former client' is intended to eliminate the possibility of a narrow reading that the duty applies only to information that relates to the subject matter of a former representation. A lawyer's continuing duty of confidentiality under section 6068(e) and Rule 1.6 applies to all information obtained by a lawyer by virtue of a lawyer-client relationship if the use or disclosure of the information likely would be harmful or embarrassing to the client or if the client has directed the lawyer to not use or disclose the information. This paragraph also adds a reference to the State Bar Act. It also has another substantive change, which is the removal of the concept that a lawyer might be required to disclose a client's confidential information. That might be possible under Model Rule 1.6, but there is no such requirement either in the California Rules or in the State Bar Act. Finally, this adds the clarifying adjective "current". The Model Rules apparently only once refer to a current client as "current client", but they otherwise use the unmodified word "client" to refer to a current client. Because this Rule is concerned with duties owed to former client, the Commission recommends adding "current" in all places in the rule that the reference is to a "current client.". The Commission believes this should avoid misunderstanding by making immediately clear the meaning of provisions that otherwise might be more difficult to read.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients	<u>Explanation of Changes to the ABA Model Rule</u>
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.	(2) reveal information relating to ~~the representation~~ <u>a former client</u> except as these Rules <u>or the State Bar Act</u> would permit ~~or require~~ with respect to a <u>current</u> client.	The proposed changes in (c)(2) track those proposed for (c)(1).

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.	[1] After termination of a lawyer-client relationship, the lawyer ~~has certain continuing~~ <u>owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (<i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide information to the lawyer that will be protected as required by Business and Professions Code section 6068(e) and Rule 1.6 without fear that any such information later will be used against the client.</u> ~~[12]~~ <u>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 confidentiality and conflicts of interest and thus may not represent another client except a matter in conformity with this Rule which the lawyer represented the former client. Under this Rule, for</u>	Proposed Comments [1] and [2] materially revise Model Rule Comment [1] in order to more fully explain how and why Rule 1.9 protects former clients, and to avoid any suggestion that proposed Rule 1.9 modifies long-standing California authority regarding a lawyer's duties to former clients. The Supreme Court's opinion in <i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564 (cited in proposed Comment [1]) and other authority such as <i>People ex rel. Deukmejian v. Brown</i> (1981) 29 Cal.3d 159, emphasize that a lawyer has two duties to former clients. Both of these duties are described and explained in these proposed Comment paragraphs. The Commission believes that it is essential to preserve this case law, and it further believes that Model Rule 1.9 is consistent with these California principles. However, adopting the Model Rule Comment risked obscuring these points and thus causing misunderstanding of the Rule's extremely important restrictions on lawyer conduct.

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

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

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

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.	~~lawyer~~ <u>paragraph (a)</u> would not ~~be precluded, on apply if~~ the ~~grounds of substantial relationship, from defending~~ <u>lawyer later defends</u> a tenant of the completed shopping center in resisting eviction for nonpayment of rent. ~~Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client if there is not required to reveal the confidential information learned by the lawyer in order to establish ano~~ substantial risk ~~that~~ <u>relationship between</u> the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client <u>and use</u> and information that would in ordinary practice be learned by a lawyer providing such services <u>eviction matters</u>.	

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[4] Paragraph (a) applies when the lawyer's representation is in 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].	Proposed Comment [4] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is. Also, it includes a reminder of the important concept that a lawyer sometimes can avoid the violation of duties owed to a former client, just as a lawyer sometimes can avoid the violation of duties owed to a current client, by limiting the scope of a new representation. This reminder includes cross-references to Rule 1.2(c) (limiting the scope of a representation) and to Rule 1.7, Comment [15] (discussing the same point in the context of a lawyer's duties to a current client).
	[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	Proposed Comment [5] has no direct corollary in the Model Rule Comment. It also is part of the expanded explanation of what a "matter" is and includes citations to pertinent California appellate opinions. In addition, the Commission is recommending that Review Department's opinion in <i>In re Matter of Lane</i> (1994) 2 Cal. State Bar Ct. Rptr. 735, be rejected. In that opinion, the Review Department suggested that the substantial relationship test,

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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 <i>In re Complex Asbestos Litigation</i>, (1991) 232 Cal.App.3d at p. 592; <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.</u>	which provides an irrebuttable presumption in civil disqualification matters, was also applicable to disciplinary proceedings. The Commission determined that the Review Department's conclusion is ill-advised in those situations where the lawyer's new client is not present and the lawyer will be afforded an opportunity to provide direct evidence of what information the lawyer actually obtained in the prior representation.
	<u>[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 Business and Professions Code section 6068(e) and 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.</u>	Proposed Comment [6] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is and is intended to underline that the concept of a "matter" should be understood within the context of the purposes of Rule 1.9 as they are explained in Comment [1].

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[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 of the former client.	Proposed Comment [7] has no direct corollary in the Model Rule Comment. It supplements proposed Comment [6].
Lawyers Moving Between Firms [4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the	Lawyers Moving Between Firms ~~[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the~~	The Commission proposes to remove all of Model Rule Comment [4] as being discursive and not helpful to understanding the Rule.

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

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.	[69] 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~~to which this Rule applies.	Proposed Comment [9] is nearly identical to Model Rule Comment [6], but removes the reference to disqualification in the last sentence.
[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).	~~[710] Independent of the question of disqualification of a firm, a~~A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c).	Proposed Comment [10] is substantially the same as Model Rule Comment [7]. However, the proposed Comment removes the reference to lawyer disqualification. Although the Commission understands that Rule 1.9 will be cited when disqualification issues are raised, it has written the Rule primarily for disciplinary purposes and does not want to suggest that it presumes to dictate to courts how to exercise their authority, for example, under C.C.P. § 128(a)(5). In addition, a reference to Bus. & Prof. Code § 6068(e) has been added. See Explanation of Changes for paragraph (b)(2), above.

<u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment	<u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.	[~~8~~<u>11</u>] Paragraph (c) provides that <u>confidential</u> information acquired by ~~the~~<u>a</u> lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the <u>former</u> client. ~~However,~~<u>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.</u> 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. <u>However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)</u>	Proposed Comment [11] is based on Model Rule Comment [8]. The first set of changes clarify that it (and Rule 1.9) speak only of confidential information that is protected by Rule 1.6, not to non-confidential information that a lawyer might have learned in the course of representing a former client. The addition of the last sentence was made in response to public comment received on this Rule and proposed Rule 1.6 expressing the incorrect view that <i>Matter of Johnson</i> prohibits a lawyer from using to the disadvantage of a former client or disclosing information that is generally known. That opinion holds that a lawyer has obligations with respect to information that is in a public record, and therefore potentially available to others, but that is not generally known..
[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.	<u>Client Consent</u> [~~9~~<u>12</u>] The provisions of this Rule are for the protection of former clients and can be waived if the <u>former</u> client gives informed <u>written</u> consent, ~~which consent must be confirmed in writing under paragraphs (a) and (b).~~ See Rule 1.0(e). With regard to the effectiveness of an advance ~~waiver~~<u>consent</u>, see Comment [22] to Rule 1.7. With regard to ~~disqualification~~<u>the application of a lawyer's conflict to</u> a firm with which a lawyer is or was formerly associated, see Rule 1.10.	Proposed Comment [12] is much the same as Model Rule Comment [9]. There are two substantive changes. First, the proposed Comment substitutes California's more client-protective requirement of "informed written consent" in place of the Model Rule's requirement of "consent confirmed in writing" (this change can be seen in paragraphs (a) and (b) of the proposed Rule, and is consistent with the same change made in other proposed conflicts Rules). Second, as explained with respect to Comment [10], this removes the reference to disqualification.

Proposed Rule 1.9 Duties to Former Clients

Minority Dissent

Comment 5 proposes to change the time-honored “substantial relationship” test to preclude its application in disciplinary proceedings and legal malpractice actions. The substantial relationship test provides that when a substantial relationship exists between the former representation and the current representation, the attorney’s knowledge of confidential information is conclusively presumed. (See *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489.) Comment 5 changes this rule by making the presumption rebuttable in disciplinary proceedings and legal malpractice actions. The Commission reasons that Evidence Code section 958 is an exception to the lawyer-client privilege and that the lawyer therefore can and should be allowed to prove that he or she did not actually receive confidential information. There are several problems with altering the application of the substantial evidence in some proceeding, but not others.

First, the substantial relationship test is not a rule of evidence at all, but a substantive rule of law. A conclusive or irrebuttable presumption differs from a rebuttable presumption in that only the latter is considered a rule of evidence. (See *People v. McCall* (2004) 32 Cal.4th 175, 184-185 “[A] distinction must be drawn between mandatory rebuttable presumptions, which operate as evidentiary devices, and mandatory conclusive presumptions, which operate as rules of substantive law.”].)

Because it is a substantive, prophylactic rule -- a “rule by necessity, for it is not within the power of the former client to prove what is in the mind of the attorney” (*Global, supra*, at p. 489.) -- the question is not whether or not the lawyer can disprove receipt of confidential information. Based on ethical policy, not evidence, the substantial evidence test presumes conclusively that the lawyer received confidential information from the former client. The presumption is conclusive, rather than rebuttable, because the very probe into whether the attorney actually gained access to confidential information would itself destroy the values sought to be protected. (*Conflicts of Interest in the Legal Profession* (1981) 94 Harv. L. Rev. 1244, 1329.) “The presumption also stems from a recognition of how difficult it is for the former client to prove that confidential information was given to the attorney.” (*Id.*) “By forcing a client to prove receipt of information, the cloak of secrecy would be torn from the attorney-client communications. As one court has stated, ‘[t]hat kind of Hobson’s Choice is not one to which the legal profession ought to submit its clients.’” (*Ibid.*) The fact that the presumption might be rebuttable does not alter the client’s dilemma.

Second, because it is a prophylactic rule and not a rule of evidence, a lawyer’s denial that he or she received confidential information misses the point. “The interest to be preserved by preventing attorneys from accepting

representation adverse to a former client is the protection and enhancement of the professional relationship in all its dimensions.” (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315 , 325.) The question is not whether confidential information was *actually* exchanged between the lawyer and the client, but whether it *normally* would have been exchanged. (*Id.* at p. 327.) While a limited exception exists where the lawyer can show that there was no opportunity to receive confidential information, there is no exception that allows a lawyer to discuss what confidential information the lawyer did or did not receive.

Third, if, as the Commission maintains, this is indeed a rule of evidence, then the application of the substantial relationship test should be left to the courts. In disciplinary proceedings the State Bar Court should determine under its own rules of evidence and procedure how the test should be applied in those proceedings. (See, e.g., Rules of Practice of the State Bar Court and Bus & Prof Code § 6086.5.) It is beyond the purview of the Commission to draft rules of evidence or procedure for the State Bar Court.

Finally, the notion that this--or any other rule--will apply differently depending on whether the proceeding involves disqualification, on one hand, or discipline or malpractice, on the other, is unprecedented. We should not have rules that have such differential application. Comment 5 should be deleted.

Rule 1.9 Duties to Former Clients

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a law 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 Business and Professions Code section 6068(e) and 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 law firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to a former client 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 a former client 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 [15 P.2d 505]) 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 and Business and Professions Code section 6068(e) 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 and Business and Professions Code 6068(e) 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 land use and eviction matters.
- [4] Paragraph (a) applies when the lawyer's representation is in 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 [280 Cal.Rptr. 614]) 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 572, 592 [283 Cal.Rptr. 732]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185].) 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 does not apply and 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 Business and Professions Code section 6068(e), 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 of 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, 1.9(c), and Business and Profession Code 6068(e). 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 would violate this Rule by 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 to which this Rule applies.

- [10] A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c), and Business and Professions Code section 6068(e).

- [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. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

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 1.0.1(e). With regard to the effectiveness of an advance consent, see Comment [22] to Rule 1.7. With regard to the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 7 **Agree = 2**
Disagree = 0
Modify = 4
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Public Defenders Association ("CPDA")	M			CPDA is generally in agreement with Proposed Rules 1.9 and 1.10 except for their failure to follow existing law in recognizing that imputed conflicts of interest must be analyzed differently between criminal cases and civil cases, especially in criminal cases where the clients are represented by a public defender's office or other indigent defense office. The problems with Proposed Rules 1.9 and 1.10 are not so much in the language of the proposed rules but instead arise from certain comments published in conjunction with these rules. Comments [5] and [6] to Proposed Rule 1.9 are problematic, contrary to existing law, fail to take into consideration various factors concerning public defender and other indigent offices, and would result in wasteful expenditures of limited public funds without resulting in any additional protection of the confidences and secrets of former clients. The application of the <i>Ahmanson</i> presumption to criminal cases was expressly rejected in <i>Rhaburn v. Superior Court</i> . The CPDA respectfully suggests that Comments [5] and [6] must be modified to limit their application to civil cases, or at least recognize that the vicarious disqualification rule must be	The CPDA letter describes proposed Comments [5] and [6] as expanding the scope of Rule 1.9 by creating imputation among lawyers associated in a law firm so that a lawyer can be subject to vicarious disqualification because another lawyer in the law firm possesses disqualifying information. This is not correct, and the Commission has not made the requested change. Each of the three paragraphs in Rule 1.9 is premised on a lawyer's actual possession of confidential information. Comments [5] and [6] discuss whether two matters are substantially related, that is, whether confidential information acquired in a lawyer's employment in one matter will be deemed to be pertinent to the lawyer's employment in a different matter. The imputation with which CPDA is concerned appears in Rule 1.10. Also regarding Comment [5], see the reply to OCTC, below.

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

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT3.1 (02-22-10)RLK-KEM-LM.doc

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					applied more flexibly in criminal cases. In addition, since Comment [5] to Proposed Rule 1.10 incorporates Rule 1.9, and applies the same disqualification rules where the former client was represented by a lawyer who is no longer employed by the firm, Rule 1.10, subdivision (b)(1), and Comment [5] must likewise be modified.	
2	COPRAC	M			We agree with the minority as to the issue involving Business and Professions Code section 6068(e) and proposed Rule 1.6, in that it appears to COPRAC that the definition of confidential information set forth in proposed rule 1.6 is narrower than the scope of Section 6068(e). The proposed rule references the State Bar Act; Comment [3] references Rule 1.6; Comment [7] then refers to both section 6068(e) and Rule 1.6; and finally Comment [10] then references yet a further iteration, a duty to preserve confidential information “about a client.” COPRAC suggests that uniformity of reference would assist practitioners in applying the rule. Reference to section 6068(e) and Rule 1.6 (assuming that rule is re-crafted to address the concerns of the minority) would be appropriate.	The Commission does not agree with the commenter’s concerns because both proposed Rule 1.6(a) and current rule 3-100(A) expressly prohibit disclosure of information protected under Bus. & Prof. Code § 6068(e). Nevertheless, there is no important reason for not including dual references to Rule 1.6 and Section 6068(e), and the Commission has edited Rule 1.9 accordingly.

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [3]	Comment [3] appears to have an incorrect reference to the type of work being performed by the lawyer who is the subject of the second example in this Comment. The lawyer's previous representation in a land use matter is compared, first, with a zoning matter (considered to be substantially related) and, second, with an eviction matter (considered to not be substantially related). The example incorrectly concludes by stating "there is no substantial relationship between the <i>zoning</i> and the eviction matters." The word "zoning" in this phrase should be replaced with the words "land use" in order for the proper comparison to be made.	The Commission agrees and has made the suggested change.
				Comment [5]	Comment [5] should be revised to state "The evidentiary presumption created for disqualification purposes should not apply in a disciplinary context." We note the Rule uses the terms "firm" and "law firm." We recommend that a uniform term be used throughout.	See the reply to OCTC re Comment [5], below. The Commission agrees and generally has used "law firm" except that it generally has dropped the modifier where there is a second reference to a firm soon after an earlier one so that confusion is unlikely.
				paragraph (b)	We believe that the language of sub-section (b) is unclear as to what is required to be known. COPRAC proposes that section (b) be rewritten as follows:	The Commission disagrees and has not made the requested change. Paragraph (b) is essentially identical to the corresponding Model Rule provision, and the Commission is not aware that its drafting

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT3.1 (02-22-10)RLK-KEM-LM.doc

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					“(b) A lawyer shall not represent a person in a matter which the lawyer knows to be the same or substantially related to a matter in which a law firm with which the lawyer formerly was associated had 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 that is protected by Business and Professions Code section 6068(e) and Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.”	has lead to confusion in the many jurisdictions in which it has been adopted.
3	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M			PREC is generally supportive of the proposed Rule and its Comments. However, there is some concern that the Comments are too long, give practice pointers, and are suggestive of means to avoid disqualification in a way that may be viewed as attempting to create substantive law for civil proceedings. Comments [8] and [9] in particular seem directed to provide guidance not just to lawyers but also to Courts on the subject of	The Commission’s response regarding Comment [8] is given immediately below. On Comment [9], the Commission disagrees that its discussion of burdens is not appropriate. The court in <i>Adams v. Aerojet-General</i>, 86 Cal. App. 4th 1324 (2001) relied on this particular comment in reaching its well-settled decision. Although the allocation of the burden might depend on the situation in which the issue arises, such as in a damage claim by a

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Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
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					disqualification. Comments that refer to disqualification are not just for disciplinary purposes – they seem calculated to specifically address how Courts will handle disqualification.	former client, a disciplinary proceeding or a disqualification motion, the statement is accurate.
				Comment [8]	With respect to Comment [8], the disqualification reference could be avoided by saying that such representation is not a violation of this rule.	The Commission agrees and has removed the reference to disqualification in Comment [8].
				Comment [9]	If Comment [9] is to be retained, the last sentence should be modified to make it clear that the burden of proof should rest upon the firm <i>and the lawyer</i> whose disqualification is being sought. Paragraph (b) of the Proposed Rule is about a lawyer, not just a firm. We note, however, that the disciplinary rules are no place to set civil burdens of proof or regulate disqualification.	The Commission has also revised Comment [9] to remove the reference to disqualification. The Commission does not believe it is necessary to add the phrase “and the lawyer”. Because the lawyer is in the firm that is the subject of the Rule, the burden will necessarily also fall on the individual lawyer.
				1.9(c)(1) and (2)	PREC also has some concern about the repeated references to the State Bar Act, in subsections (c)(1) and (2). We note that the reference to the State Bar Act in a disciplinary rule is too broad, and carries with it the same lack of clarity that would come with language such as “except otherwise as provided by law.” If the primary concern by reference to the State Bar Act is Section 6068(e), and if that is the intent, the rule should simply refer to that section.	The Commission agrees that the broad reference to the State Bar Act could lead to confusion. However, the legislature presumably has the authority to create exceptions to the general rule of client confidentiality by revising other sections of the statute, and narrowing the Rule as suggested might conflict with any such action by the legislature.

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Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [11]	Regarding Comment [11], we are concerned about the last sentence that seems to convey that a lawyer is free to disclose any information about a former client that is “generally known information.” This is not well defined and leaves open the possibility of being construed by lawyers as <i>carte blanche</i> to reveal information from the public record. If the sentence is retained, we believe the meaning of “generally known information” should be clarified, and distinguished from public record information.	See Response to OCTC re paragraph (c) and Comment [11], below.
4	Office of Chief Trial Counsel (“OCTC”), State Bar of California	NI		1.9(a) & 1.9(b)	1. OCTC is concerned that paragraphs (a) and (b) have added an undefined term, “materially adverse,” rather than “adverse” in the current rule. This is a significant change in the law. This will create uncertainty for lawyers and make prosecution more difficult.	The Commission disagrees as this language is found in other jurisdictions without causing confusion so far as the Commission is aware.
				1.9(b)	In addition, paragraph (b) should reference § 6068(e), as well as Rules 1.6 and 1.9(c).	The Commission agrees and has made the requested change. See the Commission response to the COPRAC letter.
				1.9(c)(1)	2. OCTC is concerned about the phrase “except as these Rules or the State Bar Act would permit ... or when the information has become generally known” in paragraph (c)(1). First, OCTC repeats the concern it raised in relation to proposed Rule 1.6 that lawyers are	The Commission disagrees and has not made the requested change. OCTC misunderstands the <i>Johnson</i> decision. It does not say that a lawyer never can disclose public information but rather that a lawyer is not free to disclose information simply because it can be found among public records;

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.9(c)(2)	required to disclose confidential information under some circumstances. Second, OCTC notes that currently, a lawyer may not reveal information in the public record if the lawyer learned of that information during or because of the representation. See <i>In the Matter of Johnson</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190. 3. Paragraph (c)(2) references the exception to current clients. First, like paragraph (c)(1), (c)(2) raises issue of whether the confidentiality rules should require some disclosures. Second, unlike (c)(1), paragraph (c)(2) does not include the language "or when the information is generally known." This requires clarification.	information might be in a public record but not generally known. See also Comment [11], the last sentence of which draws a distinction between "generally known" information and "information in the public record." The Commission disagrees and has not made the requested change. OCTC is correct that paragraph (c)(2) does not express an exception for information that is generally known. However, that paragraph prohibits the disclosure of confidential information, and the Commission does not see how a lawyer could be considered to have "disclosed" information that already is generally known.
				Cmt. [5]	4. The statement in Comment 5 that the substantial relationship test presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In <i>In the Matter of Lane</i> (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive	Comment [5] describes a distinction between the application of the substantial relationship test in disqualification and in other contexts. After lengthy deliberations, the Commission has concluded that the <i>Lane</i> case's reliance on the substantial relationship test in the disciplinary context is misplaced, and has revised Comment [5] to reflect that position.

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT3.1 (02-22-10)RLK-KEM-LM.doc

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
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					presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.) " (Id at 747.) If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with Comment [5]'s analysis, which states the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; the new client can learn of them even if not present by reading the pleadings or a transcript. The new client may also be a witness. The Commission's Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney's mind. It would create numerous disputes as to what the client really told the lawyer. Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar	

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					and civil cases as in disqualification motions. Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (<i>City National Bank v. Adams</i> (2002) 96 Cal.App.4th 315, 328.) In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See <i>City National Bank v. Adam, supra</i>, Cal.App.4th at 328; <i>In re I Successor Corp</i> (Bkrtcy S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed	

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
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					for the former client. (<i>City National Bank v. Adams, supra</i>, 96 Cal.App.4th at 327-328.) Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) While Woods addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.	
				Cmt. [6]	5. Comment [6] presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related."	The Commission believes Comment [6] is correct and cannot tell from the OCTC letter how it might be edited.
				Cmt. [7]	Comment [6] also does not reference Business & Professions Code section 6068(e). Yet, Comment [7] does reference section 6068(e). The difference in these Comments could create some confusion and uncertainty.	The Commission agrees and has added the 6068(e) reference to Comment [6].

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [11]	As to Comment [11], OCTC is concerned that, like paragraph (c) itself, what is meant by "generally known information" and this Comment appears not consistent with the established law that section 6068(e) is broader than the attorney-client privilege. Section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that is in the public record. (See <i>In the Matter of Johnson</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the current law.	The Commission disagrees with OCTC's position that "section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that is in the public record." See reply to the OCTC comment on paragraph (c)(2), above. Nevertheless, the Commission has added a sentence to the Comment that draws a distinction between "public record" and "generally known."
5	Orange County Bar Association	M		1.9(c)(1) & (2)	The OCBA is concerned that the change from the Model Rule in paragraphs (c)(1) and (2), to substitute "current client" for "client," potentially introduces ambiguity. As former clients continue to enjoy various protections against use and disclosure of their confidential information, it is not clear whether the modified reference to "current client" is intended to narrow the exception to apply only to rules applicable to current clients, to the exclusion of rules permitting disclosures as to former clients. The OCBA accordingly asks the Commission to clarify the meaning and intent behind the reference to "a current client" in the exception.	The Model Rules usually refer to current clients without the modifier "current", which sometimes causes a lack of clarity as to whether the reference includes former clients. The Commission has adopted the style of including "current" whenever a misreading otherwise might be possible. In paragraph (c) the reference to "current" client is correct and emphasizes that the duty of confidentiality to former clients is no less than is owed to current clients. The Commission has not made the requested change. Subparagraph (c)(1) provides a good example because, without "current" it confusingly would read: "... 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 client,".

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT3.1 (02-22-10)RLK-KEM-LM.doc

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	Comment [1] should be amended to substitute "with respect to" for "in" on line five (with the phrase to read ". . . will injuriously affect his or her former client with respect to any matter. . .") so that the Comment is not read as restricted only to the very matter in which the attorney represented the former client.	The Commission has not made the requested change. The questioned phrase is taken directly from the Supreme Court's opinion in <i>Wutchumna Water Co. v. Bailey</i> , 216 Cal. 564 (1932), where it appears multiple times.
				Comment [4]	Comment [4] should be amended to add "in" after "is" in the second line (simply to correct what appears to be a typographical error).	The Commission agrees and has made the suggested addition.
				Comment [7]	Comment [7] should be amended to substitute ". . . with respect to any matter in which the lawyer represented the former client" for "in any manner in which the lawyer represented the former client" (in the third sentence, subpart (i)), to clarify the meaning of the Comment, consistent with our suggestions for Comment [1].	This repeats the suggestion made with respect to Comment [1], and for the same reason the Commission has not made this change.
					Comment [7] also should be amended by substituting "of" for "to" in the last line (simply to correct what appears to be a typographical error).	The Commission agrees and has made the suggested change.
				Comment [11]	The OCBA believes that Comment [11] should be deleted entirely, as not useful and as inherently contradictory, or it should be amended to eliminate any ambiguity.	The Commission disagrees and has not made the requested change. The first and third sentences of Comment [11] are taken directly from the Model Rule and are correct. The second sentence merely provides cross references to other Rules.

Rule 1.9 Duties to Former Clients. [Sorted by Commenter]						TOTAL = 7 Agree = 2 Disagree = 0 Modify = 4 NI = 1
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6	San Diego County Bar Association, Legal Ethics Committee	A			We approve of the new rule in its entirety.	No response required.
7	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 1.9: Duties to Former Clients

STATE VARIATIONS

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

California: Rule 3-310(E) forbids representation adverse to a client or former client if a lawyer "by reason of the representation of the client or former client . . . has obtained confidential information material to the employment."

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

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

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

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

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

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

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

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

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

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

Proposed Rule 1.10 [n/a]

“Imputation of Conflicts: General Rule”

(Draft #6.3, 2/25/10)

Summary: This new rule addresses situations where an individual lawyer's conflict of interest may prohibit other associated lawyers from undertaking or continuing the conflicting representation. In addition, the Commission has recommended that the Board adopt a limited non-consensual screening provision, which some members of the Commission believe is very controversial. See Introduction and Explanation of Changes for paragraphs (a)(2) and (a)(2)(i).

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-310

Statute

Case law

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

- ☒ Other Primary Factor(s)

See the introduction in the Model Rule comparison chart.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 6
Opposed Rule as Recommended for Adoption 4
Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

(See Explanation for paragraphs (a)(1), (a)(2), and (a)(2)(i) in the Model Rule comparison chart.)

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☒ Very Controversial – Explanation:

See the introduction and the explanation of paragraphs (a)(1), (a)(2), and (a)(2)(i) of the proposed rule in the Model Rule comparison chart.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.10* Imputation of Conflicts: General Rule

February 2010

(Draft rule following consideration of public comment)

INTRODUCTION:

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

Public Comment and effect on the Commission's decision to recommend non-consensual screening in limited situations. Because the Commission was equally divided on the issue of permitting screening in limited situations to facilitate the mobility of lawyers who were only peripherally involved in the matter, the Commission solicited input from the public and the profession on the issue of whether California should sanction any kind of non-consensual ethical screening. Several commenters, including COPRAC and the legal ethics committees from the Orange County Bar, the San Diego Bar, and the Santa Clara Bar, recommended that a broad screening provision, similar to the ABA provision, be adopted. See Public Comment Chart, below. In light of this public comment, the Commission revisited the issue of non-

* Proposed Rule 1.10, Draft 6.2 (2/11/10).

consensual screening in a private firm and voted to adopt a provision that would permit such screening only in the limited situation where the prohibited lawyer “did not substantially participate in the prior representation.” See subparagraph (a)(2)(i). Notwithstanding the views of COPRAC and the local bar committees, the Commission determined that the first step to permit screening by private firms in California should be a modest one. There is precedent for this approach in other jurisdictions; there are twelve such jurisdictions that permit screening in limited situations: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, and Wisconsin. Although a federal court has predicted that under appropriate circumstances, California would permit non-consensual screening, see *In re County of Los Angeles* (2000) 223 F.3d 990, no California state court has yet sanctioned non-consensual screening for a lawyer who moves from one private firm to another. Given the current state of California case law, the Commission concluded that a limited screening provision would be more appropriate to “test the waters” in California.

In addition to paragraph (a)(2)(i), which limits the availability of screening to only those lawyers who “did not substantially participate in the prior representation,” the proposed screening provision also affords the former client added protection by placing on the screening law firm and the screened lawyer a heightened burden to demonstrate the effectiveness of the screening procedures that have been implemented. Unlike the Model Rule, the screening firm must agree to provide to the client, at the firm’s expense, the opportunity to retain an independent lawyer to review and assess the firm’s screening procedures, and provide access to that lawyer. See Explanation of Changes for subparagraph (a)(2)(iii). Further, subparagraph (a)(2)(v) shifts responsibility for the cost of a successful challenge to the law firm’s screen, which should provide an added incentive to the law firm and screened lawyer to maintain the screen, thereby preserving the former client’s confidential information. See Explanation of Changes for subparagraph (a)(2)(iii).

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

Minority. A minority of the Commission opposes the adoption of screening in the context of a lawyer moving from one private law firm to another private law firm. See Explanation of Changes for paragraph (a)(2), below. The minority also objects to the term “materially limiting” in paragraph (a)(1). See Explanation of Changes for paragraph (a)(1), below. Finally, the majority takes issue with the “did not substantially participate” standard that the Commission recommends adopting. See Explanation of Changes for subparagraph (a)(2)(i), below.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Commission's Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
(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	(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 first part of paragraph (a) is identical to Model Rule 1.10(a).
(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or	(1) the prohibition is based on a personal interest of the ~~disqualified~~<ins>prohibited</ins> lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or	Subparagraph (a)(1) is nearly identical to Model Rule 1.10(a)(1), except that it substitutes “prohibited” for “disqualified” to reflect that this Rule is primarily intended as a rule of discipline. <u>Minority.</u> A minority of the Commission objects to the “materially limiting” standard because it eliminates the client protection provided by the current California rule. Under the current rule, a lawyer is required to disclose the possibility of a conflict of interest when the lawyer knows that another lawyer in the lawyer's law firm has a relationship or interest in the subject matter of the representation. This standard in this rule allows lawyers to avoid informing the client of situations that could result in a conflict. The standard would turn on a prediction about whether there is a substantial risk, which would allow lawyers to avoid disclosing circumstances that later turn out to be a conflict and injure the client. This standard will communicate to lawyers that they need only determine that they are straight shooters who will do the right thing, a determination easily made by a lawyer acting under the influence of economic motivation. This standard makes it questionable whether any lawyer ever will be subject to discipline under this Rule. This also means that the Rule will provide

* Proposed Rule 1.10, Draft 6.3 (2/25/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Commission's Proposed Rule*</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule	<u>Explanation of Changes to the ABA Model Rule</u>
		negligible protection to clients, and the continuing viability of client-protective current California case law will be called into question. The client-protective standard should be: "... that could have an adverse effect on the representation of the client"
(2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and	(2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the ~~disqualified~~<u>prohibited</u> lawyer's association with a prior firm, and	The Commission recommends adoption of a substantially modified version of Model Rule 1.10(a)(2). Model Rule 1.10(a)(2), adopted by the ABA in February 2009 and further amended in August 2009, broadly permits screening of lawyers who move from one private firm to another, even if the former client does not consent. "Broadly permits screening," means that the jurisdiction's provision permits screening of any lawyer who has acquired (or is presumed to have acquired) confidential information of the former client, regardless of the degree of involvement of that lawyer in the former client's representation. In effect, this is equivalent to the "substantial responsibility" standard in MR 1.11 and would place private lawyers more or less on equal footing with government lawyers. Although no jurisdiction to date has adopted the precise ABA approach, 13 jurisdictions have adopted broad screening provisions. Jurisdictions that broadly permit screening are: Delaware, Illinois (both current and proposed), Kentucky, Maryland, Michigan (both current and proposed), Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee (proposed revision), Utah and Washington. Although there was little support for a broad screening provision, the Commission was equally divided on the issue of permitting screening in limited situations to facilitate the mobility of lawyers who were only peripherally involved in a matter. "Permits screening in limited situations" means that a jurisdiction's provision permits screening only of a lawyer who did not "substantially

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		participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter, or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or “is not likely to be significant” (e.g., Minn.) Jurisdictions that permit screening in limited situations are: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee (current rule only); and Wisconsin. The public comment materials for Rule 1.10 specifically solicited comments on whether California should adopt a Rule that permits some form of nonconsensual screening. Several commenters, including COPRAC and the ethics committees from the Orange County Bar, the San Diego Bar, and the Santa Clara Bar, recommended that a broad screening provision, similar to the ABA provision, be adopted. See Public Comment Chart, below. Only one commenter expressly objected to the adoption of any screening provision. Following public comment, the Commission revisited the issue of nonconsensual screening and voted to recommend the adoption of a modified version of Model Rule 1.10(a)(2) that permits screening of a lawyer who moves laterally from one private firm to another private firm only in the limited situation where the moving lawyer had not substantially participated in the prior representation. The specifics of the recommended screening provision are discussed in the Explanations to each of the subparagraphs to proposed Rule 1.10(a)(2).

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		<u>Minority.</u> A minority of the Commission dissents because this Rule will not protect clients. In some situations a client will consent to screening - if requested to do - so based on the nature of the situation and the client's trust in the law firm. When the client lacks that trust, which likely will be because of the intensely disputed and significance of the matter to the client, the law firm should not have the right to impose screening. The freedom to do so is in the commercial interests of law firms but not in the interests of the affected client and will reduce trust in the legal system. It is crucial to understand that there is no effective way to know that confidential information held by a lawyer in a firm representing a client's adversary has not been imparted to the other firm lawyers. The mechanisms in the Rule may allow for verification that screening mechanisms are in place, but not whether they are violated. Our rules protect client confidential information to assure that clients can communicate their most harmful or embarrassing information to their lawyer without fear of consequence. That interest cannot be protected where the client does not have confidence that information in the hands of an opposing law firm which has an interest as an advocate for the client's adversary will not be used or disclosed for the benefit of the adversary. "No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . . No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent." (<i>Cho v. Superior Court</i> (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) The mechanisms in this Rule do not change this conclusion.

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	(i) <u>the prohibited lawyer did not substantially participate in the prior representation;</u>	Subparagraph (a)(2)(i) has no counterpart in the Model Rule. This subparagraph expressly limits the availability of screening as provided in the Rule to moving lawyers who did not “substantially participate” in the prior representation. The term “substantially participate” is taken from Colorado Rule 1.10. The intent is to limit the availability of screening as provided under this Rule to those lawyers who were involved only peripherally in the prior representation and thus not likely to have acquired material confidential information. See Comment [7], which clarifies what is intended by the term “substantially participate.” <u>Minority.</u> A minority dissents to the "did not substantially participate" standard because it does not assure that a client's confidential information is protected. It focuses on the length or amount of a lawyer's involvement in the prior matter and not whether the lawyer acquired confidential information or whether that information is important in the new matter against the former client. The screened lawyer may have been involved in the former client's matter briefly, but in that brief involvement learned a client's deepest secret. No amount of screening will reduce the former client's anxiety that the client's deepest secret in held by a lawyer in an adversary's law firm.
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;	(iii) the ~~disqualified~~prohibited lawyer is timely <u>and effectively</u> screened from any participation in the matter and is apportioned no part of the fee therefrom;	Subparagraph (a)(2)(ii) is based on Model Rule 1.10(a)(2)(i). As has been done throughout the Rules, the word “prohibited” has been substituted for “disqualified.” In addition, the Commission recommends including the additional requirement that the lawyer be “effectively” screened. See also proposed Rule 1.0.1(k) and Comments [8]-[10] thereto (definition of “screened”).

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(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and	(iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which <u>notice</u> shall include a description of the screening procedures employed; a statement of the <u>law</u> firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; <u>an agreement that the client has the right, at the law firm's expense, to retain an independent lawyer of the client's choice to review and assess the screening procedures that have been implemented, that the client will be given a reasonable opportunity to retain the independent lawyer and the independent lawyer will be given reasonable access to information that is reasonably necessary to enable the independent lawyer to complete the review and assessment</u>; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; ~~and~~	Subparagraph (a)(2)(iii) is based on Model Rule 1.10(a)(2)(ii), but has been substantially revised to provide added protection to the former client by placing on the screening law firm and the screened lawyer a heightened burden to demonstrate the effectiveness of the screening procedures that have been implemented. Unlike the Model Rule, the screening firm must agree to provide to the client, at the firm's expense, the opportunity to retain an independent lawyer to review and assess the firm's screening procedures, and provide access to that lawyer. See also Explanation for subparagraph (a)(2)(v).

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(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.	(~~iii~~iv) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures; <u>and</u>	Subparagraph (a)(2)(iv) is identical to Model Rule 1.10(a)(2)(iii).
	(v) <u>the law firm shall pay the client's reasonable attorney fees and costs if the client successfully challenges before a tribunal the effectiveness of the screen or the accuracy of a certification of compliance. The remedy provided by this paragraph (a)(2)(v) is not exclusive and does not affect any other legal rights and remedies the client may have under the law.</u>	Subparagraph (a)(2)(v) has no counterpart in the Model Rule. It provides that the law firm shall pay the former client's attorney fees and costs if the client successfully challenges the effectiveness of the screen or the accuracy of the certificates the firm must provide the former client under subparagraph (a)(2)(iv). Similar to subparagraph (a)(2)(iii), this provision shifts responsibility for the cost of a successful challenge to the law firm's screen, which should provide an added incentive to the law firm and screened lawyer to maintain the screen, thereby preserving the former client's confidential information.
(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	(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:	Paragraph (b) is identical to Model Rule 1.10(b), which is consistent with California law. See <i>Goldberg v. Warner-Chappell</i> (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116. See also <i>Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.</i>, 607 F.2d 186 (7th Cir. 1979).

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(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and	(1) the matter is the same <u>as</u> or substantially related to that in which the formerly associated lawyer represented the client; and	Subparagraph (a)(1) is identical to Model Rule 1.10(a)(1), except for the addition of the word “as.” No change in meaning is intended.
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.	(2) any lawyer remaining in the firm has information protected by ~~Rules~~<u>Rule</u> 1.6, <u>Business</u> and <u>Professions Code section 6068(e), and Rule</u> 1.9(c) that is material to the matter.	Subparagraph (a)(2) is based on Model Rule 1.10(a)(2), but a reference to B&P Code § 6068(e), which states a lawyer’s duty of confidentiality, has been added.
(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.	(c) A ~~disqualification—prescribed by~~<u>prohibition under this rule</u>~~Rule~~ may be waived by ~~the~~<u>each</u> affected client under the conditions stated in Rule 1.7.	Paragraph (c) is identical to Model Rule 1.10(c), except that the phrase “prohibition under” has been substituted for “disqualification prescribed by” because the Rule is intended as a disciplinary rule, not as a civil standard. The word “each” has been substituted for “the” to make clear that both affected clients of the firm must waive any prohibitions under the Rule.
(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.	(d) The ~~disqualification~~<u>imputation of a conflict of interest to</u> lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.	Paragraph (d) is identical to Model Rule 1.10(d), except that the phrase “imputation of a conflict of interest to” has been substituted for “disqualification of” because the Rule is intended as a disciplinary rule, not as a civil standard.

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

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

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Commission's Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.	On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal ~~disqualification~~ <u>prohibition</u> 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 if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.	[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 <u>by others in the law firm</u> if the lawyer is prohibited from acting because of events <u>that occurred</u> before the person became a lawyer, for example, work that the person did while a law student. ~~Such persons~~ <u>In both situations</u>, however, ~~ordinarily~~ <u>such persons</u> 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~~ <u>1.0.1</u> (k) and 5.3. <u>See also Comment [13].</u>	Comment [4] is based on Model Rule 1.10, cmt. [4]. Language has been added to the second sentence for clarity. <u>Minority.</u> A minority of the Commission believes that the second sentence misstates California law, at least where the lawyer acted in a fiduciary capacity in the previous employment. The substitution of “in both situations” for “such persons” is intended to clarify that screening should be implemented in the event of either situation described in the first two sentences. The word “ordinarily” has been deleted because it is unclear under what circumstances such a person who was substantially involved in the matter on the other side should be permitted to participate in the matter. The reference to Rule 1.0.1 is to the number the Commission has assigned to the proposed terminology section.
[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	[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	Comment [5] is identical to Model Rule 1.10, cmt. [5], except that the word “current” is substituted for “present” to conform to the usage throughout the Rules, and a citation to B&P Code § 6068(e) has been added. See Explanation of Changes for subparagraph (b)(2).

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Commission's Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).	associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a ~~present~~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), and Business and Professions Code section 6068(e).	
[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).	[6] Rule 1.10(c) removes imputation with the informed consent of ~~the~~each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(~~b~~), Comments [14] – [17A], and that each affected client or former client has given informed written consent to the representation, ~~confirmed in writing~~. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule ~~1.0~~1.0.1(e).	Comment [6] is based on Model Rule 1.10, cmt. [6]. The changes to the Model Rule comment either reflect (i) the revisions the Commission has made in the black letter of this Rule (i.e., “each” for “the” in paragraph (c), and requiring “informed written consent” instead of the Model Rule’s “informed consent, confirmed in writing”); or (ii) the changes the Commission has recommended for the basic conflicts rules, proposed Rule 1.7.

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[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.	[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike ~~section~~<u>paragraph</u> (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in ~~sections~~<u>subparagraphs</u> (a)(2)(~~iii~~)(~~iv~~) be followed. <u>However, the screening procedures afforded under subparagraphs (a)(2)(ii)-(iv) are available only in situations where the prohibition has arisen out of the prohibited lawyer's association with a prior law firm. Thus, a screen would not be available to rebut the presumption of shared confidences within a law firm if the prohibition arises from the law firm's representation of the former client. In addition, the screening procedures are available only if the prohibited lawyer did not substantially participate in the prior representation. Whether a lawyer has substantially participated in the prior representation will depend upon the specific facts. Substantial participation is not necessarily limited to a lawyer's participation in the management and direction of the matter at the policy-making level, but may also mean responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.</u> A description of effective screening mechanisms appears in Rule ~~1.0~~<u>1.0.1</u>(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation. <u>See Comment [13].</u>	Comment [7] is based on Model Rule 1.10, cmt. [7]. Non-substantive changes include: (i) "Paragraph" has been substituted for "section" to conform to California Rule style. (ii) "Rule 1.0.1" has been substituted for "Rule 1.0" because proposed Rule 1.0.1 is the counterpart to Model Rule 1.0. (iii) A cross-reference to Comment [13] has been added to direct readers to that Comment, which elaborates on the last sentence of the Model Rule. Substantively, five sentences have been added to clarify the limitation on the availability of screening under this Rule. The second sentence clarifies an important limitation in the Rule – the screening provisions are available only when the firm seeks to screen a lawyer whose prohibition is based on the lawyer's previous association with a different firm. That limitation assures that a law firm could not erect a screen to protect the confidential information of a client that was formerly represented by firm lawyers when they were at the firm. The third sentence emphasizes that screening under the Rule is available only for lawyers who did not substantially participate in the prior representation, and the fourth and fifth sentences describe generally what is meant by "substantial participation," providing clarification of when the Rule is applicable.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Commission's Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.	[8] Paragraph (a)(2)(~~ii~~ⁱⁱⁱ) 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~~^{prohibited}.	Comment [8] is nearly identical to Model Rule 1.10, cmt. [8], except that “prohibited” has been substituted for “disqualified,” as has been done throughout the Rules.
[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.	[9] The notice required by paragraph (a)(2)(~~ii~~ⁱⁱⁱ) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures. <u>Paragraph (a)(2)(iii) also requires the law firm to agree to pay the expense for the retention, at the client's option, of an independent lawyer to review and assess the procedures that have been implemented in order to ascertain the effectiveness of the screen and the law firm's compliance with this Rule. The agreement also requires that the law firm provide the independent lawyer with reasonable access to information relating to the law firm's internal procedures and to firm personnel to assess the screen's effectiveness.</u>	Comment [9] is based on Model Rule 1.9, cmt. [9]. The first three sentences are identical to the Model Rule comment. The remainder of the Comment has been added to clarify the application of subparagraph (a)(2)(iii).

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Commission's Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	[9A] Paragraph (a)(2)(v) provides that in the event the client succeeds in challenging before a tribunal any of the provisions or procedures for implementing the law firm's screen or the accuracy of the firm's certification of compliance, the law firm will be responsible for the client's reasonable attorney fees and costs incurred in the proceeding. This remedy is not limited to a disqualification motion in litigation between the law firm's client and the former client but may also include other proceedings, such as an action for declaratory or injunctive relief. The law firm would not be entitled to its attorney fees or costs under Paragraph (a)(2)(v) if the tribunal determines that the client is not entitled to any relief. In addition, paragraph (a)(2)(v) does not preclude the client from pursuing any other right or remedy to which the client is entitled by law.	Comment [9A] has no counterpart in the Model Rule. The Commission recommends its addition to clarify the application of subparagraph (a)(2)(v). The next to last sentence notes that recovery of reasonable fees and costs is only available to the former client.
[10]The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.	[10] The certifications required by paragraph (a)(2)(~~iii~~iv) are intended to give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.	Comment [10] is nearly identical to Model Rule 1.10, cmt. [10]. The phrase “are intended to” has been added because it is a more accurate statement of the purpose of requiring certifications under subparagraph (a)(2)(iv).
[11]Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the	[11]Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the	Comment [11] is identical to Model Rule 1.10, cmt. [11], except that “prohibited” has been substituted for “disqualified” to reflect that the Rule is a disciplinary rule and not intended as a civil standard.

<u>ABA Model Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Commission's Proposed Rule</u> Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment	<u>Explanation of Changes to the ABA Model Rule</u>
government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.	government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually ~~disqualified~~<u>prohibited</u> lawyer.	
[12]Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.	[12]Where a lawyer is prohibited from engaging in certain transactions under <u>Rules [1.8.1] through Rule 1.8.1.8.9, paragraph (k) of that</u> Rule <u>1.8.11</u>, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.	Comment [12] is based on Model Rule 1.10, cmt. [12]. Any changes to the comment merely reflect the rule numbering convention the Commission has adopted for the 1.8 series of rules. Brackets have been placed around the Rules pending a final decision on numbering.
	<u>[13]This Rule does not limit or alter 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); Penal Code section 1424; In re Charlissee C. (2008) 45 Cal. 4th 145; Rhaburn v. Superior Court (2006) 140 Cal.App.4th 1566.</u>	Comment [13] has no counterpart in the Model Rules. It has been added to signal that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it.

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(Commission's Proposed Rule – Clean Version)

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the prohibited lawyer's association with a prior firm, and
 - (i) the prohibited lawyer did not substantially participate in the prior representation;
 - (ii) the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which notice shall include a description of the screening procedures employed; a statement of the law firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; an agreement that the client has the right, at the law firm's expense, to retain an independent lawyer of the client's choice to review and assess the screening procedures that have been implemented, that the client will be given a reasonable opportunity to retain the independent lawyer and the independent lawyer will be given reasonable access to information that is reasonably necessary to enable the independent lawyer to complete the review and assessment; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures;
- (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:
 - (iv) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures; and
 - (v) the law firm shall pay the client's reasonable attorney fees and costs if the client successfully challenges before a tribunal the effectiveness of the screen or the accuracy of a certification of compliance. The remedy provided by this paragraph (a)(2)(v) is not exclusive and does not affect any other legal rights and remedies the client may have under the law .

- (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 Rule 1.6, Business and Professions Code section 6068(e), and Rule 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)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be 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 others in the firm would be materially limited in pursuing the matter 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 [13].

[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), and Business and Professions Code section 6068(e).

[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 [14] – [17A], 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 [22]. For a definition of informed consent, see Rule 1.0.1(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike paragraph (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in subparagraphs (a)(2)(ii)-(iv) be followed. However, the screening procedures afforded under subparagraphs (a)(2)(ii)-(iv) are available only in situations where the prohibition has arisen out of the prohibited lawyer's association with a prior law firm. Thus, a screen would not be available to rebut the presumption of shared confidences within a law firm if the prohibition arises from the law firm's representation of the former client. In addition, the screening procedures are available only if the prohibited lawyer did not substantially participate in the prior representation. Whether a lawyer has substantially participated in the prior representation will depend upon the specific facts. Substantial participation is not necessarily limited to a lawyer's participation in the management and direction of the matter at the policy-making level, but may also mean responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions. A description of effective screening mechanisms appears in Rule 1.0.1(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation. See Comment [13].

[8] Paragraph (a)(2)(ii) 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 prohibited.

[9] The notice required by paragraph (a)(2)(iii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures. Paragraph (a)(2)(iii) also requires the law firm to agree to pay the expense for the retention, at the client's option, of an independent lawyer to review and assess the procedures that have been implemented in order to ascertain the effectiveness of the screen and the law firm's compliance with this Rule. The agreement also requires that the law firm provide the independent lawyer with reasonable access to information relating to the law firm's internal procedures and to firm personnel to assess the screen's effectiveness.

[9A] Paragraph (a)(2)(v) provides that in the event the client succeeds in challenging before a tribunal any of the provisions or procedures for implementing the law firm's screen or the accuracy of the firm's certification of compliance, the law firm will be responsible for the client's reasonable attorney fees and costs incurred in the proceeding. This remedy is not limited to a disqualification motion in litigation between the law firm's client and the former client but may also include other proceedings, such as an action for declaratory or injunctive relief. The law firm would not be entitled to its attorney fees or costs under Paragraph (a)(2)(v) if the tribunal determines that the client is not entitled to any relief. In addition, paragraph (a)(2)(v) does not preclude the client from pursuing any other right or remedy to which the client is entitled by law.

[10] The certifications required by paragraph (a)(2)(iv) are intended to give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually prohibited lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rules [1.8.1] through Rule 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[13] This Rule does not limit or alter 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); Penal Code section 1424; *In re Charlissee C.* (2008) 45 Cal. 4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566.

Rule 1.10 Imputation of Conflicts: General Rule. [Sorted by Commenter]						TOTAL = 8 Agree = 1 Disagree = 4 Modify = 2 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Public Defenders Association ("CPDA"); Sheela, Bart	M		1.10(b)(2)	Comments [5] and [6] to proposed Rule 1.9 are contrary to California law in failing to recognize that imputed conflicts of interest must be analyzed differently between criminal and civil cases, especially when clients are represented by public defenders or other indigent defense counsel. Compare <i>Rhaburn v. Superior Court</i> (2006) 140 Cal.App.4 th 1566, 1575. Because proposed Rule 1.10, cmt. [5] incorporates Rule 1.9 and Rule 1.10(b)(1) applies the same disqualification rules when the former client was represented by a lawyer who is no longer with the firm, Rule 1.10(b)(2) and Comment [5] need to be revised accordingly.	As explained in the commenter chart accompanying Rule 1.9, the Commission believes that Comments [5] and [6] to proposed Rule 1.9 are consistent with California law, and it therefore did not make the requested Rule 1.9 change. Because the CPDA observation about Rule 1.10 involves the cross-reference to Rule 1.9, and because there is no change to Rule 1.9, the Commission has made no change to the Rule 1.9 reference. The Commission, however, has concluded that a cross-reference to <i>Rhaburn</i> in the Comment to Rule 1.10 is warranted and has made that change. See Comment [13].
2	COPRAC	D			A majority of COPRAC members believes that California should not adopt a rule requiring imputation of conflicts of interest. The predominant view is that this issue is adequately addressed by case law in California and should not be the subject of discipline. Assuming that an imputation rule is adopted, a slight majority of COPRAC members favor significantly broader screening for private	The Commission disagrees that a rule concerning imputation of conflicts should not be adopted. The principles concerning imputation that are currently found in California case law are not readily accessible. Moreover, every jurisdiction has adopted a version of Model Rule 1.10. Inclusion of Rule 1.10 will enhance compliance with the law. The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which

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

Rule 1.10 Imputation of Conflicts: General Rule. [Sorted by Commenter]						TOTAL = 8 Agree = 1 Disagree = 4 Modify = 2 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					lawyers. These COPRAC members favor a screening regimen similar to that set forth in current ABA Model Rule 1.10. There is a significant difference of opinion, however, and no consensus among COPRAC members, regarding whether certain specific provisions from the ABA Model Rule should be included, particularly the specific notification and certification requirements.	has strong policies concerning client loyalty and confidentiality. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).
3	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	D			The Committee believes that Proposed Rule 1.10 concerns itself primarily with issues of disqualification of attorneys in court proceedings. PREC believes that issues relating to disqualification of attorneys in court proceedings is within the jurisdiction of the courts, and is not a proper matter to be included in rules of ethics that are intended to establish rules for the imposition of attorney discipline. Accordingly, PREC recommends that Rule 1.10 not be adopted.	The Commission disagrees that a rule concerning imputation of conflicts should not be adopted. Proposed Rule 1.10(a) expresses a fundamental duty of professional responsibility and is not simply a disqualification rule. Further, the principles concerning imputation that are currently found in California case law are not readily accessible. Moreover, every jurisdiction has adopted a version of Model Rule 1.10. This Rule would make a significant change in the California Rules. However, the Commission has concluded that this change is warranted, and that there are situations in which a lawyer could be disciplined for knowingly undertaking a representation based on a conflict that emanates from another firm lawyer. Also, the inclusion of Rule 1.10(a) will further lawyer compliance and enhance client trust in lawyers and the legal system.

4	Office of Chief Trial Counsel ("OCTC"), State Bar of California	NI		1.10(b) 1. Paragraph (b) leaves out a reference to § 6068(e). Cmt. [1] In addition, there is no guidance on what constitutes a law firm for purposes of the Rule. Comment [1] simply states that whether two lawyers constitute a law firm "can depend on the specific facts." Cmt.[3] 2. OCTC is unsure of Comment [3]'s purpose and recommends striking or clarifying it. Cmt. [4] It is not clear why Comment [4], which addresses non-lawyer personnel, is included. The Rules do not regulate such persons. Cmt. [9] Comment [9] is confusing to OCTC and should be clarified or stricken.	The Commission has added a reference to section 6068(e). The Commission did not make a change. Comment [1] provides a cross-reference to proposed Rule 1.0.1(c) – which defines "law firm" – and cmts. [2]-[4] thereto. The Commission does not believe that it is possible to define in advance how the term "law firm" will be applied in all situations. For example, there might be facts under which two independent law firms work so closely together that they should be considered a single law firm for purposes of imputation. The Commission has made no change. Comment [3] is derived nearly verbatim from Model Rule 1.10. As noted in the Ethics 2000 Reporter's Explanation of Changes, this comment "deals with the elimination of imputation of a lawyer's 'personal-interest' conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply." See also proposed Rule 1.7. The Commission has retained this Comment, which is based on Model Rule 1.10, cmt. [4]. As noted in the Ethics 2000 Reporter's Explanation of Changes, this comment reflects current case law and "is intended to give guidance to lawyers about important practical questions." The Commission has not made the requested change to Comment [9] (now Comment [13]). As noted in the Explanation of Changes to proposed Rule 1.10, the comment "has been added to signal

						that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it." Nevertheless, the Commission has made some clarifying changes to the Comment and added references to California case law.
5	Orange County Bar Association	D			The OCBA is opposed to any formal requirement for informed written consent from clients to implement an ethical screen to avoid disqualification. The OCBA favors a rule that allows non-consensual screening to avoid disqualification conflicts. The concerns over client confidentiality can be satisfied by adoption of the elements of permissive screening, which are stated in ABA Model Rule 1.10(a)(2) and its subparagraphs.	The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which has strong policies concerning client loyalty and confidentiality. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).
6	Sall, Robert K.	A			The commenter is opposed to allowing non-consensual screening of any kind for conflicted lawyers to avoid conflicts. The Commenter strongly supports the Commission's decision to reject the controversial non-consensual screening provisions of Model Rule 1.10(a)(2).	The Commission agrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is inappropriate in California, which has strong policies concerning client loyalty and confidentiality. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).
7	San Diego County Bar Association Legal Ethics Committee	M			The Commission has rejected the broad screening provisions adopted by the ABA in February 2009. We think the ABA is right and the Commission. Even with screening, lawyers remain bound by agency rules and disciplinary rules forbidding improper use or disclosure of confidential information.	The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which has strong policies concerning client loyalty and confidentiality. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).

8	Santa Clara County Bar Association	D			The SCCBA recommends that the February 2009 amended version of ABA Model Rule 1.10 be adopted. The amended version adds provisions allowing for the limited screening of attorneys moving from one firm to another. The amendments set out the specifics of such screening.	The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which has strong policies concerning client loyalty and confidentiality. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).

Rule 1.10: Imputation of Conflicts: General Rule

STATE VARIATIONS

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

Alabama: In the rules effective June 2008, Alabama's version of Rule 1.10 imputes conflicts that arise under Alabama's versions of 1.7, 1.8(a)-(k), 1.9, and 2.2.

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

California has no provision comparable to ABA Model Rule 1.10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Massachusetts: Rule 1.10(d) provides for screening a “personally disqualified lawyer” if he or she “had neither substantial involvement nor substantial material information

relating to the matter . . . and is apportioned no part of the fee therefrom.” Rule 1.10(e) describes an appropriate screening process, including a requirement in Rule 1.10(e)(4) that the former client receives an affidavit of the personally disqualified lawyer and the firm describing the screening procedures and attesting that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pennsylvania: Rule 1.10(b) permits firms to avoid disqualification based on a personally disqualified lawyer who was formerly with another firm if: “(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice

is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.”

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

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

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

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

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

Tennessee: Rule 1.10 includes the following screening provisions:

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

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

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

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

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

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

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

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

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

Texas: Rule 1.09 provides:

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

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

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

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

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

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated

would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

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

Proposed Rule 1.12 [n/a]

“Former Judge, Arbitrator, Mediator”

(Draft #6, 02/17/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

☒ Existing California Law

Rule

RPC 3-310(A)

Statute

Case law

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

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 11

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

February 2010

(Draft rule to be considered for public comment.)

INTRODUCTION:

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

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

* Proposed Rule, Draft 6 (02/17/10).

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Explanation of Changes to the ABA Model Rule</u>
(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.	(a) Except as stated in paragraph (de), 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 <u>written</u> consent, ~~confirmed in writing~~.	Paragraph (a) is identical to Model Rule 1.12(a), except that the cross-reference is to paragraph (e) because of the addition of new paragraph (c), and the requirement of California's more client-protective "informed written consent" instead of the Model Rule's "informed consent, confirmed in writing."
(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge, or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.	(b) A lawyer shall not ~~negotiate for~~<u>participate in discussions regarding prospective</u> employment with any person who is involved as a party, or as <u>a</u> lawyer for a party, <u>or with a law firm for a party</u>, 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~~<u>participate in discussions regarding prospective</u> employment with a party, or <u>with a</u> lawyer ~~involved~~<u>or a law firm for a party</u> in a matter in which the clerk is participating personally and substantially, but only ~~after~~<u>with</u> the ~~lawyer has notified approval of~~ the judge or other adjudicative officer.	Paragraph (b) is a modified version of Model Rule 1.12(b). First, the phrase "negotiate for," that appears in two places, has been replaced with the phrase "participate in discussions regarding prospective." The Commission's replacement language is consistent with the Model Rule language in covering negotiations for employment but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as employment negotiations. In addition, the Commission's language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics. Second, the phrase "or with a law firm for a party" has been added for clarification. It makes clear that negotiations are prohibited not only with a lawyer actually appearing in the matter, but also with that lawyer's law firm. The same clarifying change is made in the second sentence. In addition, the Commission has added the

* Proposed Rule, Draft 6 (02/17/10), redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	<u>Explanation of Changes to the ABA Model Rule</u>
		requirement that the judge or adjudicative officer must <i>approve</i> negotiations by a law clerk, not just be given notice of the negotiations as specified in the Model Rule.
	(c) <u>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.</u>	The Commission has added paragraph (c) to provide for greater confidence in the integrity of the judicial system and in the administration of justice by not allowing judges to leave a case, join a law firm involved in the matter, and have that firm continue to act as counsel in the case over the objection of one of the parties simply by screening the former judge from the case.
(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:	(~~e~~d) If a lawyer is disqualified by paragraph (a) <u>because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal</u>, no lawyer in a <u>law</u> firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:	Paragraph (d) is based on Model Rule 1.12(c). Together with proposed paragraph (c), it permits screening only of law clerks to avoid imputation in a law firm. See <i>Cho v. Superior Court</i> (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863]. The Commission recommends screening for law clerks because the aforementioned concerns over reduced confidence in the administration of justice by screening adjudicative officers is not as great for law clerks. Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and	(1) the disqualified lawyer is ~~timely~~ <u>and effectively</u> screened from any participation in the matter and is apportioned no part of the fee therefrom; and	In subparagraph (d)(1), the Commission has added “and effectively” to “timely” to emphasize that not only must a screen be implemented in a timely manner, but it also must be effective.
(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.	(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~~ <u>Rule</u> .	Subparagraph (d)(2) is identical to Model Rule 1.12(c)(2).
(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.	~~(d)~~ <u>(e)</u> An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.	Paragraph (e) is identical to Model Rule 1.12(d).

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

* Proposed Rule, Draft 6 (2/17/10). Redline/strikeout showing changes to the ABA Model Rule.

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.	[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed <u>written</u> consent, ~~confirmed in writing.~~ [See Rule 1.0(e) ~~and (b).~~] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.	Comment [2] is identical to Model Rule 1.12, cmt. [2], except that California's more client-protective "informed written consent" has been substituted to conform to the changes to paragraph (a). See Explanation of Changes for paragraph (a). For the same reason, the reference to Model Rule 1.0(b) (definition of "confirmed in writing") has been deleted.
[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.	[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. ~~Thus, paragraph~~ <u>Paragraph</u> (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm ~~unless the conditions of this paragraph are met.~~	Comment [3] is based on Model Rule 1.12, cmt. [3]. The revisions are necessary to conform the comment to new paragraph (c), which does not provide for screening of adjudicative officers to avoid imputation of their disqualification to members of their law firms. See Explanation of Changes for paragraph (c).
[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.	[4] <u>Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met.</u> Requirements for screening procedures are stated in Rule <u>[1.0(k)]</u>. Paragraph ~~(e)~~ <u>(d)</u>(1) does not prohibit the screened lawyer from receiving a salary or partnership	Comment [4] is based on Model Rule 1.12, cmt. [4] and clarifies that the permissive screening provisions in paragraph (d) apply only to law clerks to adjudicative officers. See Explanation of Changes for paragraph (d).

<u>ABA Model Rule</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Commission's Proposed Rule*</u> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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.	[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.	Comment [5] is identical to Model Rule 1.12, cmt. [5].

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

(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.
- (b) A lawyer shall not participate in discussions regarding prospective 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 participate in discussions regarding prospective 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" includes 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 1.0.1(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 and Business and Professions Code section 6068(e), 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 1.0.1(k). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

**Rule 1.12 Former Judge, Arbitrator, Mediator.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Committee on Alternative Dispute Resolution, State Bar of California	M			The term “matter,” as used in Proposed Rule 1.12, should be defined as its absence will make the effect and application of the Proposed Rule uncertain.	The Commission does not agree that “matter” is subject to a useful definition and determined not to include one in Rule 1.0.1. This appears to be the usual conclusion as there is none in the Model Rules and only five jurisdictions have included a definition of ‘matter’ in their Rules.
2	San Diego County Bar Association Legal Ethics Committee	M			It is unclear whether “personally and substantially” is intended to include anything beside “confidential information that is material to the matter.” If not, then the sentence should read: “Personally and substantially is intended to be limited to the receipt or acquisition of confidential information that is material to the matter.” If so, then the sentence should read: “Personally and substantially is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter.” Since the rule is intended to foster confidence in the legal system and clients most likely would be shocked to find a former Judge, Arbitrator, Mediator representing an adversary, client’s should not have the burden of proving that a former judge’s, etc.	Comment [1] states that “personally and substantially” is not limited to the acquisition of confidential information but also includes the judge’s personal participation in a matter. Whether a judge personally participated in a matter might be more easily determined than whether the judge received confidential information, and both aspects therefore should be preserved in the Comment.

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

RRC - 3-310 [1-12] - Public Comment Chart - By Commenter - DFT3 (02-17-10)-LM.doc

**Rule 1.12 Former Judge, Arbitrator, Mediator.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					participation actually entailed the receipt of material confidential information. Rather, if a former judge, etc., has heard facts about the substantive claims involved in the former or pending matter, the former judge, etc., should be required to obtain written consent from the parties before undertaking any representation. If this recommendation is adopted, the modified language should read: “‘Personally and substantially’ is intended to include, <u>without limitation</u>, the receipt or acquisition of confidential information that is material to the matter <u>or participation in a matter that included knowledge of facts related to the substantive claims in that matter.</u>”	
3	Santa Clara County Bar Association	M			Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the “negotiating employment” stage. The rule should apply to the interviewing stage though requiring the judges’ approval for an interview is not necessary. The following language should be added at the conclusion of subparagraph (b) as it now reads: “In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in	The Commission agrees with this criticism. It therefore recommends that the language of subparagraph (b) be amended to read as follows: “A lawyer shall not participate in discussions regarding prospective employment with any person . . . A lawyer serving as a law clerk . . . may participate in discussions regarding prospective employment . . . This change is intended to broaden and to clarify what was previously intended by “negotiate for employment” as used in the earlier version. This new language also tracks more closely that used in

Rule 1.12 Former Judge, Arbitrator, Mediator. [Sorted by Commenter]							TOTAL = 3 Agree = 0 Disagree = 0 Modify = 3 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
					a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer."	Canon 3E(5)(h) of the Code of Judicial Ethics.	

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

STATE VARIATIONS

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

California has no direct counterpart to Rule 1.12.

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

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

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

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

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

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

Proposed Rule 1.14 [n/a]

“Client with Diminished Capacity”

(Draft #14, 2/27/10)

Summary: This proposed new rule addresses the special circumstances applicable when a lawyer represents a client who has diminished capacity. It permits, but does not require, a lawyer to notify an individual or organization that has the ability to take action to protect a client who is at risk of undue influence or other harm. The rule excludes representation of minors, clients in criminal matter, and persons who are the subject of conservatorship proceedings.

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 3-100

Statute

Bus. & Prof. Code §6068(e); Family Code §3150; Welfare & Institutions Code §§300, 602, 675 et seq., §§5000-5579; and Probate Code, Division 4, Parts 1-8, §§1400-3803; Civil Code § 51 (Unruh Act).

Case law

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 5
Opposed Rule as Recommended for Adoption 3
Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

(See the introduction in the Model Rule comparison chart.)

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

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

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

See the Introduction to the Model Rule comparison chart.

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule Proposed Rule 1.14* Client With Diminished Capacity

February 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

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

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

* Proposed Rule 1.14, Draft 14 (2/27/10).

INTRODUCTION (Continued):

argued that even well-intentioned lawyers will inevitably breach confidentiality to “protect the client” but that the actual result will be serious adverse consequences for the client. The proposed Rule is also opposed based on the following: (1) paragraph (b) does not impose a primary requirement that a lawyer act in a client’s best interest; (2) the Rule excludes representations of a minor, a client in a criminal matter, or a conservatee and this has an unintended effect of chilling the consideration of protective action by the lawyers for those clients; (3) the Rule improperly treats disclosure of confidential information as a first resort rather than a last resort for protecting a client; (4) the Rule does not require a lawyer to ask for a client’s permission before contacting a third party; and (5) the comments to the Rule fail to warn lawyers that the loss of trust and candor in the client-lawyer relationship, following a disclosure of confidential information, may be so severe that it warrants mandatory withdrawal from the client’s representation

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

* Proposed Rule 1.14, Draft 14 (2/27/10). Redline/strikeout showing changes to the ABA Model Rule

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

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity	<u>Explanation of Changes to the ABA Model Rule</u>
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.	(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 and Business and Professions Code section 6068(e). When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule ~~Rule 1.6(a)~~ to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's ~~interests~~interest, given the information known to the lawyer at the time of the disclosure.	<u>Paragraph (c)</u> refers to information protected under both Business and Professions Code section 6068(e) and Rule 1.6, because both address the lawyer's obligation to protect client confidential information under California law. Similar to the Model Rule approach, a lawyer is permitted to reveal information under the concept of "implied authorization." However, unlike the Model Rule approach, which implements "implied authorization" as a part of the confidentiality rule, Rule 1.6, the Commission is recommending that the concept of "implied authorization" only be recognized in this Rule. The Commission's more limited approach reflects California's strong policy in favor of protecting the client's confidential information. The Commission has determined that neither an "implied authorization" rubric nor a specific express exception to confidentiality in either Rule 1.6 or Business and Professions Code section 6068(e) is necessary to effectuate the purposes of proposed Rule 1.14. Analytically, the Commission does not regard the permissive disclosure of information pursuant to Rule 1.14 as an exception to the duty of confidentiality. Under the concept of "implied authorization," a lawyer's disclosure under Rule 1.14 to protect a client with diminished capacity is an act of loyalty and advocacy intended to further the client's interests. Ordinarily, a lawyer seeks the client's informed consent to disclose information in furtherance of the client's representation but when a client has a diminished capacity, obtaining the client's informed consent may not be possible. The

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity	<u>Explanation of Changes to the ABA Model Rule</u>
		Commission's proposed Rule 1.14 recognizes that fact and reflects a policy determination that "implied authorization" is a rule of necessity that is consistent with loyalty and advocacy rather than a breach of the duty of confidentiality.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.	[1] <u>The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests.</u> The normal ~~client-lawyer-client~~ relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client ~~is a minor or~~ suffers from a diminished mental capacity, however, maintaining the ordinary ~~client-lawyer-client~~ relationship may not be possible in all respects. In particular, a ~~severely incapacitated person~~<u>client with significantly diminished capacity</u> ~~may have no power~~<u>not be competent</u> to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about <u>many</u> matters affecting the client's own well-being. For example, ~~children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that~~some persons of advanced age ~~can be quite~~<u>are</u> capable of handling routine financial matters ~~while needing~~<u>but may need</u> special legal protection concerning major transactions. <u>In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations</u>	Comment [1] is based on Model Rule 1.14, cmt. [1], but (1) adds an introductory sentence to identify the purposes of the rule and (2) omits the reference to minors, representation of whom is addressed in the Family Code and the Welfare and Institutions Code. See Explanation Of Changes to paragraph (a) and the prefatory language of paragraph (b), above. The Commission has also substituted the standard it recommends in the Rule itself, "significantly diminished capacity," for the Model Rule phrase, "severely incapacitated person," which neither appears in the black letter of Model Rule 1.14 nor is defined. The remaining changes are stylistic. The last sentence was added in response to public comment. The Commission agreed that it was appropriate to remind lawyers of their obligations under the Unruh Act in this Rule. The term "lawyer-client" has been substituted for "client-lawyer" throughout the Rule to conform to California rule style.

* Proposed Rule 1.14, Draft 14 (2/27/10). Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).	
[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.	[2] The fact that a client suffers ~~a disability~~from diminished capacity does not ~~diminish~~affect the lawyer's obligation to treat the client with attention and respect. Even if the ~~person~~client has a legal representative, the lawyer should as far as possible accord the represented person the <u>full</u> status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client 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.	Comment [2] uses the term "diminished capacity" rather than the Model Rule's term "disability" for consistency of reference with the title of the Rule. The remainder of the Comment tracks Model Rule 1.14, cmt. [2], except that a sentence has been added to clarify that the lawyer may need to adapt the method of communication to the client's capacity to comprehend and deliberate.
	[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	Except for its last sentence, which is based on the last sentence of Model Rule 1.14, cmt. [6], Comment [3] has no Model Rule counterpart. It has been added to provide much-needed clarity to the significantly diminished capacity standard set forth in section (b)(1). It accomplishes this by reference to standards articulated in the Probate Code and by enumerating some of the factors to be considered and steps that may be taken in determining whether the client meets the significantly diminished capacity standard. The last clause of the Comment cautions that the lawyer must take care at all times to maintain lawyer-client confidentiality.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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 appropriate circumstances, lawyers are encouraged to 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. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.</u>	Following public comment, the Commission determined that including the first sentence of Model Rule 1.14, cmt. [6], would be misleading and potentially confusing. Because the first two factors are covered by the Probate Code and the second two factors are inconsistent with the Probate Code, inclusion of the ABA language could create ambiguity as to the appropriate standard to apply and allow a lawyer to base a decision on the ABA factors, which are arguably too broad and too easily met, thus leading to disclosures in cases where it might be inappropriate to breach confidentiality.
	<u>[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:</u> <u>(1) the amount of time that the lawyer has to make a decision about disclosure;</u> <u>(2) whether the disclosure is likely to lead to</u>	Comment [4] has been added to emphasize that the lawyer's disclosure to a third party of a client's perceived significant diminished capacity should be a last resort, by identifying the steps to be taken and the factors to be considered before making such disclosure. The Comment is an attempt to balance the lawyer's obligation to protect the client's interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;</u> (3) <u>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;</u> (4) <u>the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and</u> (5) <u>the nature and extent of information that must be disclosed to prevent the risk of harm to the client.</u> <u>A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.</u>	

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.	[35] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally ~~does~~<u>will</u> not affect the applicability of the ~~attorney~~<u>lawyer</u>-client ~~evidentiary~~ privilege. ~~Nevertheless~~<u>See Evidence Code section 952.</u> <u>However,</u> the lawyer must keep the client's interests foremost and, except ~~for protective action~~<u>as</u> authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.	Comment [5] is based on Model Rule 1.14, Cmt. [3], but has been modified to add a reference to California Evidence Code 952, which governs in these situations.
[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).	~~[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).~~	Model Rule 1.14, Cmt. [4], has been deleted. As noted above, (see Explanation of Changes for paragraphs (a) and (b)), the rights of minors and conservatees are addressed in California statutes. See also Proposed Comment [9].

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
Taking Protective Action [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.	~~Taking Protective Action~~ ~~[56] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph~~<u>Paragraph</u> (b) permits the lawyer to take protective measures deemed necessary <u>to protect the client's interests</u>. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or 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 ~~intruding~~<u>minimizing intrusion</u> into the client's decisionmaking autonomy ~~to the least extent feasible~~, maximizing client capacities and respecting the client's family and social connections.	Comment [6] is based on the latter half of Model Rule 1.14, Cmt. [5], which addresses section (b) of the Rule. The first part of the Model Rule comment merely repeats the language of the black letter rule as the predicate for the substantive comment and has been eliminated as surplusage.

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.	~~[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.~~	The last sentence from MR 1.14, cmt. [6], as revised, has been inserted in Comment [3], above. See Explanation of Changes for Comment [3] concerning the deletion of the first sentence of MR 1.14, cmt. [6].
	<u>[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.</u>	Comment [7] has no Model Rule counterpart. It sets forth the rationale for paragraph (b) and also clarifies that a lawyer who makes a permitted disclosure pursuant to paragraph (b) is not subject to discipline.
[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with	~~[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with~~	Model Rule 1.14, Cmt. [7], has been deleted. As noted above, (see Explanation of Changes for paragraph (b)), the proposed Rule does not permit the lawyer to take steps to have a guardian, guardian <i>ad litem</i> or conservator to be appointed for the client. Instead, the Commission has proposed substituting Comment [8], which clarifies that that this Rule does not permit a lawyer to file for appointment of a guardian or

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.	~~diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.~~ [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 person where the lawyer would not otherwise be permitted to do so under Rule 1.7.	conservator where such conduct is not otherwise permitted by Rule 1.7, or to take any action adverse to the client.
Disclosure of the Client's Condition [8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to	~~Disclosure of the Client's Condition~~ ~~[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to~~	Model Rule 1.14, cmt. [8], has been deleted. As noted above, (see Explanation of Changes for paragraph (c)), there is no counterpart in Business & Professions Code § 6068(e) to Model Rule 1.6's concept of "implied authorization," so this Comment does not clarify the strictly limited disclosure permitted under paragraph (b).

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.	~~the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.~~	
	[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) who is under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code § 3150, Welfare and Institutions Code §§300, 602, 675 et 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.	Comment [9], which has no counterpart in the Model Rule, explains that certain categories of person have been excluded from the rule because the rights of such persons are addressed in specific California statutes. See also Explanation of Changes for paragraphs (b) and (c).
	[10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.	Comment [10] has no counterpart in Model Rule 1.14. It clarifies that the course of conduct described in paragraph (b) is not mandatory and that a lawyer is not subject to discipline for violation of the rule for failing to take action under paragraph (b).

<u>ABA Model Rule</u> Rule 1.14 Client with Diminished Capacity Comment	<u>Commission's Proposed Rule*</u> Rule 1.14 Client with Diminished Capacity Comments	<u>Explanation of Changes to the ABA Model Rule</u>
Emergency Legal Assistance [9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.	Emergency Legal Assistance ~~[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.~~	The Commission recommends deleting Comments [9] and [10], both of which are addressed to providing emergency legal assistance to a non-client. Comments that are concerned with a lawyer's interactions with non-clients have no place in a Rule that has been carefully crafted to balance the lawyer's obligation to protect a client's interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship.

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

Rule 1.14 Client with Diminished Capacity

(Commission's Proposed Rule – Clean Version)

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client 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) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 and Business and Professions Code section 6068(e). When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is 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 lawyer-client 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 lawyer-client 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. In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).
- [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 lawyer-client 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 appropriate circumstances, lawyers are encouraged to 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. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[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 may 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; or using voluntary surrogate decision-making 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 decision-making 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 person where the lawyer would not otherwise be permitted to do so under Rule 1.7.
- [9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor,

(2) involved in a criminal matter or (3) who is under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

- [10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

TOTAL = 70 **Agree = 60**
Disagree = 6
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Allphin, Sondra J.	A	N		If this rule is passed it will help to protect those people in California who are substantially mentally impaired from serious financial harm.	No response necessary.
2	Anderson, Jack	A	N		Please adopt proposed rule 1.14, so that we can do our job of protecting our elder clients' interests more effectively and more completely.	No response necessary.
3	Anderson, Michelle E.	A	N		No comment.	No response necessary.
4	Angevine, Elizabeth Anne Miller	A	N		This change is needed for California attorneys.	No response necessary.
5	Arrieta, Cristian R.	A	N		The rules of professional conduct should enable us to come to our clients' aid in their time of need, not hamper us from so doing.	No response necessary.
6	Bond, Stephen A.	A	N		No comment.	No response necessary.
7	Boyd, James G.	A	N		This modification is sorely needed and is consistent with California's Rules of Professional Conduct moving toward consistency with the ABA Model Rules. Rule 1.14(b) could be improved by either modification or clarification to indicate that "an individual or organization that has the ability to	No response necessary. The Commission did not make the suggested change. The Commission concluded that the suggested limitation would unduly restrict the

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

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Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					take action to protect the client" is either a governmental entity (i.e. Adult Protective Services, Public Guardian, or Public Conservator), or a Professional Fiduciary or Trust Company with whom the reporting attorney has no prior or concurrent attorney-client relationship. Otherwise, there would be a high likelihood of actual conflicts or potential conflicts of interest for which no waiver would be available.	protective purpose of the Rule. For example, it would prevent the lawyer from communicating with a family member even in the critical situations that are within the narrow scope of the Rule.
8	Carney, Janis A.	A	N		This is an extremely important rule change for those who practice elder law. We <u>must</u> have this rule change.	No response necessary.
9	Caspersen, R. Frederick	A	N		I support this new rule whole-heartedly.	No response necessary.
10	Chavers, Herbert Lee	A	N		This proposed rule would allow me to act on behalf of my client when my client may not be able to fully appreciate or even resist such actions.	No response necessary.
11	Clarke, Jr., J. Frederick	A	N		In my opinion, the proposed Rule strikes the appropriate, nuanced balance between the attorney's traditional professional duty of protecting client confidences and the attorney's duty as a moral being under circumstances where the client has diminished capacity to help protect the client him or herself.	No response necessary.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
12	Conley, Shelly	D	N		In updating rules of court and business and professions codes, it is only worthwhile if the attorneys are held to abide by the rules.	
13	COPRAC	A	Y		COPRAC supports the proposed rule. But, COPRAC is concerned that the rule does not go far enough in real world terms to effectively permit lawyers to address the needs of clients with diminished capacity. COPRAC believes that seeking the appointment of a guardian ad litem may be appropriate in certain circumstances to protect clients with diminished capacity. COPRAC also recommends that Comments [9] and [10] from the ABA Model Rule be retained, in order to allow a lawyer to take limited action in extreme, emergency situations.	No response necessary. The Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by filing a guardianship or conservatorship petition or other action adverse to his/her client. The Commission did not make the suggested change. Permitting an attorney to provide "emergency legal assistance" in the absence of an attorney-client relationship goes significantly beyond the scope of the black letter rule. Because proposed Rule 1.14 is being introduced into the California rules for the first time, the Commission supports a more narrowly circumscribed range of permissible conduct under the Rule.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
14	Courts, Kathleen	A	N		The minority's objections suggest that a lawyer will rush in to protect a client even when the situation does not warrant it. Not so: this rule carefully instructs us to consider the client's interests as primary. Comment [3] refers us to PC 811, whose requirements for determining capacity are relatively specific and strict.	No response necessary.
15	Craven, Thomas A.	A	N		The rule appears to be well-considered in balancing the principle of total confidentiality and the occasional need to strongly advise a client to do what counsel believes is critical in protecting the client's best interests, where there appears to be no defensible objection to the suggestion and no reasonable options.	No response necessary.
16	Daniels, Edward	A	N		I strongly support adoption of the proposed rule.	No response necessary.
17	Davis, Shirleymae	A	N		I strongly support this rule.	No response necessary.
18	Day, Richard V.	A	N		I believe this Proposed Rule is extremely important because of the increasing age of our client population and the increasing numbers of them that suffer from some form of diminished capacity.	No response necessary.
19	Disability Rights California	D	Y		We believe that the proposed California Rule is too vague and too broad and would allow attorneys to inappropriately compromise	Proposed paragraph 1.14(b) permits action only when the lawyer reasonably believes that the client has "significantly diminished capacity" etc. The

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

TOTAL = 70 **Agree = 60**
Disagree = 6
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					clients' personal autonomy and confidentiality in situations in which this is not warranted. A more targeted rule could assist attorneys in navigating the difficult ethical issues raised by situations in which they question their clients' capacity while at the same time preventing unnecessary disclosure of confidential client information. We believe that a rule pertaining to the representation of clients with diminished capacity <i>should</i> clarify the circumstances wherein an attorney may assist in the appointment of a guardian <i>ad litem</i>. For attorneys who represent seniors and individuals with disabilities in litigation, the ability to seek appointment of a guardian <i>ad litem</i> can be an essential tool in advancing those clients' rights if used appropriately. In Comment [8], we would recommend that the reference to guardianships be deleted, since this applies only to minors and could lead to confusion with the availability of guardians <i>ad litem</i>. As discussed above, the use of guardians <i>ad litem</i> may, under appropriate circumstances, be an appropriate measure so long as it is not opposed by the client and allows the attorney to more effectively carry out the express wishes of the client.	Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by filing a guardianship or conservatorship petition or other action adverse to his/her client. The Commission did not make the requested change. As stated in paragraph (a) of the proposed Rule, a lawyer is to maintain a normal lawyer-client relationship to the extent possible. When this occurs, a lawyer may follow a client's direction to assist in the appointment of a guardian <i>ad litem</i>. If it is not possible to maintain a normal lawyer-client relationship, the Rule is clear that the lawyer may not take this or any other step that makes the lawyer the adversary of the client. The Commission did not make the suggested change. As noted above, the Commission determined that filing a guardianship petition without the consent of the client should not be an option available to a lawyer under this Rule.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					To the extent the Proposed Rule is adopted in some form, we strongly support Comment [10] and believe the rule should include this provision, not just the Comment.	The Commission did not make the suggested change. Placing Comment [10] in the Rule would not change its impact.
20	Erenea, Doreen	A	N		No comment.	No response necessary.
21	Fishbach, Kenneth	A	N		This rule is long overdue to allow attorneys to protect their elderly and other diminished capacity clients.	No response necessary.
22	Foster, John C.	A	N		Agrees that the current rule needs to be modified to allow attorneys to protect their client and make the necessary judgment based upon the attorney's experience.	No response necessary.
23	Gambatese, Roger	A	N		I strongly support any proposal that moves closer to ABA Model Rule 1.14.	No response necessary.
24	Goldsmith, Dara	A	N		This is a good rule to enable attorneys to take action to protect clients. I believe it is important for the attorney to protect the client from loss or harm.	No response necessary.
25	Grier, John	A	N		No comment.	No response necessary.
26	Hikoyeda, Allan T.	A	N		The proposed rule will allow attorneys greater flexibility to serve and protect the client who may be susceptible to undue influence, fraud, or other physical, mental or emotional abuse.	No response necessary.

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

TOTAL = 70 **Agree = 60**
Disagree = 6
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
27	Hinshaw, Caroline K.	A	N		Agree with proposed rule 1.14.	No response necessary.
28	Hoehler, William J.	A	N		California needs this. It is years overdue. It is the balance we need to protect a client and preserve confidentiality.	No response necessary.
29	Hoey, Beverly M.	A	N		I am very glad the proposed changes are here and I enthusiastically endorse them.	No response necessary.
30	Hoffman, Paul Gordon	A	N		I strongly agree that a lawyer dealing with a client with diminished capacity should have the right to alert some third party or parties (such as Adult Protective Services) of the fact that the client is suffering from diminished capacity so that an appropriate investigation may be commenced by those parties.	No response necessary.
31	Hunt, Lori A.	A	N		No comment.	No response necessary.
32	Jackson-Sapirstein, Rebekah	A	N		No comment.	No response necessary.
33	Janer, Gary	D	N		This rule puts the attorney into the position of determining a client's capacity. Even though it is permissive, the rule would ultimately be used to create a duty by providing that a reasonably trained attorney should be able to determine the capacity and thus had the power to prevent the undue influence or financial loss. I also adopt the minority's reasoning as sound and as such this rule should be rejected.	As noted in proposed Comment [10], action pursuant to paragraph 1.14(b) is permitted, but not required. The Commission does not see how this permissive standard could be read as creating a duty, and it believes it is important to state in the Rule the extent to which a lawyer may act without being subject to professional discipline.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
34	Kramer, Linda C.	A	N		This proposed rule would be a useful tool for an attorney who believes her client is incompetent and thus unable to take steps to defend his/her interests and consequently is unable to take action to protect him/herself.	No response necessary.
35	LeBlanc, John A.	A	N		I completely support this change.	No response necessary.
36	Lejnieks, John H.	A	N		This is a well thought-out and crafted rule that is long overdue.	No response necessary.
37	Lindsley, Philip P.	M	N		I question the inclusion of “relating to the representation” as too limiting and confusing in translation to the real world; i.e. when does the scope of representation end?	The Commission has removed the phrase criticized by the commenter.
				Comment [4]	Comment [4] should include language that “the enumeration of these factors in balancing the decision to disclose should not be construed to prohibit disclosure if any, or all, of these factors are present.”	Proposed Comment [4] makes clear that the decision requires that the lawyer may not proceed under paragraph 1.14(b) unless “(i) no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces” <u>and</u> that the lawyer take into account “such factors as” the ones enumerated. It is clear that none of the individual factors enumerated is either required for action under paragraph 1.14(b) or that its absence would preclude action under paragraph 1.14(b).
				Comment [6]	Not sure what is meant by utilizing “voluntary surrogate decision making tools such as durable POAs . . .” One would assume from the context, you are speaking of existing	Proposed Comment [6] provides several illustrations of such tools, including not only durable powers of attorney and consultations with other agencies or individuals that have the ability

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Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [8]	POAs. Does this suggest that it would be appropriate to assist in finding your client incapacitated and bring to life a springing power? Comment should omit this reference or further clarify. I believe Comment [8] is disingenuous. This rule allows the waiver of confidentiality and the prohibition against taking actions potentially (legally) adverse to our clients to prevent, in our judgment, a greater and more adverse harm to our clients.	to assist or protect the client. Confidentiality and loyalty are treated distinctly in the proposed Rule. It narrowly permits a lawyer to disclose information, but it does not permit a lawyer in any circumstances to act as a client's adversary. The Commission does not believe that any change in Comment [8] is warranted.
38	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M	Y	1.14(a)	In 1.14(a), we suggest that a Comment be added to include a specific reference to the obligation of the attorney to comply with the reasonable accommodations provisions of the Americans with Disabilities Act and of the Unruh Civil Rights Act. Both of these Acts require a lawyer dealing with a client with a disability not just treat them the same as other clients, but to make reasonable accommodations to ensure that they are able to fully obtain the services of the lawyer. Pointing lawyers to this obligation in the Rule would help to increase lawyers' awareness and compliance with the additional obligations.	The Commission agrees that a reference to lawyers' Unruh Act obligations would provide useful guidance and has modified the Comment accordingly. "In addition to the obligations of an attorney provided in this rule, attorneys may be required to make reasonable accommodations to persons with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the attorney. See California Civil Code section 51 (Unruh Civil Rights Act)."
				1.14(c)	We suggest strengthening the language of 1.14(c) to make clearer that the information disclosed must be no greater than the	The Commission agrees and has revised paragraph (c) to state:

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**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

TOTAL = 70 Agree = 60
Disagree = 6
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [3]	minimum amount necessary to alert the 3rd party of the problem. A Comment on this point might also be helpful. In proposed Comment [3], we are concerned about the listed criteria for disclosing information. After referring to Probate Code sections 811 and 812, which provide very specific criteria for determining whether a person has diminished capacity, the Comment then incorporates the criteria listed in the ABA Comment. As drafted, we believe the rule could undercut the references to the Probate Code and allow a lawyer to base a decision on the ABA factors, which are too broad and too easily met, thus leading to disclosures in cases where it might be inappropriate to breach confidentiality.	“ . . . When taking protective action pursuant to paragraph (b), the lawyer is <u>impliedly authorized under this Rule</u> to reveal information about the client, but only to the extent <u>the lawyer</u> reasonably <u>believes disclosure is necessary</u> to protect the client’s interest, given the information known to the lawyer at the time of the disclosure.” The Commission agrees and has deleted the third sentence of Comment [3], which contains the broader ABA factors, to avoid ambiguity as to the appropriate standard.
39	Lumsdaine, Joseph A.	A	N		This proposed rule rectifies in large part a recurring problem I, and many I meet in probate court, have struggled with for years. Adopt it. It’s about time!	No response necessary.
40	McEvoy, Jean C.	A	N		This is a rule that has been needed for a long time. I absolutely agree with this proposed Rule.	No response necessary.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
41	McGowan, Maureen C.	A	N		No comment.	No response necessary.
42	Morris, Melissa Law Foundation of Silicon Valley	D	Y		We feel that protecting the rights of clients to keep their communications with their attorneys confidential is extremely important, especially for people with disabilities. The promise of confidentiality is essential to the trust they establish with their attorney. Clients have the right to make their own bad decisions. It is not the role of the attorney to report in situations where the attorney feels the client is the victim of abuse.	The Commission agrees that the protection of client confidentiality is critical to the lawyer-client relationship. However, following extensive input from stakeholders, the Commission has decided to include in the Rules of Professional Conduct for the first time a rule along the lines of ABA Model Rule 1.14 in order to provide to the attorney whose client has significantly diminished capacity guidance that will enable the attorney to protect the interests of his/her client without improperly abrogating client confidentiality. The balance struck is a narrow permission to disclose the existence of the problem so that another person can act to protect the client while the lawyer is prohibited from taking any action that might be adverse to the directions or interests of the client.
43	Mullin, Ronald	A	N		This Rule change is needed.	No response necessary.
44	Office of the Chief Trial Counsel ("OCTC"), State Bar of California	M		1.14(b)	OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney's unqualified personal assessment of a client's abilities and using that unqualified	The Commission received a substantial amount of input from many stakeholders who confront the problems this Rule is intended to address. The Rule is substantially narrower than Model Rule 1.14 in the discretion permitted a lawyer who takes action pursuant to it.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [1]	assessment to permit the attorney to reveal a client's confidences. Further, it appears to be broadening what B&P Code section 6068(e) allows. Comment [1] is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions – and how and to whom does the attorney reveal this. Comment [3] attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney may in appropriate situations seek the advice of a diagnostician. Thus, the Comment creates its own exception to confidentially not specifically in the Rule. OCTC believes this is not appropriate for a Comment. It should either be stated specifically in the Rule, or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counselor, a priest, or some other person? If this exception is to be permitted, it should be in the Rule and more specific.	The Commission has revised Comment [3] to remove the third sentence, which raised concerns with several commenters about the conflicting standards a lawyer might employ in determining whether a client suffers from significantly diminished capacity. As to the confidentiality concerns OCTC expresses, paragraph (c) expressly provides that a lawyer may reveal information about the client to the extent the lawyer reasonably believes disclosure is necessary to protect the client's interests, which is the purpose of consulting with a diagnostician. As noted above, paragraph (c) expressly permits reasonably necessary disclosures. The comment does not attempt to define the term “diagnostician” because the lawyer must act reasonably in making a determination in the specific factual circumstances of a particular representation.

RRC - 1-14 - Public Comment Chart - By Commenter - DFT5 (03-01-10) RD-ML.doc

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [4]	Comment [4] states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence 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, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules more difficult.	The Comment is meant to provide guidance on how to proceed under the black letter of the Rule. This is true in current rule 3-100, which concerns the disclosure of confidential information to prevent a crime likely to result in death or substantial bodily harm. The Discussion to that rule lists factors that a lawyer should consider in deciding how to proceed under the rule. See, e.g., Cal. Rule 3-100, Discussion ¶¶. [6], [9].
				Cmts. [5], [6]	Comments [5] and [6] state the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with B&P Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult.	See response concerning Comment [1], above.
				Cmt. [7]	Comment [7], which is different than Model Rule Comment [7], explains that section (b) is a balancing between the interest of preserving	As provided in the Rule, the lawyer must not only "believe," but must "reasonably believe." If the lawyer's belief is shown not to have been reasonable, the lawyer would be subject to discipline.

RRC - 1-14 - Public Comment Chart - By Commenter - DFT5 (03-01-10) RD-ML.doc

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

TOTAL = 70 **Agree = 60**
Disagree = 6
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [8]	client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline of almost any attorney who claims that he or she revealed the confidences because of a belief that it was appropriate under this rule. Thus, what safeguards exist for the client? Comment [8] states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310). Thus, according to this Comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?	This Rule is intended to narrow the options a lawyer may take unilaterally. As noted in Comments [1] and [2], a lawyer must treat the client with respect and to the extent possible, maintain a normal lawyer-client relationship. Filing a petition for a conservatorship or guardianship is a radical departure from that relationship. Permitting disclosure to “an individual or organization that has the ability to take action to protect the client” helps assure that the client comes within the protection of an individual or organization that more likely than not is better situated to explore non-legal options on the client’s behalf.
45	Orange County Bar Association	A	Y		The OCBA endorses the adoption of proposed Rule 1.14 and its commentary. Although the OCBA suggests that proposed Comment [3] be modified as follows, its endorsement is not contingent upon adoption of the proposed change.	No response necessary.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					“Significantly diminished capacity” is not defined in the proposed Rule or commentary. Instead, the Rule describes several factors for the lawyer to “consider and balance” in making that assessment. Proposed Comment [3] currently states that “. . . the lawyer may seek guidance from an appropriate diagnostician. . . .” The OCBA proposes modifying that portion of the Comment to state that “. . . lawyers are encouraged to seek guidance from an appropriate diagnostician. . . .”	The Commission agrees and has changed the last sentence of Comment [3] to state: In appropriate circumstances, lawyers are encouraged to seek guidance ...”
46	Penrose, Steven	A	N		No comment.	No response necessary.
47	Pershing, Richard W.S.	A	N		I support the proposed Rule although I remain concerned about an attorney's ability to determine when to avail themselves of the rule on behalf of the client.	No response necessary.
48	Pham, Diem Thinh	A	N		I support proposed rule 1.14 because the rule permits the attorney to take preventive measure in protecting the client and the risk for abuse is minimized and adequately safeguarded by the limitations imposed on the attorney as discussed in the rule's comments.	No response necessary.
49	Prior, Robert D.	A	N		No comment.	No response necessary.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
50	Rigg, Laurie C.	A	N		This rule fills an urgent need for us estate planning attorneys to use our discretion to protect our clients from harm and still be able to preserve their confidences as much as possible. Please pass it as written with NO modifications.	No response necessary.
51	Robbeloth, Ann Marshall	A	N		I support Proposed Rule 1.14.	No response necessary.
52	Rogers, John T.	A	N		Agree with this proposed rule.	No response necessary.
53	Roodhouse, Linda C.	A	N		I fully support Proposed Rule 1.14. I encourage the adoption of this proposed rule as soon as possible.	No response necessary.
54	Ross, Scott	A	N		I'm strongly in favor of this rule. The goal of protecting the client trumps the attorney/client confidentiality concern, and the protections on confidentiality are reasonable.	No response necessary.
55	Sammis, Ian M.	A	N		This rule is needed and seems adequate to protect the client and the attorney.	No response necessary.
56	San Diego County Bar Association Legal Ethics Committee	A	Y		We approve the new rule in its entirety.	No response necessary.
57	Santa Clara County Bar Association	A	Y		Support the adoption of the rule with one recommendation: Add the following to Comment [10]: "The implementation of this rule is not	The Commission did not make the requested addition. The language of proposed Comment [10] has been revised to make clear that taking action under paragraph [b] is permissive. As revised

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					intended to establish an affirmative duty of conduct that would create a new standard of care for attorneys."	Comment [10] states: "A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule." It is unnecessary to add that the rule does not establish an affirmative duty of conduct or a new standard of care.
58	Schur, Dara Disability Rights California	D	Y		We oppose the rule and support the minority position. We are concerned the proposed rule will infringe on the autonomy of people with disabilities, create barriers in attorney-client trust relationships, and will unnecessarily in many cases result in the breach of client confidences and the destruction of trust in the lawyers who are supposed to speak for the people with disabilities. We believe that lawyers ought to be bound by the expressed interest of the client, even if the client is dealing with a disability, rather than a best interest standard. We have a concern about the phrase in 1.14(a) that lawyers who represent clients with diminished capacity should aspire to maintain a normal client-lawyer relationship, "as far as	The Commission agrees that the protection of client confidentiality is critical to the lawyer-client relationship. However, following extensive input from stakeholders, the Commission has decided to include in the Rules of Professional Conduct for the first time a rule along the lines of ABA Model Rule 1.14 in order to provide to the attorney whose client has significantly diminished capacity guidance that will enable the attorney to protect the interests of his/her client without improperly abrogating client confidentiality. The balance struck is a narrow permission to disclose the existence of the problem so that another person can act to protect the client while the lawyer is prohibited from taking any action that might be adverse to the directions or interests of the client. In a normal client-lawyer relationship, the lawyer reasonably believes that written and oral communications regarding client options, consequences, advised courses of action are

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					reasonably possible." We believe this quoted phrase is unclear as we carry out a normal client-lawyer relationship with all of our clients.	understood by the client and that the client has the ability to make decisions and communicate those decisions to the lawyer. These assumptions may be faulty when the client suffers from diminished capacity, and in such a case the lawyer may be required to take extra measures to ensure that the means of communication used are adequate to the client's needs (e.g., relying more on in-person meetings or oral communications, involving family members where authorized and appropriate, etc.).
59	Smedley, David G.	A	N		I am in favor of the proposed rule.	No response necessary.
60	Sood, Victoria Tran	A	N		I support the proposed rule 1.14 because I believe that it is vital that attorneys have this tool to protect people with diminished capacity. I urge you to make this tool available to attorneys.	No response necessary.
61	Stern, Peter S.	A	N		I strongly encourage the adoption of Rule 1.14.	No response necessary.
62	Swanson, Linda Alden	A	N		I would like to see the rule, or the comments, include some discussion of the client's subjectivity to undue influence. Some individuals are more easily influenced than others.	No response necessary.
63	Temmerman Jr., Robert	A	N		I am very much in favor of the proposed rule and consider it to be an insightful, well drafted, and refreshing approach to protecting our elderly clients when they perhaps most need protection.	No response necessary.

RRC - 1-14 - Public Comment Chart - By Commenter - DFT5 (03-01-10) RD-ML.doc

**Rule 1.14 Client with Diminished Capacity.
[Sorted by Commenter]**

TOTAL = 70 **Agree = 60**
Disagree = 6
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
64	Thompson, Kent C.	D	N		If counsel believes that there is diminished capacity and there is a need for disclosure, utilize either a temporary Conservatorship or have a GAL appointed for the client. A Conservator or GAL can be authorized to undertake the action of the practitioner. Better means, other than the proposed Rule, are available to the practitioner.	The Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by initiating conservatorship proceeding.
65	Thompson, Scott A.	A	N		No comment.	No response necessary.
66	Uro-May, Patricia	A	N		This is a much needed change. I have often had to wrestle with the dilemma regarding confidentiality that this proposed change addresses. Thank you to whoever put this forward.	No response necessary.
67	Watson, Edward J.	M	N		I believe Comment [7] should not be deleted, especially when considering the situation where the client has already indicated a desire to have the attorney act on client's behalf, in the event of diminished capacity. I believe that conservatorship proceedings, which include the appointment of an attorney to represent the proposed conservatee, protect the interest of the client sufficiently. Some protection and procedure to move more swiftly than the current system is needed. And, I don't feel that the revisions to Rule 1.14 are addressing the real need. It seems that these	The Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by filing a guardianship or conservatorship petition or other action adverse to his/her client.

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					revisions are addressing solely the needs of attorneys for specific guidance and protection from subsequent claims, without dealing with the real world problems and protection of clients.	
68	Webber, Stephen E.	A	N		The proposed rule's shortcoming is that it does not go far enough, being limited only to those with diminished capacity, primarily the elderly, instead of including all mentally impaired individuals.	No response necessary.
69	Wilcox, Gregory	A	N		Time is overdue for a rule that allows an attorney to protect his or her own client when it is obvious that the client's abilities are compromised and that outside help is needed.	No response necessary.
70	Yi, Connie	A	N		I strongly agree with the proposed rule, it would be consistent with the fiduciary duty we owe to the client.	No response necessary.

Rule 1.14: Client with Diminished Capacity

STATE VARIATIONS

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

California has no rule comparable to ABA Model Rule 1.14.

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

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

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

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental

condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

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

care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

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

Proposed Rule 2.1 [n/a]

“Advisor”

(Draft #4, 2/19/10)

Summary: Proposed Rule 2.1 is based on Model Rule 2.1 and describes a lawyer's role as a client's advisor. It provides that a lawyer must exercise independent professional judgment and render candid advice.

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☐ Existing California Law

Rule

Statute

Case law

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

- ☒ Other Primary Factor(s)

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

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

(See the introduction in the Model Rule comparison chart.)

☐ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☒ Very Controversial – Explanation:

Three of the five comments received, including comments from OCTC, COPRAC and the Santa Clara County Bar Association maintain that the proposed Rule should not be adopted because it is not a disciplinary rule, it is not enforceable, is unnecessary and provides for advice that is beyond a lawyer's expertise.

☐ Moderately Controversial – Explanation:

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.1* Advisor

February 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 2.1 is based on Model Rule 2.1 and describes a lawyer's role as a client's advisor. There is no counterpart to this Rule in the California rules and the Commission is recommending adoption of the first sentence of the Model Rule without any change. The Commission is recommending that the second sentence of the Model Rule not be adopted, but that the sentence be incorporated into Comment [2] to the proposed Rule. Although it is anticipated that the Rule may not be frequently applied as a lawyer disciplinary standard, the Commission recognizes the importance of this Rule as guidance to lawyers and clients on a lawyer's duty to exercise independent professional judgment.

Regarding the comments to the Rule, the Commission is recommending adoption of modified versions of two of the Model Rule Comments, and deletion of three Model Rule comments. For the most part, deletions have been made to focus the rule on key concepts of independent professional judgment and candor. The commentary concerning a lawyer's responsibility to render *advice* on factors beyond technical legal considerations, such as moral or social factors, was viewed as inconsistent with the terms of the Rule itself, which provides only that a lawyer duly consider these factors in rendering legal advice. The first two Comments were modified to remove references that suggest the frequency in which non-legal considerations might arise in the course of representing clients. The Commission determined that the Model Rule statements may not be the case and are unnecessary to make the point of the comment and to clarify that the standards in the Rule are permissive, rather than mandatory requirements in every representation.

* Proposed Rule 2.1, Draft 4 (2/19/10)

Minority. A minority of the Commission objects to this Rule because it imposes an undefined duty to exercise duty of independent judgment. Largely due to the absence of a definition of “independent judgment,” the minority is concerned that the vast majority of lawyers will not understand when and how this Rule applies. See full minority statement, below.

<u>ABA Model Rule</u> Rule 2.1 Advisor	<u>Commission's Proposed Rule*</u> Rule 2.1 Advisor	<u>Explanation of Changes to the ABA Model Rule</u>
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.	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.~~	The proposed Rule is identical to the first sentence of the Model Rule. In response to public comment, the second sentence of the Model Rule was deleted and moved to Comment [2].

* Proposed Rule 2.1, Draft 4 (2/19/10); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 2.1 Advisor Comment	<u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment	<u>Explanation of Changes to the ABA Model Rule</u>
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.	Scope of Advice [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice ~~often involves unpleasant~~ <u>may involve</u> facts and alternatives that a client may <u>find unpleasant and may</u> 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.	Comment [1] is nearly identical to Model Rule 2.1, cmt. [1]. It was revised to replace with word “often” with the word “may” because the Model Rule language makes a judgment about what often occurs in a lawyer client relationship that is not necessarily the case and is unnecessary to make the point of the Comment. The reference to “unpleasant facts and alternative” was changed to state “facts and alternatives that a client may find unpleasant” in response to public comment that it is the client's perception of the facts, rather than the facts themselves, that determine whether they are unpleasant.
[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.	[2] ~~Advice~~ <u>In some cases, advice</u> couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. ~~Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.~~ Although a lawyer is not a moral advisor ~~as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied in~~ <u>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.</u>	Comment [2] is based on Model Rule 2.1, cmt. [2]. The first sentence was revised to clarify that it is not intended to state a proposition that applies in every representation. The second sentence has been deleted because it may suggest to some lawyers that there is a risk of disciplinary exposure if a lawyer provides competent advice but does not also provide advice on moral issues. The third sentence was deleted and its substance incorporated into the last sentence. The last sentence was revised to incorporate language that was taken from the second sentence of the proposed Rule. The Model Rule Comment language in the last sentence was replaced with the second sentence from the proposed Rule, because the deleted language makes a judgment that moral and ethical considerations impinge on most legal questions, that may not be the case and is not necessary to make the point of the Comment.

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

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

Proposed Rule 2.1 Advisor

Minority Dissent

A minority of the Commission dissent to this Rule in its present form because it adopts an undefined duty of independent judgment, which has not been applied consistently in other jurisdictions. Some applications of this Rule in other states would produce results that would be inimical to the interests of client and a lawyer's duty of undivided loyalty to a client. This Rule should not be adopted without a definition of independent judgment that foreclose an interpretation that would be inconsistent with a duty of loyalty.

The Commission chose not to define what is meant by "independent judgment." Traditionally, in California, independent judgment has been understood to be an element of a lawyer's duty of loyalty to a client. That duty requires a lawyer to represent a client's interests faithfully and exercise judgment consistent with the faithful representation of the client. In this sense, "independent judgment" means judgment that is independent of influences other than the client. If the Rule was limited to that concept of independent judgment, there would not be an issue.

However, some jurisdictions that have applied the Rule have construed "independent judgment" to mean judgment independent of the client's interests. (See e.g. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002) [lawyer sanctioned for rude and abusive conduct; in reply to the lawyer's argument that she merely was following orders, the Court confirmed the sanction, in part because Rule 2.1 requires lawyers to exercise independent professional judgment (and not just follow orders)]; *U.S. v. Hughes*, 41 Fed. Appx. 276, 281 n. 3 (10th Cir. 2002) [part of the Court's recital of underlying facts, it explains that counsel sought to withdraw on the basis that they had "reached an ethical conflict between their duty to follow the client's wishes and yet retain the required independent professional judgment mandated by Rule 2.1"] This construction of "independent judgment," which imposes a duty on lawyers to advise clients for the benefit of others, is antithetical to a duty of loyalty and the reason that duty exists. Furthermore, it would conflict with other Rules, such as Rule 1.2 and 1.4.

There is no California authority on this Rule. California courts would be expected to look at cases in other jurisdictions, including cases that have construed “independent judgment” to mean something inconsistent with a duty of loyalty. Neither the courts nor lawyer should be burdened with working out the meaning of this Rule, with unforeseen and potentially negative consequences to the lawyer-client relationship.

Rule 2.1 Advisor

(Commission's Proposed Rule – Clean Version)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice may involve facts and alternatives that a client may find unpleasant and 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] In some cases, 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, 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.

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 2**
Disagree = 2
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	D			COPRAC does not support the proposed rule because we do not believe that it is appropriate as a disciplinary rule. Should the proposed rule be adopted in some form, we would recommend removing the second sentence of the proposed rule. We are generally in agreement with the concern expressed as the Minority position. We have no objection to the second sentence being included in a Comment to the rule, nor do we object to the disclaimer recommended by the Minority, but we do not believe that this sentence should be included in the rule itself.	The Commission agrees that the proposed Rule does not state a disciplinary standard. However, the Commission believes that the Rule provides useful guidance to the legal profession regarding the existence and scope of a lawyer's duty of independent judgment and candor. The second sentence of the proposed Rule was moved to replace the second sentence in Comment [2]. The Commission did not include the disclaimer suggested by the minority position because the revised second sentence uses the permissive verb "may," which does not impose a requirement.
2	Office of the Chief Trial Counsel ("OCTC"), State Bar of California	A			OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.	The Commission agrees that the proposed Rule does not state a disciplinary standard. However, the Commission believes that the Rule provides useful guidance to the legal profession regarding the existence and scope of a lawyer's duty of independent judgment and candor

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

3	Orange County Bar Association	M		The OCBA endorses the adoption of the first sentence of the proposed Rule, but recommends that the second sentence be deleted. The second sentence should be deleted because it is not intended to be mandatory and is, essentially, a practice pointer. With modifications to the language, the second sentence should be placed in an appropriate location in the Comments to read as follows: “In rendering advice, a lawyer may refer not only to law, but also to such other considerations the lawyer deems to be relevant to the client’s situation.” The OCBA believes that it is more appropriate for the language to be as broad as possible, rather than focusing on “moral, economic, social and political” factors. The OCBA recommends that the language in Comment [1] be modified to read as follows: “Legal advice may involve facts and alternatives that a client may find unpleasant and be disinclined to confront.” There is no need for the word “often,” and whether facts are unpleasant depends on the client’s perspective and not on the facts themselves.	Comment accepted. The second sentence of the proposed Rule was deleted, The Commission has revised the second sentence of Comment [2] to incorporate language that was taken from the second sentence of the proposed rule. The Commission, however, did not make the further changes the commenter suggests. The sentence in question states that the lawyer may refer not only to the law, but to other considerations. It, therefore, is not focused on just moral, economic, social and political factors. Instead these factors are listed as examples of the types of other considerations a lawyer may discuss with a client. The Commission agrees with the comment and has made the requested change.

				Comment [2]	With respect to Comment [2], the OCBA endorses the deletion of the second and third sentences from the comment to the Model Rule, but suggests that the last sentence be modified as follows: <i>“For instance,</i> although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon <i>many</i> legal questions and may influence <i>the client’s course of action.</i>”	Although the Commission did not use the commenters’ suggested language verbatim, it has revised the second sentence of Comment [2] along the lines suggested to incorporate language that was taken from the second sentence of the proposed rule in response to OCBA’s prior comment.
4	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
5	Santa Clara County Bar Association	D			This rule is unnecessary and, indeed, encourages an attorney to provide advice to a client that is beyond the scope of the lawyer’s expertise.	The Commission agrees that the proposed Rule does not state a disciplinary standard. However, the Commission believes that the Rule provides useful guidance to the legal profession regarding the existence and scope of a lawyer’s duty of independent judgment and candor. It has deleted the second, permissive sentence of the public comment version of the Rule and moved it into the Comment.

Rule 2.1: Advisor

STATE VARIATIONS

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

California has no direct counterpart to Rule 2.1.

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

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

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

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

decision that is morally just as well as legally permissible.

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

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

(Draft #11.1, 2/20/10)

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

Comparison with ABA Counterpart

Rule

Comment

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

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

Primary Factors Considered

- ☒ Existing California Law

Rules

RPC 5-200

Statute

Case law

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

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.3* Candor to the Tribunal

February 2010

(Draft rule following consideration of public comment)

INTRODUCTION:

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

* Proposed Rule 3.3, Draft 11.1 (2/20/10).

Minority. A minority of the Commission believes that, aside from the changes made to the Model Rule to conform the proposed Rule to California's policy of strictly limiting disclosures of confidential information and certain other clarifying changes, most of the revisions to the Model Rule that the Commission is recommending are unwarranted. In particular, the minority takes the position that the change the Commission has implemented to paragraph (c) concerning the duration of the duties under this Rule runs counter to prevailing authority in every other jurisdiction and threatens to undermine the integrity of the judicial process. See Minority Statement in Explanation of Changes for paragraph (c). See also Explanation of Changes for Comment [6].

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

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

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

* Proposed Rule 3.3, Draft 11.1 (2/20/10); Redline/strikeout showing changes to the ABA Model Rule

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.	tribunal, <u>unless disclosure is prohibited by Business and Professions Code section 6068(e)</u>. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.	
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.	(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, ~~including, if necessary, disclosure to the tribunal~~<u>extent permitted by Business and Professions Code section 6068(e)</u>.	Paragraph (b) imposes a special obligation on lawyers to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. See Comment [12]. Paragraph (b) follows Model Rule 3.3(b), except it substitutes the clause, "to the extent permitted by Business and Professions Code section 6068(e)" for the phrase "if necessary, disclosure to the Tribunal" at the end of the paragraph. See the Explanation of Changes to paragraph (a)(3).
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.	(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding <u>or the representation, whichever comes first</u> ~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~	Paragraph (c) is a significant departure from Model Rule 3.3(c) in two respects. First, unlike the Model Rule that imposes an obligation through the conclusion <u>of the proceeding</u>, paragraph (c) provides that the obligations set forth in paragraphs (a) and (b) should end either with the termination of the representation or the conclusion of the proceeding. The Commission determined that the lawyer lacks standing after termination of the lawyer's employment and that the lawyer should not have a duty to be involved in a time-consuming controversy after the lawyer has been discharged which could abrogate the lawyer's loyalty to a former client.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal	<u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal	<u>Explanation of Changes to the ABA Model Rule</u>
		Second, paragraph (c) deletes the clause “and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.” See the Explanation of Changes to paragraph (a)(3). <i>Minority.</i> A minority of the Commission opposes the first departure from the Model Rule for a number of reasons: (1) a lawyer who has been terminated or has withdrawn does not lack standing to correct the lawyer's false statement of material law or fact under paragraph (a); (2) the lawyer would not interfere with the relationship between the former client and the client's new lawyer by advising the new lawyer of relevant facts including the existence of criminal or fraudulent conduct in the proceeding or urging that corrective action be taken (see Comment [10]); (3) the lawyer may only take remedial measures under paragraph (a)(3) and (b) to the extent permitted under Business and Professions Code §6068(e); (4) the proposal would allow lawyers to circumvent paragraphs (a) and (b) by simply withdrawing from the representation; and (5) no known state variation limits paragraph 3.3(c) as proposed.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.	(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all ~~material~~ facts known to the lawyer that ~~will~~<u>the lawyer knows, or reasonably should know, are needed to</u> enable the tribunal to make an informed decision, whether or not the facts are adverse.	Paragraph (d) follows the ABA counterpart, except it does not limit the lawyer's obligation to disclose all “material” facts and extends the duty to facts that the lawyer knows, or reasonably should know, are needed to enable the tribunal to make an informed decision. <i>Minority.</i> A minority of the Commission believes there is insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that the paragraph is unclear and would subject lawyers to being second-guessed on what facts were “needed” to enable a tribunal to make an informed decision in a particular matter.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule ~~1.0~~<u>1.0.1</u>(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.	Comment [1] is identical to the Model Rule counterpart, except that the reference for the definition of tribunal is to Rule 1.0.1, which is the number assigned to the Terminology section in the Proposed Rules.
[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.	[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently~~ <u>However</u>, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not ~~allow the tribunal to be misled by~~<u>make</u> false statements of law or fact or <u>present</u> evidence that the lawyer knows to be false. <u>For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material</u>	The first two sentences in Comment [2] are identical to the Model Rule counterpart. The third sentence in Model Rule Comment [2] is deleted because the lawyer's duty of confidentiality under Business and Professions Code § 6068(e) is not qualified by the lawyer's duty of candor to the tribunal. The next-to-last sentence is the same as the ABA counterpart, except for several grammatical changes and to clarify that the lawyer's obligation is to not make false statements of law or fact or present evidence the lawyer knows to be false rather than ensuring that the tribunal will not be misled. The last sentence has no counterpart in the Model Rule and is a revision of current California rule 5-200(D), which

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>misstatement of law includes a prohibition on a lawyer citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.</u>	prohibits the citation to invalid authority. The Commission determined that adding the substance of current rule 5-200(D), which is more specific than proposed paragraph (a)(1), would provide guidance on the kinds of conduct that paragraph (a)(1) covers. As provided in paragraph (a)(1), the sentence also clarifies that a lawyer is also required to correct an invalid citation previously made to the tribunal.
Representations by a Lawyer [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).	Representations by a Lawyer [3] ~~An advocate~~<u>A lawyer</u> is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of ~~matters~~<u>the facts</u> asserted therein, ~~for~~<u>because</u> litigation documents ordinarily present assertions <u>of fact</u> by the client, or ~~by someone on the client's behalf~~<u>a witness</u>, and not ~~assertions~~ by the lawyer. Compare Rule 3.1. However, an assertion <u>of fact</u> purporting to be <u>based</u> on the lawyer's own knowledge, as in <u>a declaration or</u> 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. <u>Bryan v. Bank of America (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].</u> There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. <u>Di Sabatino v. State Bar (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].</u> The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud	The first sentence in Comment [3] is similar to the ABA counterpart, except that "lawyer" is substituted for "advocate," since "advocate" is not the defined term in the rules. The sentence includes several grammatical changes to make the sentence more clear without changing its substance. The second, third, fourth and fifth sentences are similar to Model Rule Comment [3], except for several grammatical changes and the inclusion of a lawyer's declaration in addition to an affidavit. Citations to two applicable cases have been added.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).	
Legal Argument [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.	Legal Argument [4] ~~Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities~~ <u>argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. Furthermore, as stated in paragraph A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2), an advocate has requires a duty</u> <u>lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine Legal authority in the controlling jurisdiction may include legal premises properly applicable authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on</u>	The first sentence of Comment [4] is derived from the first sentence in Comment [4] of the comments to the New York Rules of Professional Conduct. The sentence, in effect, reverses the first and second sentences in the Model Rule comment without changing the meaning. The second sentence is new and helps explain the reason for the obligation to disclose applicable law. The third sentence largely tracks its Model Rule counterpart, except that it substitutes “lawyer” for “advocate,” and adds the requirement that the legal authority be known to the lawyer. The fourth and fifth sentences provide guidance on what constitutes “legal authority in the controlling jurisdiction.” The sixth sentence is new and was added in response to public comments that raised concerns that imposing on a criminal defense lawyer the obligations of subparagraph (a)(2) might implicate constitutional principles of due process and effective assistance of counsel. The final sentence is new and provides guidance concerning the lawyer’s obligations under paragraph (a)(4) of the Rule, a provision that has no counterpart in the Model Rule.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the case</u>~~tribunal.~~	
Offering Evidence [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	Offering Evidence [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. ~~This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.~~ A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.	The first sentence in Comment [5] is identical to the Model Rule counterpart. The second sentence in the Model Rule Comment has been deleted. The final sentence in Comment [5] is identical to the Model Rule counterpart.
[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer	[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 first and second sentences in Comment [6] are identical to the Model Rule counterpart. The third sentence has been added to point the reader to Comment [7], which provides relates to a lawyer's duties concerning testimony by a criminal defendant.

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

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
also Comment [9].	<u>made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. Business and Professions Code section 6068(d); <i>People v. Guzman</i> (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in <i>Price v. Superior Court</i> (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; <i>People v. Johnson</i> (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; <i>People v. Jennings</i> (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; <i>People v. Brown</i> (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].</u> The ~~obligation~~<u>obligations</u> of ~~the advocate~~<u>a lawyer</u> under ~~the these~~ Rules of Professional Conduct ~~is~~<u>and the</u> State Bar Act are subordinate to ~~such requirements. See also Comment [9]~~<u>applicable constitutional provisions.</u>	The third sentence adds a reference to the State Bar Act, which also regulates a lawyer's conduct before tribunals. The reference to Comment [9] has been deleted because the Commission recommends deletion of Model Rule 3.3, cmt. [9].
[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. <u>See, e.g., <i>People v. Bolton</i> (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671].</u> A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule ~~1.0~~<u>1.0.1</u>(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.	Comment [8] is identical to the Model Rule counterpart, except that a citation to an important California case on the concept discussed has been added and the cross-reference changed to "1.0(f)" changed to "1.0.1(f)," Proposed Rule 1.0.1 ("Terminology" is the counterpart to Model Rule 1.0.

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].	~~[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~	Model Rule Comment [9] has been deleted because it does not provide useful guidance and is not consistent with current California law.
Remedial Measures [10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the	Remedial Measures ~~[10]~~ Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. ~~In such situations, the advocate's~~ <u>The lawyer's</u> proper course is to	The first sentence in Comment [9] is identical to the first sentence in Model Rule Comment [10]. The second sentence is identical to its Model Rule counterpart. The third sentence is identical to the third sentence in Model Rule Comment [10]. The fourth sentence is derived from the fourth sentence in Model Rule Comment [10]. The proposed Comment replaces "advocate's" with "lawyer's", since advocate is not a defined

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

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

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
	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.	does not apply to another lawyer who is retained to investigate or represent a person 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 or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Preserving Integrity of Adjudicative Process [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, ~~including disclosure if necessary,~~ whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.	Comment [12] is identical to its Model Rule counterpart, except that it clarifies that "other evidence" referred to in the comment is evidence relating to the proceeding. It adds a cross-reference to Rule 3.4. The Comment deletes the phrase "including disclosure if necessary" for the reasons explained in the changes to paragraphs (a)(3) and (b).
Duration of Obligation [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the	Duration of Obligation [13] ~~A~~Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact ~~has to be established. The~~ Either the conclusion of the proceeding ~~is~~or of the representation provides a reasonably definite point for	The first sentence in Comment [13] derives from the Model Rule counterpart and no material change is intended. The second sentence conforms the Model Rule comment to the changes recommended for paragraph (c). It also departs

<u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment	<u>Explanation of Changes to the ABA Model Rule</u>
meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.	the termination of the ~~obligation~~mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.	from the Model Rule by referring to “mandatory” obligations under the rule. The third sentence is identical to the Model Rule. A fourth sentence has been added to clarify that there may be obligations that go beyond the rule, citing, for example, Rule 3.8 on duties of prosecutors.
Ex Parte Proceedings [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.	Ex Parte Proceedings ~~[14] — Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~	Model Rule 3.3, Comment [14] is not included in the comments to proposed Rule 3.3.

Withdrawal [15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.	Withdrawal [15] ~~Normally, a~~ lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's ~~disclosure~~<u>taking reasonable remedial measures</u>. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in ~~such an extreme~~<u>a</u> deterioration of the ~~client-lawyer-client~~<u>such</u> relationship <u>such</u> that the lawyer can no longer competently <u>and diligently</u> represent the client, <u>or where continued employment will result in a violation of these Rules</u>. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. ~~In connection~~ <u>This Rule does not modify the lawyer's obligations under Rule 1.6 or Business and Professions Code section 6068(e) or the California Rules of Court with</u> ~~a~~<u>respect to any</u> request ~~for permission~~ to withdraw that is premised on a client's misconduct, ~~a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.~~	The first sentence in comment [14] is similar to the first sentence in Model Rule Comment [15], except "disclosure" is replaced with "taking reasonable remedial measures" to make the comment consistent with the wording of the proposed Rule. The second sentence is also similar to the Model Rule counterpart except that it provides clearer guidance on when the deterioration of the lawyer-client relationship may require the lawyer to seek the tribunal's permission to withdraw. The third sentence duplicates the third sentence in the Model Rule Comment. The fourth sentence does not have a counterpart in Model Rule Comment [15] and has been added to clarify that the lawyer's obligations under this Rule are not superseded by the lawyer's obligations under the State Bar Act or the California Rules of Court in requesting permission to withdraw. The Comment departs from Model Rule [15] in that it does not permit the lawyer to reveal confidential client information to the extent reasonably necessary to comply with this rule or with Model Rule 1.6.

Rule 3.3 Candor Toward the Tribunal

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (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 Rule 1.6 and 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.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

- [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing as authority a decision that has been overruled or a statute that has been repealed or declared

unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Representations by a Lawyer

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

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits,

such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on

testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

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

Remedial Measures

- [9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer

must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

- [10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).
- [11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

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

Duration of Obligation

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

Withdrawal

- [14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a

deterioration of the lawyer-client 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 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

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

TOTAL = 9 **Agree = 0**
Disagree = 1
Modify = 8
NI = 0

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

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

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Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]						TOTAL = 9 Agree = 0 Disagree = 1 Modify = 8 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					germane to the case, because the prosecutor in a criminal case has “the responsibility of a minister of justice. . . .” (ABA Model Rule 3.8, Comment [1]) We support Michael Judge and Janice Fukai’s reasoning and comments in opposition to this Rule as well.	be directly adverse to the position of the client and not disclosed by opposing counsel”). The lawyer in that case had written the court a letter after being apprised of his failure to cite the case that he believed in good faith that the relevant statement in the case was dictum and that it did not serve to overrule the case he had relied upon. <u>Schaefer</u> is a 1945 case applying Business and Professions Code §6068(d) and decided many years before the Model Code from which the current rule derives. <u>Schaefer</u> does not support the notion that the rule does not apply to lawyers in California. Nevertheless, the Commission added the following sentence to Comment [4]: Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules.
				Comment [4]	We have no objection to the first sentence of Comment [4] nor to the last sentence of Comment [4], but we do object to those sentences in between and feel they should be deleted.	The Commission agreed and made appropriate revisions to both Comment [4] and paragraph (a)(2) (see RRC Response to LACBA, below).

Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]							TOTAL = 9 Agree = 0 Disagree = 1 Modify = 8 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
				Comment [7]	CPDA disagrees with the portion of Comment [7] which requires that the attorney seek permission from the court to withdraw when the attorney believes that the client will be committing perjury and asks that that portion of the Comment be deleted.	CPDA appropriately raises the question whether the Rule should require that a lawyer must make a motion to withdraw so as not to give implied consent to the perjurious testimony. The cases in California on the narrative approach are not entirely consistent on whether seeking to withdraw is a prerequisite to permitting the narrative approach. <u>People v. Brown</u> says it is. <u>People v. Johnson</u> and <u>People v. Gadson</u> say that mandatory withdraw would not solve the problem. See the discussion in the Rutter Group Practice Guide: Professional Responsibility at ¶8:187 – 8:187.1. As a solution, the Commission added the following at the end of second sentence in Comment [7] to clarify that the duty to seek to withdraw in this situation is covered under Rule 1.16: "as required under Rule 1.16".	
				Comment [8]	CPDA agrees with the first two sentences of proposed Comment [8]. However, CPDA believes that proposed sentences three and four should be deleted, and sentence five should be changed. Sentence five contains the phrase “. . . an obvious falsehood. . . .” This phrase should be changed: it does not specify to whom the falsehood must be obvious. The fifth sentence should read “a falsehood that is obvious to the lawyer,” or, better and	The Commission made no change to the third sentence in proposed Comment [8] which tracks the definition of "knows" in proposed Rule 1.0(f). The Commission made no change to the last sentence in proposed Comment [8]. The sentence tracks Model Rule Comment [8] and is sufficiently clear in view of the reference to the definition of "knows" referenced in the preceding sentence. Comment [8] and paragraph (b) are consistent	

Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]						TOTAL = 9 Agree = 0 Disagree = 1 Modify = 8 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					simpler, “a falsehood that is known to the lawyer.” <i>People v. Bolton</i> states the correct standard, and simultaneously states the reason for CPDA’s position on Comment [8]. “Criminal defense attorneys sometimes have to present evidence that is incredible . . . [B]ut, as long as counsel has no . . . factual knowledge of its falsity, it does not raise an ethical problem.” We believe that the <i>Bolton</i> case should be cited in either Comment [7] or [8], to provide additional guidance to attorneys.	with <i>People v. Bolton</i>, which deals with evidence the lawyer suspects but does not know is false. The Commission added a citation to <i>People v. Bolton</i>.
2	COPRAC	M		3.3(c)	Regarding paragraph (c), we believe the minority position is the better one, regarding when a lawyer’s obligations under paragraphs (a) and (c) should end. We are persuaded that a lawyer should not have a continuing obligation to oversee the course of a proceeding which the lawyer is no longer involved in, having been terminated or having withdrawn from representation. We believe a lawyer would lack standing to continue to be involved in proceedings regarding a former client and could potentially interfere with the relationship between the former client and his or her new lawyer. Accordingly, we believe the lawyer’s duties should not continue to the conclusion	COPRAC refers to paragraphs (a) and (b). The Commission responded to COPRAC’s concerns by revising paragraph (c) as follows: “continue to the conclusion of the proceeding <u>or the representation, whichever comes first.</u>”

Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]						
TOTAL = 9 Agree = 0 Disagree = 1 Modify = 8 NI = 0						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.3(d)	of the proceeding, but to the conclusion of the representation, if such conclusion occurs earlier. In paragraph (d), regarding a lawyer's duty to inform the tribunal of necessary facts, we believe the language of the ABA Rule: "all material facts known to the lawyer that will enable the tribunal to make an informed decision," provides better guidance to practitioners than the Commission's proposed changes. We think it would be too difficult to opine on what facts a lawyer "reasonably should know are needed," as suggested by the Commission, particularly in retrospect, and the vagueness of this revised requirement could inure to the detriment of lawyers who are in good faith attempting to follow the Rule.	The Commission disagrees and recommends retaining the "knows or reasonably should know" qualifier, which creates an objective standard and should facilitate enforcement.
				Comment [7]	In proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the "narrative" approach is only available to the criminal defendant currently on trial.	The Commission agrees with COPRAC's suggestion and recommends that "criminal defense client" be changed to "criminal defendant."

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Rule 3.3 Candor Toward the Tribunal. [Sorted by Commenter]						TOTAL = 9 Agree = 0 Disagree = 1 Modify = 8 NI = 0
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [9]	COPRAC disagrees with proposed Comment [9] to the extent that it is intended to provide that a lawyer has no obligation to take remedial measures when opposing counsel elicits testimony the lawyer knows to be false from the lawyer's client or a witness. We believe the better position is that a lawyer should have a duty to take remedial measures whenever the lawyer knows that the lawyer's client or witness has testified falsely, regardless of which side elicited the false testimony. We believe that the following phrase found in ABA Comment [10] that was deleted from proposed Comment [9], "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer," should be reinserted in Comment [9]. We do not believe there is any legitimate rationale for the distinction established by the Comment [9], providing that a lawyer is obliged to take remedial measures if a client knowingly makes false statements during a deposition, but permitting a lawyer to forego such measures if a client makes false statements at trial.	COPRAC, OCBA and SDCBA recommend that Comment [9] restore the following language from Model Rule Comment [10] at the end of the second sentence: "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer" and, thus, impose the obligation to take remedial measures under paragraph (b) regardless of who adduces the false evidence. The Commission agreed that Comment [9] should be changed to track Model Rule Comment [10] on this issue.

3	Judge, Michael P. Los Angeles County Public Defender	D			When counsel is faced with the dilemma of remaining silent or disclosing authority harmful to the client, a rule barring affirmative misstatements of law permits counsel to remain silent, thereby remaining loyal to the client. In contrast, the proposal would create a new rule which would require counsel to volunteer to the court authority contrary to the position of the client. A rule which requires counsel to affirmatively offer case law harmful to the client undermines two critical core values of our criminal justice system in California. The first being counsel's duty of loyalty to his or her client. The second core value of our criminal justice system is the adversarial system. The critical value of an adversarial system is undermined when counsel for the party who had diligently researched an issue is required to assist his or her opponent, who may have done nothing, by revealing the authority which requires the court to rule against that party. Comment [4] The proposed rule is very narrow, applicable only to "controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." However, this narrow articulation of the rule is undermined by Comment [4], which states, "the lawyer must disclose the authorities the court needs to be aware of in order to rule intelligently on the matter." The Comment also refers to "a tribunal that is	No change is recommended. See response to CPDA's similar comment. The Commission agreed that proposed Comment [4] should be redrafted and made the appropriate changes. See below.

					fully informed.” The narrow duty to disclose controlling authority articulated in the proposed Rule itself is thus undermined by the Comments which appear to impose on counsel a duty to ensure that the judge is fully informed and has all the authorities necessary to rule intelligently.	
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Subsection (b)	We support deleting the language in (b) “including, if necessary, disclosures to tribunal” at the end of the sentence. We suggest adding the phrase “consistent with Business & Professions Code Section 6068(e)” at the end of the sentence, however, in place of the deleted language to make the rule clear as to how to understand “reasonable remedial.” We agree that a lawyer should correct a previously improperly cited authority, but believe (with a minority of the RRC) that the duty should end when the lawyer ceases to represent the client.	The Commission agreed and added the following to paragraph (b): “to the extent permitted under Business and Professions Code §6068(e).” The Commission changed paragraph (c) to provide that the lawyer’s obligations end with either “the conclusion of the proceeding or the representation, whichever comes first.”
				Comment [4]	We are concerned that the language contained in Comment [4] (“Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter.”) may be too general and broad a phrase in a disciplinary context, even though it is part of a Comment and not part of the Rule itself.	The Commission agreed that Comment [4] and paragraph (a)(2) should be reconsidered by the RRC in light of the comments received from CPDA, Mr. Judge and Ms. Fukai, LACBA, and Mr. Scofield (whose thoughtful memorandum is not reported in this chart). The comments received reveal that the distinction we have tried to draw between controlling authority that is directly adverse and directly adverse authority in the controlling jurisdiction is not sufficiently clear and will likely cause confusion such that it does not warrant departing from the standard in the Model Rule, which is followed in most jurisdictions. In view of the comments received, the Commission revised paragraph (a)(2) to track Model Rule

					paragraph (a)(2) and revised proposed Comment [4], including the following sentence: "Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules."
5	Office of Chief Trial Counsel ("OCTC"), State Bar	M		OCTC is concerned that the Model Rule language is narrower than current rule 5-200 in that it requires candor only to a tribunal, while rule 5-200 provides that a lawyer "shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth." OCTC believes that provision should be included in the Rule. OCTC is concerned that the Rule's "knowingly" requirement would excuse gross negligence, contradicting <i>Matter of Harney</i> (Rev.Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280, and <i>Matter of Chesnut</i> (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174. OCTC is concerned that the Rule omits the term "artifice" as is currently found in rule 5-200(B). OCTC contends the word should remain in the Rule so as to not narrow its reach. Comment [3] OCTC is concerned that Comment [3] is incomplete because the Fed. Rules of Civil Procedure and Code Civ. P. 128.7 require that statements be made "after an inquiry reasonable under the circumstances".	The Commission disagrees. Proposed Rules 3.4 (Fairness to Opposing Party and Counsel) and 4.1 (Truthfulness in Statements to Others) cover the same ground with greater specificity. The Commission disagrees. Both <i>Harney</i> and <i>Chesnut</i> were decided under Bus. & Prof. Code § 6068(d), and would not be affected by this Rule. Moreover, the definition of "know" in proposed Rule 1.0.1(f) (based on MR 1.0(f)) does not permit reckless disregard of the facts. The Commission disagrees that removing "artifice" from the Rule will narrow OCTC's ability to charge lawyers. The word is found in Bus. & Prof. Code § 6068(d), so OCTC will not lose the ability to make such a charge. The Commission disagrees. An inquiry is only required if reasonable under the circumstances. As Comment [8] recognizes, a "lawyer cannot ignore an obvious falsehood."
6	Orange County Bar Association	M		Comment [6]	The OCBA agrees with the minority that the language "or otherwise permit the witness to present testimony the lawyer knows to be The Commission agreed and deleted that clause.

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				Comments [6] and [7] Comment [9]	false,” is unclear, and should be deleted The OCBA recommends that the Commission use the phrase “criminal defendant” consistently, rather than the term “criminal defense client” used in Comment [7] The OCBA recommends that the phrase, “either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer” be included in this Comment, consistent with the ABA. We believe that the lawyer’s obligation to take remedial measures should apply to false testimony on cross-examination, just as the lawyer has an obligation to take remedial measures if false testimony is elicited in a deposition by the adverse party’s counsel – which is another form of cross-examination.	The Commission agreed. See above. The Commission agreed. See above.
7	San Diego County Bar Association Legal Ethics Committee	M		Subparagraph (d) Comment [9]	Agree with a Commission minority that there is “insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that [paragraph subdivision (d)] is unclear and would subject lawyers to being second-guessed on what facts were ‘needed’ to enable a tribunal to make an informed decision in a particular matter.” The existing ABA Model Rule, making the lawyer take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing lawyer best serves the concept of “Candor Toward the Tribunal,” and should remain intact.	The Commission disagreed with SDCBA (see RRC Response to COPRAC, above). The Commission agrees with SDCBA (see RRC Response to COPRAC, above). The Commission believes the change will resolve the need to further explain the relationship between Comment [6] and Comment [9].

				It should be noted that the “Explanation of Changes to ABA Model Rule” for Comment [6] notes that a Minority of the Commission believed the clause “or otherwise permit the witness to present testimony that the lawyer knows to be false,” in the last sentence of Comment [6], “lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. . . .” The Majority believed the reading of the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) “assuages the Minority’s concerns.” SDCBA thinks a clearer explanation of the relationship between Comment [6] and Comment [9] would be helpful to guide the lawyer in applying the proposed rule.	
8	Santa Clara County Bar Association	M		We agree with the rationale that California should rigorously protect attorney-client confidentiality even when it prevents the attorney from making disclosures to the tribunal regarding a client’s or witness’s untruthfulness or regarding evidence that may not be accurate. However, we think it should be noted that a small, but strong minority of the SCCBA Task Force support the ABA Model Rule version based on the rationale that this rule is meant to protect the integrity of the judicial process and judicial decision-making and that policy is of greater importance in this circumstance than allowing a client’s wrongdoing to be protected by attorney-client confidentiality.	No recommendation necessary.

					The minority further suggests that the fact that the California Supreme Court has never approached such a mandatory rule is irrelevant; if the approach is the correct approach, it should be adopted and presented to the Court.	
9	Scofield, Robert G.	M		Comment [4]	Mr. Scofield is concerned with the ambiguity of Comment [4] to the Rule, which can be interpreted to impose a duty on California lawyers to cite to authority from outside of the state, which would most penalize those lawyers who diligently research the law on their clients' behalf. He believes it would be easy to remove the ambiguity by providing examples of the kinds of cases to which a lawyer must cite and those that would lie outside the duty.	The Commission agrees. See Response to Los Angeles County Bar Association, above.

Rule 3.3: Candor Toward the Tribunal

STATE VARIATIONS

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

California. In presenting a matter to a tribunal, a member:

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

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

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

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

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

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

"any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

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

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

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

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

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

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

Florida: Rule 3.3 provides that a lawyer shall not

(a)(4) Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer

testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

Illinois: Rule 3.3(a)(1) provides that a lawyer shall not make a statement of material fact or law to a tribunal which the lawyer knows "or reasonably should know" is false. The Illinois version of Rule 3.3(a) adds that a lawyer shall not:

(5) participate in the creation or preservation of evidence when the lawyer knows or reasonably should know the evidence is false; ...

(8) fail to disclose the identities of the clients represented and of the persons who employed the lawyer unless such information is privileged or irrelevant; ...

(12) fail to use reasonable efforts to restrain and to prevent clients from doing those things that the lawyer ought not to do; [or]

(13) suppress any evidence that the lawyer or client has a legal obligation to reveal or produce; ...

In addition, Illinois Rules 1.2(g)-(h) are similar to ABA Model Rules 3.3(a)(3) and (b).

Maryland: adds the following Rule 3.3(e): "[A] lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused."

Massachusetts: Rule 3.3(b) states that the conclusion of the proceedings includes "all appeals." Rule 3.3(e) permits a lawyer representing a criminal defendant to elicit false testimony in narrative fashion if withdrawal is not otherwise possible without prejudicing the defendant. However, "the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals." A lawyer who is unable to withdraw when he or she knows that a criminal defendant will testify falsely "may not prevent the client from testifying" but must not "examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false."

New Jersey: adheres closely to the pre-2002 version of ABA Model Rule 3.3 but adds, in a new Rule 3.3(a)(5), that a lawyer shall not fail to disclose to the tribunal a material fact "knowing that the omission is reasonably certain to mislead the tribunal." Also, New Jersey Rule 1.6(b)(2) requires a lawyer to reveal confidences to prevent a client from committing "a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal."

New York: Regarding false statements or testimony, DR 7-102(A) provides that a lawyer representing a client shall not

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact....

In addition, DR 4-101(C)(3) permits a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." Regarding adverse authority, DR 7-106(B) provides that a lawyer presenting a matter to a tribunal shall disclose "[c]ontrolling legal authority" known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Regarding remedial measures, DR 7-102(B) provides:

(B) A lawyer who receives information clearly establishing that:

(1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

(2) A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

New York's Disciplinary Rules have no counterpart to Rule 3.3(d).

North Dakota: Rule 3.3(a)(3) provides that if a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, then:

the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless the evidence was contained in

testimony of the lawyer's client. If the evidence was contained in testimony of the lawyer's client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules. The lawyer may not use or argue the client's false testimony.

Ohio: Rule 3.B(c) provides that the duties stated in Rules 3.3(a) and (b) continue "until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination...."

Oregon: provides that the duties in Rule 3.3(a) and (b) are suspended if "compliance requires disclosure of information otherwise protected by Rule 1.6."

Pennsylvania: adds that it applies if a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence "before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition"

South Carolina: Rule 3.3(c) states that the duties stated in Rule 3.3(a) and (b) apply when the lawyer is representing a client before a tribunal "as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition."

Texas: Rule 3.03(b) and (e) provides:

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are

unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Virginia: Rule 3.3(a)(2) provides that a lawyer shall not knowingly "fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6." Virginia Rule 3.3(a)(3) requires disclosure only of "controlling" legal authority and omits the word "directly" before "adverse." (The Comment explains that "directly" was deleted because "the limiting effect of that term could seriously dilute the paragraph's meaning.") Virginia Rule 3.3(a)(4) and Rule 3.3(b) are identical to the pre-2002 version of ABA Model Rule 3.3(a)(4) and Rule 3.3(c). Virginia omits ABA Model, Rules 3.3(b) and (c) and adds a new paragraph taken verbatim from DR 7-102(B)

Washington: omits ABA Model Rule 3.3(b)f but adds a new Rule 3.3(a)(2), which provides that a lawyer shall not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6." Washington breaks up ABA Model Rule 3.3(a)(3) into several paragraphs, starting with Washington Rule 3.3(a)(4), which provides only that a lawyer shall not "offer evidence that the lawyer knows to be false." Rules 3.3(c) through (e) elaborate by providing:

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact

is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Amendments in 2006 deleted former Washington Rule 3.3(g), which had provided that "[c]onstitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule."

Wisconsin: Rule 3.3(c) deletes the phrase "the conclusion of the proceeding."

Proposed Rule 3.8 [RPC 5-110]

“Special Responsibilities of a Prosecutor”

(Draft # 9.1, 2/27/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

RPC 5-110

Statute

Case law

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

New York

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 2

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

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

(See the introduction and explanation of paragraph (g) in the Model Rule comparison chart.)

☐ No Known Stakeholders

☒ The Following Stakeholders Are Known:

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

☒ Very Controversial – Explanation:

See the introduction in the Model Rule comparison chart and Explanation of Changes for paragraph (g), below. In addition, public comments received from prosecutors included an objection to the “reasonably should know” standard in paragraph (a) of the public comment version of the Rule. In response to that input, the Commission determined to recommend that the “reasonably should know” standard be deleted and that the language in paragraph (a) should utilize the Model Rule “knows” standard.

☐ Moderately Controversial – Explanation:

☐ Not Controversial – Explanation

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.8* Special Responsibilities of a Prosecutor

February 2010

(Draft rule revised following consideration of public comment)

INTRODUCTION:

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

However, Proposed Rule 3.8 clarifies and, in some instances, expands the scope of a prosecutor's duties under the Model Rule to provide greater certainty to prosecutors and greater procedural protection to the criminal defendant, specifically by (1) providing that the prohibition on prosecution of a charge not supported by probable cause applies at all stages of prosecution; (2) clarifying the prosecutor's duties to disclose exculpatory information during a proceeding; (3) adding a new comment explaining the "reasonable efforts" standard used in paragraph (b); and (4) adding a new comment clarifying that paragraph (c) does not prohibit prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing.

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

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

* Proposed Rule 3.8, Draft 9 (2/26/10).

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;	~~The~~A prosecutor in a criminal case shall: (a) refrain from <u>commencing or</u> prosecuting a charge that the prosecutor knows is not supported by probable cause;	The proposed language of paragraph (a) adopts the language of the ABA Model Rule and adds language to increase client protection. The additional language clarifies that the scope of prohibited conduct includes both prosecuting and the act of <i>commencing</i> a prosecution that a prosecutor knows 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;	(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;	The proposed language of paragraph (b) is identical to that of the ABA Model Rule.
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;	(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, <u>unless the tribunal has approved the appearance of the accused <i>in propria persona</i></u>;	The proposed language of paragraph (c) adopts the language of the ABA Model Rule but carves out an exception to the rule where the accused is not represented by counsel but where the accused is proceeding <i>in propria persona</i> with leave of the tribunal.

* Redline/strikeout showing changes to the ABA Model Rule

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

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

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.	assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 ~~or this Rule.~~	
(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, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) 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.	(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, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) 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.	Paragraph (g) and all of its subparagraphs are taken verbatim from the Model Rule. The ABA amended Model Rule 3.8 in February 2008 by adding paragraphs (g) and (h) to impose on prosecutors a duty to take certain steps when they know of "new, credible and material evidence" that indicates a convicted defendant was innocent of the crime for which the defendant was convicted. The Commission agrees with the policies underlying these paragraphs and recommend their adoption. See also Explanation of Changes for Comments [6A] through [9]. <u>Minority.</u> A minority of the Commission objects to the inclusion of Model Rule 3.8(g)(1) on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood...." The minority argues that the way the rule is drafted suggests that if a prosecutor knows of information and it turns out later on that the information was "new, credible and material information creating a reasonable doubt," the prosecutor may be subject to discipline unless the prosecutor always discloses to a court or appropriate authority any information he or she receives. The majority, however, takes the position that rather than create a trap for unwary prosecutors, the "new, credible and material" modifier was specifically added to the proposed New York rule on

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Commission's Proposed Rule*</u> Rule 3.8 Special Responsibilities of a Prosecutor	<u>Explanation of Changes to the ABA Model Rule</u>
		which paragraph (g) is based to create a higher standard for triggering the prosecutor's duty of disclosure. The language used encourages prosecutors to err on the side of disclosure in close cases, but does not require the disclosure of all exculpatory information of which the prosecutor might become aware.
(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.	(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.	See Explanation of Changes for paragraph (g).

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

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>[1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.</u>	Proposed Comment [1B] is intended to clarify paragraph 3.8(b), which is adopted from the ABA Model Rule.
[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a an uncharged suspect who has knowingly waived the rights to counsel and silence.	[2] ~~In some jurisdictions, a~~ defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) ~~does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it~~not forbid the lawful questioning of an uncharged suspect who has knowingly waived the ~~rights~~right to counsel and ~~silence~~the right to remain silent. <u>Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.</u>	Proposed Comment [2] is adopted from Comment [2] to the ABA Model Rule, except that the exception governing an accused who is appearing <i>in propria persona</i> with approval of the tribunal has been moved into the black letter rule and therefore removed from the comment. See paragraph (c).
	<u>[2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to subsequent case law that is determined to apply retroactively. The disclosure obligations in paragraph (d) apply even if the defendant</u>	The first sentence of proposed Comment [3] has been added to clarify that paragraph (d) is intended to apply in the disciplinary context to prevent discipline being imposed in the situation in which a prosecutor followed the law at the time the case was pending, but the law

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	<u>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.</u>	was subsequently changed and applied retroactively. Although the new law and court decision will apply to the defendant's case, the prosecutor should not be disciplined because he or she could not have known that the law would change and be applied retroactively. The second sentence in proposed Comment [3] was added at the request of OCTC to clarify that a prosecutor is subject to discipline for failure to fulfill paragraph (d)'s disclosure obligations even if the non-disclosure does not result in actual prejudice to the defendant.
[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.	[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.	Proposed Comment [3] is adopted verbatim from Comment [3] of the ABA Model Rule.
[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.	[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the ~~client-lawyer~~<u>client or other privileged</u> relationship.	Proposed Comment [4] is adopted from Comment [4] of the ABA Model Rule, but the requirement of "genuine need" has been expanded to include situations in which there would be an intrusion into privileged relationships other than the lawyer-client relationship.
[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem	[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. ~~In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem~~	Proposed Comment [5] is adopted from Comment [5] of the ABA Model Rule, but omits the vague standard that (1) would protect a prosecutor's extrajudicial statements made for a "legitimate law enforcement purpose;" and (2) does not provide adequate guidance to a prosecutor who

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).	~~of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this~~ <u>Comment This comment is not</u> intended to restrict the statements which a prosecutor may make ~~which~~<u>that</u> comply with Rule 3.6(b) or 3.6(c).	could be disciplined under paragraph 3.8[f] for extrajudicial statements that “have a substantial likelihood of increasing public opprobrium of the accused.” Instead, the Proposed Comment, like the Model Rule, confirms that paragraph 3.8[f] is not intended to prohibit statements by a prosecutor in compliance with paragraphs (b) or (c) of Rule 3.6, the rule governing trial publicity.
[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.	[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.	Proposed Comment [6] is adopted verbatim from Comment [6] of the ABA Model Rule.
	<u>[6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Comment [12] to Rule 3.3.</u>	Proposed Comment [6A] has been added to clarify that prosecutors are also subject to Rule 3.3, which imposes an obligation upon a lawyer who has offered material evidence that the lawyer later comes to know is false.

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.	[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person ~~outside the prosecutor's jurisdiction~~ was convicted of a crime that the person did not commit, <u>and the conviction was obtained outside the prosecutor's jurisdiction</u>, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. <u>The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule [1.0(i)], that the conviction should or should not be set aside. Alternatively, the prosecutor is required to</u> make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to	Proposed Comment [7] is adopted from Comment [7] of the ABA Model Rule, except for three amendments or additions. First, the first sentence has been revised to clarify that a prosecutor has duties even when the wrongly-convicted person was convicted outside the prosecutor's jurisdiction. Second, a third sentence has been added and the fourth sentence of the Model Rule comment has been revised to provide guidance to prosecutors about the scope of the inquiry they are required to make. Third, the last sentence of the Comment has been added to clarify that the duties imposed on the prosecutor are not dependent upon whether the lawyer of the wrongly-convicted defendant could have discovered the evidence.

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	assist the defendant in taking such legal measures as may be appropriate. <u>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.</u>	
[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.	[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.	Proposed Comment [8] is adopted verbatim from Comment [8] to ABA Model Rule.
[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.	[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), ~~though subsequently determined to have been erroneous,~~ does not constitute a violation of this Rule <u>even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.</u>	Proposed Comment [9] largely tracks Comment [9] to the ABA Model Rule. Additional explanatory language has been added in response to public comments expressing concerns that the Model Rule language on the "good faith" standard is inadequate.

<u>ABA Model Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comment	<u>Commission's Proposed Rule</u> Rule 3.8 Special Responsibilities of a Prosecutor Comments	<u>Explanation of Changes to the ABA Model Rule</u>
	[10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]	For guidance, proposed Comment [10] refers to a specific California statutory prohibition applicable to both current and former prosecutors. Comment [10] also includes a cross reference to the Comment [16] of Rule 1.7 that addresses the concept that there may be conflicts of interest to which a client cannot consent because the representation is prohibited by applicable law.

Rule 3.8 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule Following Review of Public Comments)

A prosecutor in a criminal case shall:

- (a) refrain from commencing or prosecuting a charge that the prosecutor knows 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 proceeding, criminal proceeding, or civil proceeding related to a criminal matter 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 persons under the supervision or direction of the prosecutor, including 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,
 - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (ii) 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, 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 sovereign 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.
- [1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.
- [1B] Paragraph (b) does not change the obligations imposed on prosecutors by applicable law. "Reasonable efforts" include determining, where appropriate, whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.
- [2] 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 right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.
- [2A] The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not with respect to 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.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.
- [5] 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).
- [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable

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

- [6A] Like other lawyers, prosecutors are also subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when that lawyer comes to know of its falsity. See Rule 3.3, Comment [12].
- [7] 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)(1) 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)(2) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent. The scope of an inquiry under paragraph (g)(2) 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 a paragraph (g)(2) inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0.1(i), that the conviction should or should not be set aside. Alternatively, the prosecutor is required under paragraph (g)(2) 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.

- [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, or notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.
- [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), does not constitute a violation of this Rule even if the judgment is subsequently determined to have been erroneous. For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.
- [10] A current or former prosecutor, and any lawyer associated with such person in a law firm, is prohibited from advising, aiding or promoting the defense in any criminal matter or proceeding in which the prosecutor has acted or participated. See Business and Professions Code section 6131. See also Rule 1.7, Comment [16]

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Calhoun, Ronald District Attorney County of Kings	D	Y		I support Rod Pacheco's comments, listed below.	<u>See</u> RRC Response to comments from Rod Pacheco, District Attorney, County of Riverside, below.
2	California District Attorneys Association ("CDA") Gary Lieberstein, President	M		3.8(a)	The rule starts by saying, "A prosecutor in a criminal case shall . . . " without defining exactly what constitutes a criminal case. Current Rule 5-110 refers to criminal charges, before and after the filing of an actual case. The Proposed Rule does not make this distinction, giving rise to the question of when a prosecutor's responsibility arises. If Rule 3.8(b) and (c) are meant to apply to scenarios when no case has been filed in court, it could seriously impede law enforcement investigations. However, if by inclusion of a definition or comment, the rule makes clear that "criminal case" only applies to cases that have been filed in court, there is no objection. CDA has significant concerns about the language "recommending, commencing or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause."	The use of the term "criminal case" follows the Model Rule language and the Commission believes that this term is not intended to determine the timing of compliance. Instead, it is intended to distinguish "criminal" from "civil" matters. In addition, regarding any timing issues (such as pre or post filing), a prosecutor must construe the specific provisions of the rule individually and take account of the specific criminal law context (i.e., federal or state, felony or misdemeanor, etc. . .) to determine compliance. This rule cannot address the great variety of criminal law contexts and state a universal standard for all timing issues. The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall:

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(b)	Current Rule 5-110 is very clear on the issue, stating that charges shall not be filed “when the member knows or should know the charges are not supported by probable cause.” The addition of the “recommending” language is unnecessary, and apparently seeks to expand the group of persons that may face discipline. To attempt to throw the net around any lawyer with whom a prosecutor consults is an expansion of the rule that would be extremely unfair and unwarranted. CDAA is concerned about the standard “reasonably should know.” Again, current Rule 5-110 states simply, “knows or should know.” The current rule is adequate; the addition of the word “reasonably” only expands the opportunities to assail a prosecutor if, in hindsight, it could be argued that a prosecutor was negligently ignorant. It is CDAA’s position that Rule 3.8(b) is unnecessary and creates more ambiguity than clarity. CDAA would respectfully request that 3.8(b) be thereby deleted. This subsection is unclear as to whether the duty extends to overseeing law enforcement agencies. If it does, it assumes a level of control or influence that may not be available	(a) refrain from commencing or prosecuting a charge that the prosecutor knows ~~or reasonably should know~~ is not supported by probable cause; The Commission agrees and now recommends adoption of the Model Rule “knows” standard. The language of proposed paragraph 3.8(b) is identical to that of ABA Model Rule 3.8(b) and does not require a prosecutor to exercise control or authority that prosecutor does not already have. See Comment [1B] which has been revised to state: “Paragraph (b) does not <u>change</u> the obligations imposed on prosecutors by applicable law. ‘Reasonable efforts’ include determining where

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(c)	between prosecutors and law enforcement in many jurisdictions. We believe existing law and practice more than adequately protects the rights of the defendants and that proposed Rule 3.8(c) is thereby unnecessary. There are many reasons why a defendant may want to waive a preliminary hearing, and to emphasize an apparent prohibition on suggesting this course of action is an unreasonable interference in the judicial process and negotiations between the People and a defendant. Rule 3.8(c) is not clear on what procedure is required to “approve the appearance of the accused <i>in propria persona</i>.”	<u>appropriate whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.”</u> Whether existing law and practice adequately protect the rights of defendants is not the principal concern of the proposed Rule. Instead, the Commission's recommendation of this Rule is based on its agreement with the Model Rule concept that certain conduct by prosecutors properly should be subject to professional discipline in addition to any other consequences that might result by court sanction or otherwise. The Commission also is not concerned about why an (unrepresented) accused might want to waive a preliminary hearing or what the procedure is for doing so. The former is a matter for the accused to consider in circumstances in which his or her constitutional rights have been protected and the latter is a legal issue.
				3.8(f)	We have major concerns with the proposed rule that prosecutors would be expected to control what law enforcement officials might say publicly about a case. CDAAs believe that the same standards should apply to both prosecutors and defense counsel; that is, that neither should engage in extrajudicial statements during the	The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case, from making</u>

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(g)	pendency of a filed criminal case nor should they allow anyone directly under their supervision to do so. However, once the duty of the prosecutor is extended to apply to statements by law enforcement, usually during a time when the prosecutor does not yet have jurisdiction over a case because it is still under police investigation, would be to set up an unrealistic standard of responsibility that a prosecutor in many cases would not be able to achieve. Such a proposed rule, in this light, is unwise and unfair. CDAА agrees wholeheartedly with the Minority Opinion explained in Rule 3.8(g). This disclosure requirement standard already exists in numerous cases following <i>Brady v. Maryland</i> and its progeny. Imposing discipline on a prosecutor who incorrectly (in hindsight) evaluates such material would also be patently unfair.	an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6. The Commission's recommendation of this Rule is based on its agreement with the Model Rule concept that certain conduct by prosecutors is a proper subject for professional discipline in addition to any other consequences that might result by court sanction or otherwise.
				Cmt. [9]	CDAА believes that Comment [9] should be applied to all subsections of Proposed Rule 3.8. That is, there should be a "good faith" exception to holding a prosecutor liable for violation.	Comment [9] provides a good faith exception to a prosecutor's exercise of what are by their nature discretionary judgments as to what evidence is "credible and material" under proposed paragraph 3.8(g) and what evidence is "clear and convincing" under paragraph (h). This tracks the logic of Model Rule 3.8 (g) and its Comment [9]. The other Rule provisions do not call on prosecutors to make similar judgments.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Cardona, George Department of Justice (also	NI		3.8(c) & Cmt. [2]	We seek an addition to Proposed Comment [2] to clarify that the rule is not to be interpreted to preclude prosecutors and law enforcement agents from seeking waivers of the time for initial appearance and/or preliminary hearing, an interpretation we believe unwarranted and one that would negatively impact both law enforcement investigations and attempts by arrested individuals to improve their own positions through cooperation with law enforcement investigations. We ask that the following sentence be added to Proposed Comment [2] to make clear that the proposed rule is not to be interpreted to bar prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing: “Nor does paragraph (c) forbid prosecutors from seeking from an unrepresented arrestee a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the arrestee’s voluntary cooperation in an ongoing law enforcement investigation.”	The Commission agreed and adapted the suggested addition to Comment [2] which has the additional clarifying statement: “Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused’s voluntary cooperation in an ongoing law enforcement investigation

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(g)	Although we agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, which is identical to that of ABA Model Rule 3.8(g), (h). The Department previously provided to the ABA, and we previously provided to the Commission, modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission’s revisions to Proposed Comment [7] attempt to address this issue, and we appreciate this effort, but we do not believe it goes far enough. Accordingly, we feel obligated to object to Proposed Rule 3.8(g), (h) as drafted. The reasons underlying our objection are as follows: 1. Few states have followed the ABA’s lead in adopting Model Rule 3.8(g), (h).	The Commission believes that the language of proposed Paragraph 3.8(g) already addresses the situation in which a prosecutor in a jurisdiction different from the jurisdiction of conviction is not able to meaningfully evaluate whether “new, credible and material evidence creat[es] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” Specifically, in such a situation, the prosecutor does not have the requisite knowledge to trigger the rule and therefore is not required to take the steps outlined in proposed Paragraphs 3.8(g)(1) and (g)(2). However, in those unlikely situations in which an out-of-jurisdiction prosecutor does have the requisite knowledge to trigger the rule, he or she should be required to take the steps outlined.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					2. There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger. 3. Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants. 4. Proposed Rule 3.8(g) is unclear in many respects which affect the obligations set forth therein: (i) the term “knows” is undefined in the proposed rule; (ii) we are concerned by the use of the term “material” without a correlating definition; (iii) we believe the proposed rule’s use of the term “promptly” is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation; (iv) we are concerned with the mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an investigation.”	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(h)	5. Proposed Rule 3.8(h) is also unclear in many respects which affect the obligations set forth therein: (i) similar concerns regarding the use of “knows” in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h).; (ii) most troubling is Proposed Rule 3.8(h)’s mandate that a prosecutor “shall seek to remedy the conviction.” This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Comment [8] does not sufficiently clarify what is intended.	
				Cmt. [9]	6. Proposed Comment [9]’s undefined “good faith” exception. The Comment leaves it unclear whether the standard is intended to be a subjective standard based on an analysis of the individual prosecutor’s intent, or an objective standard based on what a reasonable prosecutor would do in similar circumstances.	Comment [9] has been revised to include the following further explanation: “For purposes of this rule, a judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.”
				3.8(g),(h)	7. Potential conflict with other Rules of Professional Conduct and other applicable laws. The duties imposed by Proposed Rule 3.8(g), (h) may conflict with prosecutors’ obligations under other rules and, for federal prosecutors, under other federal laws. For	The Commission recognizes that there might be conflicts between this rule and other rules or duties applicable to prosecutors but the Commission observes that this is true of all of the rules and that this general concern is not unique to prosecutors. For example, conflicts between a duty of

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(g),(h)	example, Business & Professions Code § 6068(e) and California Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client's confidences. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. In addition, there a numerous other confidentiality duties imposed on prosecutors. 8. Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.	confidentiality and a duty of candor can implicate the conduct any lawyer. A one-size fits all resolution of all possible inconsistent duties tailored for this rule is not practical and is not done in other rules. The Commission recommends adoption of the proposed Paragraphs 3.8(g) and (h) in order to impose an affirmative duty upon a prosecutor who, in specified circumstances, may be in a position to assist in undoing a wrongful conviction. The potential misuse of the proposed Rule by prisoners who may have been properly convicted is not a consideration that outweighs the importance of the proposed duty.
4	Cline, Philip District Attorney County of Tulare	D	Y	3.8(a)	The change in the language from Model Rule 3.8(a) to Proposed Rule 3.8(a) creates two significant concerns. First, by changing the language from prosecuting to recommending to prosecute, it appears that there is an attempt to include any attorney with whom a prosecutor consults in the	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a

Rule 3.8 Responsibilities of a Prosecutor. [Sorted by Commenter]							TOTAL = 17 Agree = 0 Disagree = 10 Modify = 6 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
					prosecution of the case. This would not only be extremely unfair and unwarranted, it would have an extreme chilling effect on the consultation and discussion of cases prior to filing. Second, by adding the language “reasonably should know is not supported by probable cause” diminishes rather than enhances the stated goal of greater certainty to prosecutors. It is unclear who defines the lowered knowledge standard. Who decides what a prosecutor should “reasonably” know? When does ignorance become negligent ignorance? The concern is that in any case in which there is an acquittal, a complaint of “negligent ignorance” could arise. The fact remains that some cases need to be tried before a jury, and some cases will be lost for any number of reasons that have nothing to do with whether the prosecutor “reasonably should” have believed the probable cause standard was met prior to filing the case.	charge that the prosecutor knows ~~or reasonably should know~~ is not supported by probable cause; The Commission agrees and now recommends adoption of the Model Rule “knows” standard.	
				3.8(f)	3.8(f) raises two concerns. First, it implies that prosecutors are able to control what law enforcement officials might say publicly about a case. Law enforcement agencies hold their own press conferences and are	The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the</u>	

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(g)(h)	not subject to the control of the prosecutor. Secondly, we recognize the duty to try our cases in the courtroom rather than the media. We feel that the same obligations should be imposed upon the defense bar. Since this rule does not attempt to apply the same standards to both the prosecution and the defense, we feel that is unwise and unfair. I agree with the minority's position on Proposed Rule 3.8(g)(h). If the conviction did not occur in my jurisdiction, how am I to know when information is "new, credible and material creating a reasonable likelihood. . . ." This imposes an obligation on us to step outside of our role as prosecutor and conduct investigations into criminal cases outside of our jurisdiction in order to protect ourselves from accusations of misconduct.	prosecutor, including 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. Proposed rule 3.8(g) only imposes a duty where the prosecutor <u>does in fact</u> know that newly discovered, credible and material evidence creates a reasonable likelihood that the defendant did not commit the offense of which the defendant was convicted. In light of this comment, the Commission has concluded that Comment [7] does not adequately explain the scope of a prosecutor's duties under paragraph (g) and has edited that Comment for clarity.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	COPRAC	M		3.8(a)	Some members of our Committee prefer the adoption of paragraph (a) of ABA Model Rule 3.8 rather than proposed Rule 3.8(a). They are concerned that it would be difficult to fairly judge whether, given all the facts and circumstances relating to the case, the prosecutor reasonably should have known about the evidence.	The Commission agrees and now recommends adoption of the Model Rule “knows” standard.
				3.8(f)	Paragraph (f) should be revised to read “not use investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.” Prosecutors often have cooperation with other agencies, but usually do not have the control implied by this proposed rule, given the law enforcement officials answer to their own chain of command.	The Commission has revised paragraph (f) as follows: (f) exercise reasonable care to prevent persons <u>under the supervision or direction of the prosecutor, including investigators</u> , 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.
				Comment [6A]	We recommend the deletion of the last two sentences of Comment [6A] (in the clean draft) for the same reason.	The Commission notes that this objection is addressed by the recommendation re proposed paragraph 3.8(f).

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Lee, Bob District Attorney of Santa Cruz	D	Y	3.8(a)	The "reasonably should know" standard is vulnerable to a great deal of subjective interpretation and reasonable minds frequently differ as to what constitutes probable cause. If the "reasonably should know" standard is to be included in the Rule, the Rule must also include an express provision that a prosecutor's independent judgment, made in good faith, that probable cause exists will not violate the Rule.	The Commission agrees and now recommends adoption of the Model Rule "knows" standard.
				3.8(a)	The term "recommending" is unclear and overbroad. The word "recommending" should either be deleted from the proposed Rule or the Rule needs to be expressly limited to recommendations made to a court or grand jury.	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
				3.8(d)	The added language of the proposed rule "comply with all constitutional obligations" is important.	No response necessary.
				Cmt. [2A]	The second sentence of this comment should be deleted because it appears to go beyond the constitutional standard set by the rule and could lead to discipline for	The second sentence of proposed Comment [2A] is limited by, and does not conflict with, the black letter rule, which refers to evidence that "tends to negate the guilt of the accused or mitigates the offense" or

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(f)	nondisclosure of even the most inconsequential and immaterial items of favorable evidence. Under proposed Rule 3.6, Trial Publicity, only a lawyer's own extrajudicial statements can subject the lawyer to discipline. However, proposed Rule 3:8 (f) for prosecutors appears to subject a prosecutor to discipline for the extrajudicial statements of other government employees over whom the lawyer has no direct supervisory responsibility. As written, this is an unclear, unworkable, and unfair rule to the extent that it seeks to hold individual prosecutors responsible for the actions of other government employees who are not under the prosecutor's direct supervision.	mitigates the sentence. The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including 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.</u>
				3.8(g), (h)	As the Commission's minority apparently recognizes, a prosecutor cannot be expected to know what constitutes "new, credible and material evidence" creating a reasonable likelihood that a convicted defendant did not commit a crime for purposes of proposed subdivision (g) (1) unless the crime occurred within the prosecutor's own jurisdiction. The prosecutor	The Commission believes that the language of proposed Paragraph 3.8(g) already addresses the situation in which a prosecutor in a jurisdiction different from the jurisdiction of conviction is not able to meaningfully evaluate whether "new, credible and material evidence creat[es] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." Specifically, in such a situation, the prosecutor does not have the

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**TOTAL = 17 Agree = 0
Disagree = 10
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NI = 1**

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					must be familiar with the evidence in the case in order to make such an assessment. In addition, Rule 3.8(g) apparently seeks to expand a court's legal authority to take action in a criminal case after conviction and judgment. The rule appears to assume that there is an appropriate court to which evidence regarding an out-of-jurisdiction conviction may be disclosed and a court which may authorize delayed disclosure for convictions within the prosecutor's own jurisdiction. However, once a defendant had been convicted and sentenced to prison, a trial court generally loses jurisdiction after 120 days to take any further action in the matter, with a few limited exceptions. (See Pen. Code, § 1170 (d).) If subdivisions (g) and (h) are adopted, Comment [9] must also be incorporated into the new rule because reasonable minds frequently differ as to the credibility and materiality of newly discovered evidence.	requisite knowledge to trigger the rule and therefore is not required to take the steps outlined in proposed Paragraphs 3.8(g)(1) and (g)(2). However, in those unlikely situations in which an out-of-jurisdiction prosecutor does have the requisite knowledge to trigger the rule, he or she should be required to take the steps outlined. The proposed Paragraph 3.8(g) provides for disclosure to "an appropriate court or authority"; if the trial court no longer has jurisdiction, the disclosure may be made to the office of the prosecutor in the jurisdiction in which the conviction occurred. The Commission disagrees. As with other proposed Rules, language that clarifies the meaning or application of these rule provisions is included in the Comment to the Rule rather than in the Rule itself.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	Lieberstein, Gary District Attorney of Napa County	D	Y		We believe that current Rule 5-110 currently covers this area more than adequately.	The Commission agrees that proposed Rule 3.8 materially expands the disciplinary consequences for prosecutors, but after reviewing the current and proposed rules has concluded that this expansion is appropriate.
				Cmt. [1B]	The commenter thinks Comment [1B] is particularly important in that it states that the proposed Rule is not intended to expand upon the obligations imposed upon prosecutors by applicable law. However, the commenter thinks that the Comment is in conflict with some parts of the rule.	Comment [1B] refers only to paragraph (b) of the proposed Rule. After reviewing paragraph (b), the Commission does not believe that it creates any expansion of prosecutors' obligations. The only expansion is that prosecutors act under the risk of professional discipline for certain conduct that otherwise would be improper.
					Concerned with the phrase, "a prosecutor in a criminal case" as it is not clear. The current rule, 5-110, makes a very clear distinction between pre-filing and post-filing actions. When does a criminal case begin and when does it end?	The use of the term "criminal case" follows the Model Rule language and the Commission believes that this term is not intended to determine the timing of compliance. Instead, it is intended to distinguish "criminal" from "civil" matters. In addition, regarding any timing issues (such as pre or post filing), a prosecutor must construe the specific provisions of the rule individually and take account of the specific criminal law context (i.e., federal or state, felony or misdemeanor, etc...) to determine compliance. This rule cannot address the great variety of criminal law contexts and state a universal standard for all.
				3.8(a)	Concerned about the term "recommending" and what sort of recommendation is prohibited. The term does not have any	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides:

Rule 3.8 Responsibilities of a Prosecutor. [Sorted by Commenter]						TOTAL = 17 Agree = 0 Disagree = 10 Modify = 6 NI = 1
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					meaning in our profession. We suggest removing the word "recommending." "Reasonably should know" causes us some concern because it could include facts that had not been uncovered or investigated if the State Bar determines the prosecutor <i>should have</i> found them. Opens the door to second guessing or "Monday morning quarterbacking." We prefer "should know."	A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause; The Commission agrees and now recommends adoption of the Model Rule "knows" standard.
				3.8(b)	We are concerned about 3.8(b) in that it seems to put a duty on the prosecution that we have an obligation to ensure that the police are making sure that they have advised of the right to counsel. We have no control over this aspect of law enforcement behavior.	The language of proposed paragraph 3.8(b) is identical to the language of the ABA Model Rule. Paragraph (b) requires only reasonable efforts by prosecutors and does not make them guarantors of police conduct. The Commission believes this places the correct burden on prosecutors.
				3.8(f)	We are concerned with 3.8(f) in that the rule subjects a prosecutor to discipline, including potential disbarment, for statements made by independent police departments. This is very troubling and prosecutors should not be accountable for statements made by individuals over whom they have no	The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other</u>

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[Sorted by Commenter]**

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				3.8(g)	supervision. Our concern with 3.8(g) is how is a prosecutor from one county/jurisdiction supposed to know if discovered information is material or credible evidence that would lead toward exoneration in another county/jurisdiction in another part of the state?	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. Proposed rule 3.8(g) only imposes a duty where the prosecutor <u>does in fact</u> know that discovered evidence creates a reasonable likelihood that the defendant did not commit the offense of which the defendant was convicted. A prosecutor who discovers evidence related to a case but who does not have any basis to believe that it creates such a reasonable likelihood has no duty to act under the rule.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

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8	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M	Y	3.8(d)	Section (d) pertains to prosecutors' disclosure obligations. PREC recommends that the Section include both statutory and constitutional obligations. For this reason, the words "statutory and" should be inserted before the word "constitutional" in line one.	The Commission did not make the requested change, in part, due to concerns expressed by prosecutors about the scope of the rule.
				3.8(e)	Section (e) implicates prosecutors' use of lawyers as witnesses against their current or former clients. This issue implicates prosecutors' ethical obligations in criminal cases as well as related civil matters, such as <i>habeas corpus</i> cases and extradition proceedings, which also are handled by prosecutors. PREC recommends that the Section explicitly encompass civil proceedings that are related to criminal matters.	The Commission agreed and modified paragraph (e) to encompass a "civil proceeding related to a criminal matter."
				3.8(g)	With regard to Section (g), PREC recommends that no geographic limitation be placed on prosecutors' obligation to "promptly disclose that evidence to the defendant unless a court authorizes delay" (presently in (g)(2)(A)). Accordingly, PREC recommends that the Rule read: "(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted	The Commission determined that when the conviction at issue was obtained outside the prosecutor's jurisdiction, the prosecutor's duties should not be as rigorous as when the conviction was obtained in the prosecutor's jurisdiction. A prosecutor in one jurisdiction often will have no practical way of locating a convict in another jurisdiction. Where the conviction was not obtained in the prosecutor's jurisdiction, it should be sufficient for the prosecutor to notify the relevant court or authority.

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TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

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					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; (2) promptly disclose that evidence to the defendant unless a court authorizes delay; and (3) if the conviction was obtained in the prosecutor's jurisdiction, 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."	

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TOTAL = 17 **Agree = 0**
Disagree = 10
Modify = 6
NI = 1

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9	Los Angeles County District Attorney's Office	D	Y		We urge the Commission not to adopt, as presently drafted, proposed Rule 3.8. While this Department supports many of the requirements contained in the proposed rule, there are provisions which are unclear and may inhibit prosecutors' obligations to enforce the law.	The Commission has provided the public and interested stakeholders opportunity to provide input on the proposed rule, and many stakeholders have in fact attended RRC meetings to address their concerns and suggestions regarding the rule. The Commission decided to recommend adoption of proposed Rule 3.8 only after considering the corresponding Model Rule, the versions of the Model Rule adopted in many other jurisdictions, Restatement section 97, and other sources. It also considered input from many stakeholders who attended RRC meetings to express their concerns and who actively participated in RRC deliberations. Their suggestions materially affected the final form of the RRC's recommendation.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1**

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10	Orange County Bar Association	M	Y	3.8(a)	The language of the ABA Model Rule is clear and ensures client protection. The Commission's proposal to include "recommending, commencing, or continuing to prosecute a charge" could have a chilling effect upon discussions preceding the actual filing of a charge. Moreover, the Commission's language is internally inconsistent, in that the introductory phrase that a "prosecutor in a criminal case shall . . ." connotes that a criminal lawsuit has been initiated, and would therefore exclude the "recommending" phase of the litigation. The OCBA opposes the inclusion of the phrase "or reasonably should know" on the grounds it (1) is vague as to whether an objective or subjective test would be applied, (2) would impose disciplinary consequences for potential negligence, and (3) would be impractical as applied, since it would require review of a prosecutor's work product at each stage of the prosecution to determine what the prosecutor should have known regarding whether the charges are supportable.	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause; The Commission agrees and now recommends adoption of the Model Rule "knows" standard.
				Comment [4]	In Comment [4], the OCBA suggests that the Commission delete the word "genuine" as unnecessary.	The Commission disagrees with the commenter's suggestion. The phrase "genuine need" appears in the corresponding Model Rule Comment, and there

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						does not appear to be any materially better alternative. Simply removing the word “genuine” would suggest that prosecutors may subpoena lawyers when there any need to do so. That change would make the Comment inconsistent with paragraph (e), which limits prosecutors to situations of genuine need and which describes when there is a genuine need for a lawyer’s testimony.

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TOTAL = 17 **Agree = 0**
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
11	Office of the Chief Trial Counsel ("OCTC"), State Bar of California	M		3.8(a)	OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by "recommending" for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences of opinion? What if the opinion is based on differences about what is admissible evidence?	The Commission agrees that the term "recommending" is problematical and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause;
				3.8(b)	OCTC is also concerned about paragraph (b)'s requirement that a prosecutor 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. In most situations, police, not the prosecutor, are involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them?	Paragraph (b) requires only reasonable efforts by prosecutors and does not make them guarantors of police conduct. The Commission believes this places the correct burden on prosecutors.
				3.8(c)	The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pre-trial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused	The Commission's recommendation of the proposed paragraph 3.8(c) is based on its agreement with the Model Rule concept that the proposed Rule will prevent prosecutors from overreaching with respect to unrepresented defendants that may result in waiver of important pre-trial rights.

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Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(f)	in propria persona. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this (paragraph) seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement official is an elected position.	The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators</u> , 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.
				3.8(e)	OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.	The Commission is uncertain what point the commenter is making. Paragraph (e) is not intended to address waivers of either the lawyer-client privilege or lawyer work product. That is more properly addressed in evidence rules and the law of evidence.
				3.8(g)	OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.	No response necessary.

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
				Cmt.	OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under B&P Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.	The Commission agrees and has added a comment concerning this Code section. The Code section is also referenced in the Comment to proposed Rule 1.7.	

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12	Pacheco, Rod District Attorney, County of Riverside	D		3.8(b)	Proposed Rule 3.8(b) creates an affirmative duty upon prosecutors to ensure that an “accused” is advised of and given the opportunity to obtain counsel. I strongly oppose this rule as vague, unnecessary, and unfair.	The proposed language of paragraph (b) is identical to that of the ABA Model Rule and does not affirmatively require the prosecutor to advise the defendant of the right to counsel.
				Cmt. [1B]	Proposed Comment 1B states that Proposed Rule 3.8(b) is not intended to expand the obligations imposed on prosecutors by applicable law, but neither federal nor California law imposes the affirmative duties outlined by the Proposed Rule.	Comment [1B] refers only to paragraph (b) of the proposed Rule. After reviewing paragraph (b), the Commission concludes that it does not create any expansion of prosecutors’ obligations. The only expansion is that prosecutors act under the risk of professional discipline for certain conduct that otherwise would be improper.
				3.8(d)	Proposed Rule 3.8(d) sets forth the <i>Brady</i> obligation and expands upon it by requiring a prosecutor to disclose to the defense <i>and the tribunal</i> all unprivileged mitigating <i>sentencing</i> information. While I concur in the adoption of the rule as it comports with <i>Brady</i> and limits discipline to information <i>knowingly</i> suppressed by the prosecutor, and while I applaud the clarifying language added by the Comment (i.e., “comply with all constitutional obligations, as defined by relevant case law”), I am concerned about	The Commission disagreed with the recommended deletion, in part, because the requirement for disclosure to the tribunal is limited to the context of a “sentencing” proceeding.

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				3.8(e)	the rule's apparent requirement that the prosecution <i>affirmatively advocate</i> mitigating evidence on behalf of the defense. As such, I recommend removing the language "and to the tribunal" from Proposed Rule 3.8(d). I object to requirements (2) and (3) as being unnecessary and unfairly exposing prosecutors to discipline. If the prosecution has determined that the information sought is not privileged or work product (and thus there would be no infringement upon the attorney-client privilege), the prosecutor's presentation of evidence and duty to advocate on behalf of the People should not be limited by such artificial constraints. There is no meaningful public policy or rationale to support requirements (2) and (3) other than a desire to shield defense attorneys. In sum, this rule would hamper the ascertainment of truth which is essential to the fair administration of justice. Accordingly, I propose deleting requirements (2) and (3).	The language of proposed paragraph 3.8(e) substantially follows that of the ABA Model Rule. Requirements (2) and (3) are intended to protect the attorney-client relationship from compromise or undue interference from subpoenas issued by a prosecutor in a grand jury or other criminal proceeding.
				3.8(f)	I strongly oppose this rule as it is overbroad, ambiguous, and unfairly subjects prosecutors to discipline for statements of others, even individuals over which the prosecutor has no direct supervision. The Proposed Rule appears to have no outer	The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including investigators, law</u>

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response	
				3.8(h)	limits regarding over whom the prosecutor must exercise control and the steps the prosecutor must take to avoid discipline. Accordingly, I recommend deletion of this Proposed Rule. Proposed Rule 3.8(h) sets forth a heightened degree of responsibility for prosecutors when they know of “clear and convincing evidence” of a defendant’s innocence. While the Proposed Comment cites examples of steps a prosecutor may take to “remedy” a conviction, the outer limits of this proposed affirmative obligation remain ambiguous and the Proposed Rule leaves prosecutors with little guidance as to the specific actions they must take in order to avoid discipline under this section. I recommend the Commission clarify the obligations proposed by this rule.	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. Proposed paragraph (h) is framed in terms of a prosecutor “taking steps to remedy the conviction” in order to capture the wide range of possible actions that may be appropriate in various circumstances. The illustrations provided in proposed Comment [12] provide guidance regarding what might constitute appropriate steps to remedy in particular situations.	

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**TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
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13	Paulson, David W. District Attorney of Solano County	D	Y	3.8(a)	Proposed rule 3.8 (a) changes the existing rule from: "The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause..." to "<u>A</u> prosecutor in a criminal case shall (a) refrain from <u>recommending, commencing, or continuing to prosecute</u> a charge the prosecutor <u>knows or reasonably should know</u> is not supported by probable cause." Magistrates often disagree with the prosecutor's assessment of probable cause. A magistrate's discharge of the defendant "would become almost a prima facie case for an action against that prosecutor with the State Bar. A challenge them under Penal C. 995. However, a prosecutor is less likely to proceed with. dismissed charges in an information given the possibility a lost Penal C. 995 motion would be used against him or her in a bar complaint. The "knew or should have known" standard will likely have a significant impact on the way domestic violence cases are prosecuted. Currently, many domestic violence cases are prosecuted notwithstanding the fact the victims recant or are uncooperative. The standard will inhibit prosecutors from aggressively pursuing these cases when it	The Commission agrees and has deleted the words "recommending" and "or continuing" from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause; The Commission agrees and now recommends adoption of the Model Rule "knows" standard.

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					can be easily argued the, prosecutor "should have known" there was no "probable cause" since the victim was uncooperative. Likewise, cases involving criminal street gangs often have proof problems due to uncooperative witnesses. Changes to Rule 3.8 will likely curtail the number of gang prosecutions because, prosecutors again will fear being reported to the State Bar if these cases are dismissed. The change from "the prosecutor" to "a prosecutor who recommends" will affect interactions among lawyers within prosecutors' offices. Experienced lawyers will refrain from advising new prosecutors. This likely will have the unintended consequence of increasing the number of bad prosecutions by decreasing the amount of advice new lawyers will receive.	The commenter's concerns should be addressed by the deletion of "recommending" from paragraph (a).

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14	Rackauckas, Tony District Attorney County of Orange	D	Y		I am in complete agreement with the arguments advanced by Rod Pacheco, above. I therefore respectfully urge, as he did, the deletions of the following proposed rules: Rule 3.8(b), Rule 3.8(e)(2), Rule 3.8(e)(3) and Rule 3.8(f). I also respectfully urge that the language “and to the tribunal,” be deleted from Rule 3.8(d) and clarify a prosecutor’s affirmative obligations under Rule 3.8(h).	See Response to comments from Rod Pacheco, District Attorney, County of Riverside, above. The Commission disagreed with the recommended deletion, in part, because the requirement for disclosure to the tribunal is limited to the context of a “sentencing” proceeding.

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15	Santa Clara County Bar Association	M	Y		The SCCBA strongly recommends that the RRC pull proposed Rule 3.8 from Batch 5 to take further time and public input from the appropriate criminal justice participants to draft a rule that makes more sense for this jurisdiction. The Model Rule is much too broad and undefined in major respects to be of benefit in its current form.	The Commission is recommending adoption of proposed Rule 3.8 only after considering the corresponding Model Rule, the versions of the Model Rule adopted in many other jurisdictions, Restatement section 97, and other sources. It also considered input from many stakeholders who attended RRC meetings to express their concerns and who actively participated in RRC deliberations. Their suggestions materially affected the final form of the RRC's recommendation.

Rule 3.8 Responsibilities of a Prosecutor. [Sorted by Commenter]							TOTAL = 17 Agree = 0 Disagree = 10 Modify = 6 NI = 1
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16	Sylva, Julianne	D	N		I disagree with proposed rule 3.8 because the substitution of the “ordinary negligence standard” in this rule is a completely subjective standard and would subject prosecutors to years of litigation anytime that they make a disputable decision. Furthermore, it is of great concern to me that the Commission is promoting this rule to “increase client protection” without considering the need to promote public safety or even due process as defined in the Fifth and Fourteenth Amendments of the U.S. Constitution. Please do not adopt this rule as it stands.	The Commission agrees and now recommends adoption of the Model Rule “knows” standard. The proposed Rule does not alter a prosecutor’s duties when seeking a conviction but does subject a prosecutor to professional discipline for certain conduct that already is improper. The commenter does not suggest how the imposition of such discipline might decrease public safety or interfere with due process.	

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Disagree = 10
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NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
17	Totten, Gregory D. District Attorney of Ventura County	D (in part)	Y	3.8(a)	Proposed rule 3.8(a) broadens the liability of prosecutors in several ways that go beyond both rule 5-110 and ABA Model Rule 3.8. First, it extends the “reasonably should know” standard to the case after filing. Prosecutors often have large caseloads and have to prioritize when they will work on each case. Prosecutors also often receive “hand-off” cases that have previously been assigned to another prosecutor. If a prosecutor has received reports that arguably negate probable cause but has not yet read them because he or she was working on other cases, the State Bar could argue that the prosecutor has acted unethically in failing to act on information he “should have known.” The current requirement that an attorney act competently (Rule 3-110; Model Rule 1.1) is an adequate standard to address this concern. If rule 3.8(a) is enacted as proposed, it will further empower the State Bar Court to discipline prosecutors for whatever it deems the prosecutor <i>should have known</i> . This would conceivably include facts that had not even been uncovered or investigated by police if the State Bar determines that the prosecutor, or police agency members of the ‘prosecution team,’ <i>should have</i> found them out.	Paragraph (a) has been revised to delete the “should have known” standard.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					The proposed language regarding “commencing or continuing to prosecute a charge” is acceptable, but the application of the rule to “recommending” a charge is problematic and should be deleted. The rule is not clear as to what sort of recommendation is prohibited. Even if the language regarding “recommending” a charge is deleted, the rule should be amended to add language similar to the following: “This rule shall not prohibit good faith advocacy on the issue of guilt or probable cause.” This is necessary to allow prosecutors to exercise the vigorous advocacy expected of all attorneys. ABA Model Rule 3.1 requires attorneys to assert positions only if they are “not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” But, Rule 3.1 provides an exception for criminal defense attorneys. They “may nevertheless so defend the proceeding as to require that every element of the case be satisfied.” Clearly, a defense attorney is not prohibited from defending a	The Commission agrees and has deleted the words “recommending” and “or continuing” from paragraph (a). That paragraph now provides: A prosecutor in a criminal case shall: (a) refrain from commencing or prosecuting a charge that the prosecutor knows is not supported by probable cause; The Commission did not make the requested change. The Commission believes that a prosecutor role's is different from other attorney advocates because a prosecutor's duty is to seek justice rather than to advocate vigorously on an issue of guilt or probable caused.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(b)	client even if the attorney knows or should know that the defendant is guilty. We do not argue that the law should be otherwise. But, a problem arises when there is legitimate issue as to whether probable cause exists. The defense can make whatever arguments it wants with impunity. Prosecutors should be able to make good faith arguments without fear that if the court disagrees, the State Bar will discipline the prosecutor.	
				3.8(b)	The rule is unnecessary. The court has the duty to advise the defendant of the right to counsel (Pen. Code Sections 860, 987.) There is no reason to shift this responsibility to prosecutors, or to discipline the prosecutor if the court has failed to comply with its statutory duty. Proposed paragraph 3.8(b) could improperly expose prosecutors to discipline for <i>Miranda</i> violations by police.	The language of proposed paragraph 3.8(b) is identical to that of ABA Model Rule 3.8(b) and does not require a prosecutor to exercise control or authority that prosecutor does not already have. See Comment [1B] which has been revised to state: "Paragraph (b) does not <u>change</u> the obligations imposed on prosecutors by applicable law. 'Reasonable efforts' include determining where <u>appropriate</u> whether an accused has been <u>advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done.</u> "
				Cmt. [1B]	Comment 1B states that paragraph (b) is not intended to expand the obligations imposed on prosecutors by applicable law. But neither federal nor California law place upon prosecutors the duties laid out in paragraph (b), i.e., to make efforts to assure that the	See above. Comment [1B] has been revised to state: "Paragraph (b) does not <u>change</u> the obligations imposed on prosecutors by applicable law. 'Reasonable efforts' include determining where

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(c)	accused is advised of the right to, and procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel. The Comment in effect cancels out the rule for California prosecutors. I recommend that 3.8(b) be deleted. The proposed rule allows the prosecutor to seek a waiver of constitutional rights from an unrepresented defendant if the court has approved the appearance of the defendant in propria persona. But in Comment [2], the Commission has deleted the language about court approval. As a result, Comment [2] appears to impose an absolute prohibition of seeking the waiver of pretrial rights from an unrepresented defendant, and is inconsistent with the language of Rule 3.8(c). Comment [2] should be amended to put back the language, "Paragraph (c) does not apply, however, to an accused appearing pre se with the approval of the tribunal." I question the need for this rule. The rule is apparently designed to prevent the prosecution from attempting to take unfair advantage of an unrepresented defendant. But if the case is going to be resolved by way of guilty plea, rather than by trial, the defendant <i>must</i> waive the rights to jury trial,	<u>appropriate whether an accused has been advised of the right to, and the procedure for obtaining, counsel and taking appropriate measures if this has not been done."</u> Because the reference to a tribunal's having approved a defendant's appearance <i>in propria persona</i> has been added to the black letter rule in paragraph (c), it has been removed from Comment [2]. The Commission agrees that the purpose of the proposed Rule is to prohibit a prosecutor from taking unfair advantage of an unrepresented defendant and also agrees that whether a defendant is represented by counsel is the defendant's choice. The intended effect of the rule is precisely to prevent the prosecutor from engaging in plea discussion with an

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(c)	to confront and cross-examine witnesses, and the privilege against self-incrimination. The standard guilty plea forms include these waivers. Whether a defendant is represented by counsel or appears without counsel is the choice of the defendant, not of the prosecution. The only practical effect I can see from the proposed rule is that it may prohibit plea discussions with an unrepresented defendant, or presenting an unrepresented defendant with a guilty plea form, until after a court appearance at which the court approves (or acknowledges) that the defendant is representing himself.	unrepresented defendant until the court has approved the defendant's request to appear <i>in propria persona</i> .
					The application of the proposed rule to infractions is problematic. The defendant has no right to appointed counsel, and most represent themselves. The proposed rule would apparently prohibit a discussion between the prosecutor and the defendant regarding waiving trial and pleading guilty, until the court makes a ruling "approving" self-representation.	This comment expresses concern about the application of paragraph (c) to 'infractions' but does not identify any 'important pretrial rights' that apply when an infraction is charged
				Cmt. [2A]	The language added by the Commission, "comply with all constitutional obligations, as defined by relevant case law regarding," is important. Without this language, the rule would overstate the prosecution's disclosure obligations, and would improperly subject a	No response necessary.

**Rule 3.8 Responsibilities of a Prosecutor.
[Sorted by Commenter]**

TOTAL = 17 Agree = 0
Disagree = 10
Modify = 6
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.8(f)	prosecutor to discipline for failure to disclose even <i>immaterial</i> evidence that conceivably might be favorable. Comment [2A] is helpful in clarifying that a prosecutor should not be disciplined for conduct that was lawful at the time it occurred. The rule would create an imbalance between prosecutors and defense attorneys. Prosecutors would be expected to take reasonable care to prevent "investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution" from making certain extrajudicial statements. But under Model Rule 5.3, a defense attorney would have a comparable responsibility only as to persons over which the attorney has "direct supervisory authority." Public release of inflammatory or inadmissible information from the defense can be just as damaging to the cause of justice as such statements from the prosecution. The rule should be modified to impose comparable responsibilities on defense attorneys.	No response necessary. The Commission agrees with the commenter's concerns and has revised paragraph (f) as follows: (f) exercise reasonable care to prevent <u>persons under the supervision or direction of the prosecutor, including</u> 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.

Rule 3.8: Special Responsibilities of a Prosecutor

STATE VARIATIONS

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

California: Rule 5-110 provides as follows:

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

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

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

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

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

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

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

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

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

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

which serve to heighten condemnation of the accused;
or

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

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

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

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

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

Massachusetts: Rule 3.8(c) prohibits prosecutors from seeking waivers of important pretrial rights from unrepresented defendants unless “a court has first obtained from the accused a knowing and intelligent written waiver of counsel.” Massachusetts Rule 3.8(f) tracks ABA Model Rule 3.8(e), but

adds that the prosecutor must obtain “prior judicial approval after an opportunity for an adversarial proceeding.”

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

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

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

New York: Regarding ABA Model Rule 3.8(a), New York’s DR 7-103(A) provides that a “public prosecutor or other government lawyer” shall not “institute or cause to be instituted” criminal charges when he or she knows “or it is obvious” that the charges are not supported by probable cause. Regarding ABA Model Rule 3.8(b) and (c), New York has no counterparts. Regarding Rule 3.8(d), DR 7-103(B) provides that a “public prosecutor or other government lawyer” in criminal litigation shall make timely disclosure to counsel for the defendant, “or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer,” that tends to negate the guilt of the

accused, mitigate “the degree of” the offense or “reduce the punishment.” Regarding Rule 3.8(e), New York has no counterpart. Regarding Rule 3.8(f), New York has no counterpart except the general supervisory obligation in DR 1-104(C) which provides that a “law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm.” Regarding Rules 3.8(g) and (h), New York has no counterpart.

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

Ohio: Rule 3.8(a) provides that a prosecutor shall not “pursue or” prosecute a charge that the prosecutor knows is not supported by probable cause. (A note by the drafters says the rule is thus expanded to prohibit either the pursuit or prosecution of unsupported charges and thus is broad enough to include grand jury proceedings.) Ohio omits Rule 3.8(b) because (according to a Model Rules Comparison) ensuring that the defendant is advised about the right to counsel is a police and judicial function, and because Rule 4.3 already sets forth duties applicable to all lawyers in dealing with unrepresented persons. Ohio also omits Rule 3.8(c) because that rule has a potential adverse impact on defendants who seek continuances or seek to participate in diversion programs. Rule 3.8(d) deletes the words “and to the tribunal” in connection with sentencing disclosures. Ohio omits Rule 3.8(f) because prosecutors, like all lawyers, are already subject to Rule 3.6.

Pennsylvania deletes Rule 3.8(e) (governing subpoenas to lawyers) and instead adopts a separate rule, Pennsylvania

Rule 3.10, which forbids a prosecutor or other governmental lawyer, absent judicial approval, to subpoena a lawyer before a grand jury or other tribunal investigating criminal conduct if the prosecutor seeks to compel evidence concerning a current or former client of the lawyer.

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

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

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

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

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

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

statement that the prosecutor would be prohibited from making.

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

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

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

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

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

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

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

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

Proposed Rule 8.5 [RPC 1-100(D)]

“Disciplinary Authority; Choice of Law”

(Draft #4, 2/26/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- ☒ Existing California Law

Rule

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

Statute

Case law

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

- ☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☒

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar ☐

Approved by Consensus ☐

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

Commission Minority Position, Known Stakeholders and Level of Controversy

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

☒ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☒ Moderately Controversial – Explanation:

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

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.5* Disciplinary Authority; Choice of Law

August 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

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

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

* Proposed Rule 8.5, Draft 4 (2-26-10).

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

* Proposed Rule 8.5, Draft 4 (02/26/10). Redline/strikeout showing changes to the ABA Model Rule

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

<u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment	<u>Explanation of Changes to the ABA Model Rule</u>
Disciplinary Authority [1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.	Disciplinary Authority [1] It is longstanding law that the conduct of a lawyer admitted to practice in ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this jurisdiction~~California. Extension of the disciplinary authority of ~~this jurisdiction~~California to other lawyers who provide or offer to provide legal services in ~~this jurisdiction~~California is for the protection of the citizens of ~~this jurisdiction~~. ~~Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement~~California. A lawyer ~~who is subject to the~~disciplined by a disciplinary authority ~~of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this~~another jurisdiction may be a factorsubject to discipline in ~~determining whether personal jurisdiction may be asserted over the lawyer~~California for civil mattersthe same conduct. See e.g., Business and Professions Code section 6049.1.	Comment [1] is based on Model Rule 8.5, cmt. [1] but makes three changes to conform the comment to California law. First, its substitutes "California" for "this jurisdiction." See explanation to proposed (a) above and the court rules for multijurisdictional practice¹, which also contain the inherent authority of the California Supreme Court over the practice of law in California. Second, it deletes the language regarding reciprocal discipline since California has not adopted these provisions. Third, it adds references to California's statutory provisions for discipline of lawyers who are disciplined in another jurisdiction.

¹ **Sapiro Cmt #15:** I think something got garbled in the second sentence. Was that supposed to be a placeholder for insertion of citations of Rules of Court regarding multijurisdictional practice? I do not see any citations to those Rules of Court in my copy of proposed Comment [1].

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

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

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

Rule 8.5 Disciplinary Authority; Choice Of Law

(Commission's Proposed Rule – Clean Version)

- (a) Disciplinary Authority. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (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, who is lawfully practicing in another jurisdiction, is required specifically by the 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 in California for the same conduct. See e.g., Business and Professions Code section 6049.1.

Choice of Law

- [2] A lawyer may potentially be 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 required specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

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

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 1
Modify = 2
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Orange County Bar Association	M			The proposed Rule deletes a “safe harbor” provision, which provides that a lawyer is not subject to discipline if the lawyer reasonably believes that a different jurisdiction’s rule governs. The OCBA questions whether the “safe harbor” should be deleted. The OCBA believes that, in some situation, a reasonable belief should and could serve as a complete defense. This would seem more consistent with the Commission’s approach, namely, that California’s rules govern unless another jurisdiction’s rules require otherwise. The Commission’s deletion of the safe harbor provision also affects the language proposed in Comment [3] to the proposed Rule, as well as comment [5] to the ABA Model Rule, which the Commission has deleted. The OCBA agrees with deleting comment [6] to the Model Rule.	The Commission has reconsidered the policy of deleting the safe harbor provision and readopted the deletion. In multijurisdictional practice, public protection from lawyer misconduct is more important than providing a safe harbor for a lawyer who is confused about which jurisdiction's standards apply.
2	COPRAC	A			COPRAC has considered proposed Rule 8.5 and supports the Rule as drafted.	No response needed.
3	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response needed.

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

Rule 8.5 Choice of Law. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 1 Modify = 2 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Santa Clara County Bar Association	A			No comment.	No response needed.
5	Office of the Chief Trial Counsel	M			OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with B&P Code section 6049.1. B&P Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is proposed rule 8.5 changing B&P Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.	The Commission has reviewed the Comment but found no inconsistency with the statute and declined to make any change. No change in existing law is intended.

Rule 8.5 Choice of Law. [Sorted by Commenter]						TOTAL = 6 Agree = 3 Disagree = 1 Modify = 2 NI = 0
No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	George S. Cardona, Acting U.S. Attorney – Central District of California	D			We request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.	The detailed explanation provided in support of this Comment argues, in effect, that more uncertainty is better because it allows a clearer excuse for noncompliance in certain extremely rare situations where the actor initially has a choice between compliance with the rules of two different jurisdictions. The Commission disagrees with this proposal. The proposed exemption would not adequately protect the public consistent with the longstanding principle that the California rules apply to lawyer conduct outside of California except in the limited circumstances of this rule. The proposal to move to the “predominant effect” model, even in pre-litigation matters, will also create uncertainty for lawyers, because they will not know whether the California rules or those of another jurisdiction apply.

Rule 8.5: Disciplinary Authority; Choice of Law

STATE VARIATIONS

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

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

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

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

In addition, in 2004 California Supreme Court adopted Rules 964 and 965, which permit “Registered Legal Services Attorneys” and “Registered In-House Counsel” to practice law in California without being members of the California Bar. Each requires that qualifying attorneys “[a]bide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education (MCLE) requirements.” Rules 966 and 967, respectively entitled “Attorneys Practicing Law Temporarily in California as

Part of Litigation” and “Non-Litigating Attorneys Temporarily in California to Provide Legal Services,” each contain the following language:

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

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

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

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

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

District of Columbia: Rule 8.5(a) omits the second sentence of ABA Model Rule 8.5(a) (“A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any

legal services in this jurisdiction.”) Rule 8.5(b)(2) provides as follows:

(2) For any other conduct,

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

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

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

Every member of The Florida Bar and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provision of this rule and the standards of ethical and professional conduct prescribed by this court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

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

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

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

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

In addition, Georgia Rule 9.4 generally tracks Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary Enforcement (reprinted below in the Related Materials for ABA Model Rule 8.5), which govern jurisdiction and reciprocal discipline.

Illinois: Illinois Supreme Court Rules 716 and 717 (summarized above in the Related Materials following ABA Model Rule 5.5) permit in-house and legal services lawyers to engage in limited law practice in Illinois. Rules 716 and 717 both provide that all lawyers licensed under the rules “shall be

subject to the jurisdiction of the Court for disciplinary purposes to the same extent as all other lawyers licensed to practice law in this state."

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

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

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

Nevada: Rule 8.5 consists of only one sentence: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." Also relevant is Nevada Rule 7.2(a), which states as follows: "These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada."

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

New York: DR 1-105 provides as follows:

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

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

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

(2) For any other conduct:

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

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

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

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

South Carolina: S.C. Appellate Court Rule 418 requires any "unlicensed lawyer" (defined as "any person who is admitted to practice law in another jurisdiction but who is not admitted to practice law in South Carolina") to comply with South Carolina's lawyer advertising rules (Rules 7.1 through 7.5) if the unlicensed lawyer engages in any of six specified forms of advertising or solicitation.

Texas: Rule 8.05(b) provides as follows:

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

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

secure employment to be performed in this state;
and

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

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